Neutral Citation Number: [2010] EWHC 774 (Ch)

Case No: HC07C01917

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/04/2010

Before :

MR JUSTICE MORGAN

- -

Between :

1) Digicel (St. Lucia) Limited (a company registered under the laws of St. Lucia) **2) Digicel (SVG) Limited (a company registered under the laws of St. Vincent & the Grenadines)** **3) Digicel Grenada Limited (a company registered under the laws of Grenada)** **4) Digicel (Barbados) Limited (a company registered under the laws of Barbados)** **5) Digicel Cayman Limited (a company registered under the laws of the Cayman Islands)** **6) Digicel (Trinidad & Tobago) Limited (a company registered under the laws of Trinidad & Tobago)** **7) Digicel (Turks & Caicos) Limited (a company registered under the laws of Turks & Caicos)** **8) Digicel Limited (a company registered under the laws of Bermuda)**	**Claimants**
- and -	
1) Cable & Wireless Plc **2) Cable & Wireless (West Indies) Limited** **3) Cable & Wireless Grenada Limited (a company registered under the laws of Grenada)** **4) Cable & Wireless (Barbados) Limited (a company registered under the laws of Barbados)** **5) Cable & Wireless (Cayman Islands) Limited (a company registered under the laws of the Cayman Islands)** **6) Telecommunications Services of Trinidad & Tobago Limited (a company registered under the laws of Trinidad & Tobago)**	**Defendants**

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Mr Stephen Rubin QC, Mr Huw Davies QC, Mr Stephen Houseman & Mr Rupert Allen (instructed by **Jones Day**) for the Claimants
Lord Grabiner QC, Mr Edmund Nourse & Mr Conall Patton (instructed by **Slaughter and May**) for the Defendants

Hearing dates: 5th-8th, 11th-15th, 18th-22nd May, 2nd-5th, 8th-12th, 15th-19th , 22nd , 24th – 26th, 29th – 30th June, 1st – 3rd , 6th – 10th , 13th, 15th – 17th, 20th – 24th , 27th – 30th July, 5th – 9th , 12th – 16th , 19th, 20th October, 16th, 17th, 19th, 20th, 23rd – 27th and 30th November 2009.

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE MORGAN

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Mr Justice Morgan:

PART 1: GENERAL MATTERS

THE CASE IN OUTLINE

1. These are claims for damages brought by several companies in the Digicel group of companies against several companies in the Cable & Wireless group of companies (or in one case, the relevant Defendant is Telecommunications Services of Trinidad & Tobago Limited, a company in which a Cable & Wireless company has a 49% interest).

2. The background to these claims is that, before the relevant events occurred, the Defendant companies (except for the parent company, Cable & Wireless plc, which is the First Defendant) were monopoly telecommunications operators in various jurisdictions in the Caribbean. The governments in those jurisdictions passed primary legislation providing for the ending of those monopolies and for new operators to be able to enter the telecommunications markets to compete with the former monopolist. That legislation, and regulations made under it, and the terms of the telecommunications licences granted to the former monopolist, provided in various ways for the new world of competition in telecommunications and, in particular, provided for the new entrant to be able to interconnect its network to the existing network of the former monopolist.

3. In various jurisdictions in the Caribbean, a subsidiary company in the Digicel group applied for and obtained a telecommunications licence for a mobile telecommunications network which would allow it to enter the relevant market and compete with the former monopolist. The Digicel subsidiary wished in every case to interconnect with the existing network. It considered that it could not hope to survive as a mobile telecommunications operator without such interconnection. The Digicel subsidiary sought to rely on the provisions of the legislation, and of the regulations, dealing with such interconnection. Jamaica was the first jurisdiction where a Digicel subsidiary sought interconnection from a Cable & Wireless subsidiary. Matters appeared to have proceeded without difficulty in Jamaica. The Digicel subsidiary entered the mobile telecommunications market in Jamaica and its business flourished.

4. Following interconnection in Jamaica, and over a period of some 4 years, a Digicel subsidiary sought interconnection from one of the Defendant companies in a further 7 jurisdictions. In date order, the relevant jurisdictions were St Lucia ("SLU"), St Vincent & the Grenadines ("SVG"), Grenada, Barbados, the Cayman Islands ("Cayman"), Trinidad & Tobago ("T&T") and, finally, the Turks & Caicos Islands ("TCI").

5. In each of the above-mentioned 7 jurisdictions, the Digicel subsidiary did, in time, interconnect with the relevant Defendant company. Interconnection required the purchase and installation of specialist equipment at the Digicel end of the interconnection and at the Defendant operator end of the interconnection. Speaking generally, interconnection also requires the interconnecting parties to enter into a detailed interconnection

agreement. The relevant parties did enter into such an agreement in each jurisdiction, except in the case of T&T where the matter was dealt with, on an interim basis, by a ruling from an arbitration panel.

6. Following the completion of interconnection in the above-mentioned seven jurisdictions, the Digicel subsidiary launched its mobile telecommunications service in competition with the Defendant operator. The dates of those launches were over a period from 2003 to 2006.

7. The Digicel subsidiaries say that the Defendant operators delayed the process of interconnection in many different ways. The Digicel subsidiaries say that the conduct of the Defendant operators in causing such delay was a breach of the primary legislation and/or of the regulations and/or of the Defendant operator's telecommunications licence. The Digicel subsidiaries say that these breaches are actionable as breaches of statutory duty. It is then said that other companies, such as C&W plc, are liable as joint tortfeasors together with the Defendant operating company. It is also said that there was an actionable conspiracy involving the Defendant operator but also including others, in particular, C&W plc. The alleged conspiracy is a conspiracy to injure by unlawful means. Initially, it was said that there had been a conspiracy between the operating company in T&T and C&W plc and Cable & Wireless (West Indies) Limited. The relationship between the Cable & Wireless companies and the operating company in T&T was investigated in detail at the trial. When the Claimants made their closing submissions, this allegation of conspiracy was abandoned.

8. The Digicel companies say that they have suffered heavy losses by reason of the enforced delay in their entering the relevant market. They say that if the Defendant operator had complied with its duties, interconnection would have been completed much earlier. They say that if interconnection had been completed much earlier, then the Digicel subsidiary would have entered the market much earlier. The first part of the trial of this action was for the purpose of determining questions of liability and causation and the extent of any delay caused to the Digicel subsidiary but not for the purpose of determining the quantum of any damages. The Claimants have pleaded that they have suffered losses in excess of US $ 100 million.

THE ISSUES

9. The litigation bristles with issues of law and issues of fact. I will not attempt a comprehensive statement of all the issues that potentially arise. I will however try to indicate the broad nature of the issues that need to be, or may need to be, dealt with in this judgment.

10. I will deal first with the broad issues which arise in 5 of the jurisdictions, leaving Barbados and T & T for separate mention. In SLU, SVG, Grenada, Cayman and TCI, the first issue is as to the meaning and effect of the primary and secondary legislation in those jurisdictions. The second issue is whether the relevant Defendant acted in breach of that legislation. The third issue is whether any breach of such legislation is actionable by any Claimant? The fourth issue is whether there was a breach of a telecommunications

licence in any of these jurisdictions. The fifth issue is whether a breach of a telecommunications licence was a breach of the legislation and, if so, whether any such breach was actionable. The sixth issue is, if any breach of such legislation is actionable by a Claimant, which Defendants are liable? Are there joint tortfeasors, and, if so, who are they? The seventh issue is whether a breach of such legislation constitutes "unlawful means" for the tort of conspiracy to injure by unlawful means. The eighth issue is whether a breach of a telecommunications licence (which is not also a breach of the legislation) constitutes unlawful means for the purposes of the tort of conspiracy. The ninth and tenth issues arise in TCI only. The ninth issue is whether the relevant Defendant was in breach of contract in relation to interconnection in TCI. The tenth issue is whether any such breach of contract constitutes unlawful means for the purposes of the tort of conspiracy. The eleventh issue is whether there was a combination between some or all of the Defendants with an intent to injure a Claimant by any such unlawful means. The twelfth issue is whether any intent to injure was negatived by the existence of an honest belief that the actions complained of were lawful and, if so, whether such an honest belief existed in fact. The thirteenth issue is whether any unlawful conduct on the part of a Defendant delayed the completion of interconnection. The fourteenth issue is whether any delay to the completion of interconnection due to an unlawful act of a Defendant delayed a Claimant's launch of its network in the relevant jurisdiction. The fifteenth issue relates to SLU alone: is the claim in conspiracy in relation to SLU brought outside the relevant limitation period? The sixteenth issue concerns the approach the court should take to exemplary damages and restitutionary damages.

11. In Barbados the issues can be broadly summarised as follows. The first issue is as to the meaning and effect of the primary legislation. The second issue is whether the relevant Defendant acted in breach of that legislation. The third issue is which Defendants are liable? Are there joint tortfeasors, and, if so, who are they? The fourth issue is whether there was a combination between some or all of the Defendants with an intent to injure the Fourth Claimant by unlawful means. The fifth issue is whether an intent to injure was negatived by the existence of an honest belief that the actions complained of were lawful and, if so, whether such an honest belief existed in fact. The sixth issue is whether any unlawful conduct on the part of a Defendant delayed the completion of interconnection. The seventh issue is whether any delay to the completion of interconnection due to an unlawful act of a Defendant delayed the Fourth Claimant's launch of its network in the relevant jurisdiction. The eighth issue concerns the approach the court should take to exemplary damages and restitutionary damages. The ninth issue is whether a statutory limitation period in relation to any statutory tort of conspiracy bars a claim based on an alleged common law tort of conspiracy.

12. It may be helpful to emphasise the following point which emerges from the above statement of the issues in the six jurisdictions referred to above. The question in this case is <u>not</u> whether the relevant Defendant did everything in its power to expedite the launch of the relevant Claimant's telecommunications network. If that had been the question, the answer would have been simple: the relevant Defendant did not do everything in its power to expedite the relevant Claimant's launch. Instead, what the court has to determine is: (1) what duty was placed on the relevant Defendant by the legislation or by the licence in the relevant jurisdiction; and (2) did the relevant Defendant cross the line

so as to commit a breach of that duty. If the relevant Defendant did not cross the line so as to commit a breach of duty, then that is the end of the claim. If the relevant Defendant did cross the line and did commit a breach of duty, then the further questions arise as to whether the relevant Claimant has a claim in law for loss suffered as a result of that breach of duty.

13. In T & T, the position is somewhat different from the position in the other six jurisdictions. In T&T, in certain circumstances, the relevant legislation prohibits conduct which is "contrary to honest practices". The first issue is as to the meaning and effect of that legislation. The second issue is whether the relevant Defendant acted in breach of that legislation. The third issue is whether any unlawful conduct on the part of a Defendant delayed the completion of interconnection. The fourth issue is whether any delay to the completion of interconnection, due to an unlawful act of a Defendant, delayed the Sixth Claimant's launch of its network in the relevant jurisdiction. The fifth issue concerns the approach the court should take to exemplary damages and restitutionary damages. There originally was, but no longer is, a claim based on the tort of conspiracy in T&T.

14. I will make some preliminary comments on the above issues. The Defendants say that in four of the seven jurisdictions with which this litigation is concerned (SLU, SVG, Grenada and Cayman), the Claimants have no cause of action at all, whatever the facts might be. In relation to TCI, the Defendants say that the only cause of action is for breach of contract and that claim was introduced by amendment during the trial. The Defendants accept that the Claimants have a cause of action in Barbados and T&T.

15. Although I have tried to set out the issues in a logical order, I have sometimes found it convenient later in this judgment to deal with the issues in a different order. Further, as will be seen, it sometimes emerges that my decision on one issue means that a later issue does not arise. However, in such a case, I will make findings of fact on issues that do not strictly arise, in case that would be helpful to the parties or an appellate court, save where the burden of making findings of fact is disproportionate to the benefit or where there are other difficulties such as the need to make assumptions of fact, contrary to my actual findings, which would make the process unhelpful and/or burdensome.

16. In the course of my judgment, it will be necessary to set out the facts in considerable detail and, unfortunately, this judgment will be long. The parties addressed me at considerable length on the facts; the written closing submissions (much of which dealt with matters of fact) exceeded 2000 pages and I had the advantage of several days of oral submissions in addition. The principal reason for this is that the case involves allegations of delay. As will be seen, there are many steps which need to be taken before interconnection between a new entrant and an incumbent is completed.

17. The Claimants have exposed to scrutiny virtually every step in that process in all of the seven relevant jurisdictions. The Claimants say, in relation to many of those steps, that the relevant Defendant was guilty of delay and that that delay was in breach of a duty owed to the Claimants. The Defendants deny that they were guilty of any delay and further deny that any delay was in breach of duty. The positions taken by the parties

means that I have to examine a large number of steps which were taken on the way to completion of interconnection and make my findings as to the fact of delay and whether any such delay was in breach of duty.

18. The matter does not end there. If I were to find that the Defendants were guilty of delay in breach of a duty to the Claimants, then I need to consider the consequences of that delay. The Claimants' case is relatively straightforward. They say that the Defendants delayed in many different respects and if all of that delay were eliminated, then interconnection would have been completed much earlier. They say that the launch of the new network in the relevant jurisdiction would have followed almost immediately on the completion of interconnection. The Defendants deny that there was any delay in breach of duty so that causation does not arise but if it were to arise, the Defendants say that the Claimants have failed to prove the necessary causal link between the breach of duty and the time when interconnection was completed. The Defendants go further. They say that even if the Defendants unlawfully delayed interconnection, the Claimants have failed to prove that a delay in interconnection delayed any of the Claimants' launch.

19. The questions of causation in this case require considerable attention to be paid to all of the factors in play which caused the interconnection process to take the time which it did take. An issue which arises in some of the jurisdictions is: where the time taken to achieve interconnection was attributable to a large number of factors in combination and some of those factors did not involve any unlawful behaviour on the part of a Defendant, while other factors did involve a breach of duty, have the Claimants proved that the breaches caused delay to the completion of interconnection, or would the time for completion of interconnection have been much the same, by reasons of the factors which did not involve any breach?

20. There is a further reason, in relation to T&T, for it being necessary to set out the facts in detail. In T&T, the Claimants alleged that TSTT acted dishonestly or otherwise in a reprehensible manner. That allegation is strenuously denied. The Claimants' written closing submissions ran to some 212 pages. The Defendants retaliated with 179 pages of their own. In addition, I heard oral submissions on this point and the parties then provided further written submissions. Further, in relation to T&T, there are major issues as to the causal effect, if any, of any unlawful conduct of TSTT and whether such conduct made any difference in the event to the time when interconnection was completed.

JURISDICTION

21. The Claimants have brought these proceedings in London in relation to events which occurred, or which principally occurred, in seven Caribbean jurisdictions. When permission to serve these proceedings out of the jurisdiction was sought and obtained, the justification for the Claimants suing in London was said to be that, at the centre of the claim, was an allegation of a conspiracy to injure the Claimants, where the seat of the conspiracy was London. The Claimants have throughout maintained that assertion except in relation to the claim in T&T. There is no longer any allegation of a conspiracy in relation to the events in T&T. The case in relation to T&T now involves an examination

of events which occurred in T&T and the application of a T&T statute to those events. There is no connection with the claim and England and Wales. Nonetheless, there has not been a challenge to my jurisdiction to hear and determine the claim in relation to T&T. Similarly, if I were to hold that there was no conspiracy in relation to the other six jurisdictions, or that the seat of any such conspiracy was not in England and Wales, again there is no challenge to my jurisdiction to hear and determine all matters arising.

THE APPLICABLE LAW

22. With one exception (the point as to limitation in SLU), there is no disagreement as to the law applicable to these claims. The issues as to the extent of the obligations in relation to interconnection in a particular jurisdiction are governed by the primary and secondary legislation in that jurisdiction. The issue as to whether that primary or secondary legislation creates a cause of action for breach of statutory duty is also governed by the law of that jurisdiction. Thus, in the case of a claim by (for example) Digicel SLU for damages against CWWI for the tort of breach of statutory duty in relation to interconnection in SLU, it is clear that the claim is governed by the law of SLU. The same applies as to the law as to joint tortfeasors in relation to such a tort. I have not been given any evidence as to the law in the various jurisdictions. This is because the parties have agreed that the principles of law which apply in those jurisdictions are identical to the principles of English law (with the exception of the argument as to the limitation point in relation to SLU, to which I refer below). Thus, when I come to construe the primary and secondary legislation in a particular jurisdiction it is agreed that I should construe the legislation as if it were legislation in England and Wales. Similarly, when considering whether a breach of a duty in the legislation is actionable, I am to apply English law. Similarly, with the principles as to the liability of joint tortfeasors.

23. The position is not so clear in relation to the alleged tort of conspiracy. If (taking the example of SLU) C&W plc and CWWI conspired together to cause damage to Digicel SLU in SLU, by the use of unlawful means in SLU, there is an issue between the parties as to whether the claim is governed by the law of SLU or some other system of law. This issue does not in general cause any difficulty because the parties are again agreed that the law as to conspiracy in the different jurisdictions, or any other system of law which might be relevant, is identical to English law. However, there is one issue where the parties are in dispute as to whether the relevant part of the claim is governed by the English law as to limitation (or possibly by Jamaican law) or conversely is governed by SLU law. If I were to hold that there was a conspiracy involving C&W plc and CWWI to cause damage to Digicel SLU in SLU, the cause of action in conspiracy will be statute barred if it is governed by the law of SLU but not statute barred if it is governed by English law (or Jamaican law). Accordingly, if I reach that point, it will be necessary to decide which system of law applies.

THE CLAIMANTS

24. There are eight Claimants, all companies within the Digicel group of companies.

25. The First Claimant is Digicel (St Lucia) Limited, a company registered in SLU. I will refer to this company as Digicel SLU. At all material times, this company was wholly owned, indirectly, by Digicel Limited, the Eighth Claimant. On 6th September 2002, Digicel SLU was granted a licence to operate a mobile telecommunications network in SLU. In due course, Digicel SLU entered the market in SLU and operated a mobile network there.

26. The Second Claimant is Digicel (SVG) Limited, a company registered in SVG. I will refer to this company as Digicel SVG. At all material times, this company was wholly owned, indirectly, by Digicel Limited, the Eighth Claimant. On 11th September 2002, a licence to operate a mobile telecommunications network (with effect from 12th September 2002) was issued to the Eighth Claimant, Digicel Limited, rather than to Digicel SVG. It may be that Digicel SVG had expected that the licence would be issued to it. In due course, Digicel SVG entered the market in SVG and operated a mobile network there. Later, on 11th September 2003, Digicel Limited assigned the benefit of its licence to Digicel SVG.

27. The Third Claimant is Digicel Grenada Limited, a company registered in Grenada. I will refer to this company as Digicel Grenada. At all material times, this company was wholly owned, indirectly, by Digicel Limited, the Eighth Claimant. On 20th May 2003, Digicel Grenada was granted a licence to operate a mobile telecommunications network in Grenada. In due course, Digicel Grenada entered the market in Grenada and operated a mobile network there.

28. The Fourth Claimant is Digicel (Barbados) Limited, a company registered in Barbados. I will refer to this company as Digicel Barbados. At all material times, this company was wholly owned, indirectly, by Digicel Limited, the Eighth Claimant. On 8th August 2003, Digicel Barbados was granted a licence to operate a mobile telecommunications network in Barbados. In due course, Digicel Barabados entered the market in Barbados and operated a mobile network there.

29. The Fifth Claimant is Digicel Cayman Limited, registered in the Cayman Islands. I will refer to this company as Digicel Cayman. At all material times, this company was wholly owned, indirectly, by Digicel Limited, the Eighth Claimant. On 17th October 2003, Digicel Cayman was granted a licence to operate a mobile telecommunications network in the Cayman Islands. In due course, Digicel Cayman entered the market in the Cayman Islands and operated a mobile network there.

30. The Sixth Claimant is Digicel (Trinidad & Tobago) Limited, registered in T&T. I will refer to this company as Digicel T&T. At all material times, this company was wholly owned, indirectly, by Digicel Limited, the Eighth Claimant. On 30th December 2005, Digicel T&T was granted a concession to operate a mobile telecommunications network in T&T. In due course, Digicel T&T entered the market in T&T and operated a mobile network there.

31. The Seventh Claimant is Digicel (Turks & Caicos) Limited, registered in TCI. I will refer to this company as Digicel TCI. At all material times, this company was wholly

owned, indirectly, by Digicel Limited, the Eighth Claimant. On 31st March 2006, Digicel TCI was granted a licence to operate a mobile telecommunications network in TCI. In due course, Digicel TCI entered the market in TCI and operated a mobile network there.

32. The Eighth Claimant is Digicel Limited, registered in Bermuda. I will refer to this company as Digicel. Digicel wholly owns, indirectly, the other seven Claimants. Digicel did not operate a mobile telecommunications network in any of the seven jurisdictions referred to above and in particular did not operate a mobile network in SVG. However, as pointed out above, it was Digicel, and not Digicel SVG, which had the benefit of the SVG mobile telecommunications licence between 11th September 2002 and 11th September 2003.

33. Where it is not necessary to distinguish between the individual companies, I will refer to some or all of the eight Claimants as the Digicel companies. From time to time, where it is unnecessary to distinguish between the Digicel companies then, for the sake of brevity, I will simply refer to Digicel. I will also refer to the Claimants collectively as "the Claimants" even where I am discussing a claim that is put forward by one of the Claimants only. It is often more convenient to do so rather than specifying on every occasion which Claimant is the relevant Claimant. As will be seen I usually find it convenient to refer to submissions made on behalf of one or other of the Claimants as "the Claimants' submissions".

34. The Claimants were represented by Mr Rubin QC, Mr Davies QC, Mr Houseman and Mr Allen of counsel, instructed by Jones Day. This is heavy litigation and I am very grateful to them for the considerable assistance they gave me on all matters arising at all stages. They presented the case with great ability and immense industry.

THE DEFENDANTS

35. There are six Defendants. The first five Defendants are in the Cable & Wireless group of companies.

36. The First Defendant is Cable & Wireless plc, to which I will refer as C&W plc. This company is the head of the Cable & Wireless group. It is registered in England & Wales and its headquarters are in London. It did not directly carry on any operations in any of the seven jurisdictions with which this case is concerned. C&W plc wholly owns, indirectly, Cable & Wireless (West Indies) Limited.

37. The Second Defendant is Cable & Wireless (West Indies) Limited to which I will refer as CWWI. CWWI is registered in England & Wales. Its headquarters were in Jamaica although it also had offices elsewhere, in particular, in Miami, USA. It was the regional holding company within the Cable & Wireless Group. It held the licences to operate the fixed telecommunications network in SLU, SVG and TCI. It also held the licence to operate the mobile telecommunications network in TCI. It wholly owned Cable and Wireless Caribbean Cellular (St Lucia) Limited which held the mobile telecommunications licence in SLU; that company is not a Defendant in these proceedings. It also wholly owned Cable and Wireless Caribbean Cellular (SVG) Limited

which held the mobile telecommunications licence in SVG; that company is also not a Defendant in these proceedings. CWWI also wholly owned C&W (Cayman Islands) Limited. CWWI had a controlling interest in C&W Grenada Limited (as to 70 %) and a controlling interest in C&W (Barbados) Limited (as to 81%). CWWI owned 49% of the shares in Telecommunications Services of Trinidad & Tobago.

38. The Third Defendant is Cable & Wireless Grenada Limited, registered in Grenada. I will refer to this company as C&W Grenada. This company held the fixed telecommunications licence and the mobile telecommunications licence in Grenada.

39. The Fourth Defendant is Cable & Wireless (Barbados) Limited, registered in Barbados. I will refer to this company as C&W Barbados. This company held the fixed telecommunications licence and the mobile telecommunications licence in Barbados.

40. The Fifth Defendant is Cable & Wireless (Cayman Islands) Limited, registered in the Cayman Islands. I will refer to this company as C&W Cayman. This company held the fixed telecommunications licence and the mobile telecommunications licence in the Cayman Islands.

41. Where it is not necessary to distinguish between the above five companies, I will refer to some or all of the above five companies as the C&W companies or C&W.

42. The Sixth Defendant is Telecommunications Services of Trinidad & Tobago Limited, registered in T&T. I will refer to this company as TSTT. CWWI owned 49% of the shares in TSTT. The remaining 51% of those shares were owned by National Enterprises Limited. The T&T government owned 83% of the shares in National Enterprises Limited; 66% of those shares were directly owned, and 17% of those shares were indirectly owned, by the T&T Government. The remaining shares in National Enterprises Limited, not owned by the Government, i.e. some 17%, were traded on the T&T stock exchange. Accordingly, TSTT was not a Cable & Wireless Group company. The relationship between CWWI and National Enterprises Ltd was governed by a shareholders' agreement of 20 December 1989 as amended on 19th July 1999 and again on 22nd August 2000. Under the shareholders' agreement, CWWI had the right to appoint four directors and National Enterprises Ltd had the right to appoint five directors to the board of TSTT. One of the National Enterprises Ltd's appointees was to be the Chairman of the Board, following consultation with CWWI on the choice of Chairman. TSTT held a fixed telecommunications licence and a mobile telecommunications licence in T&T.

43. All of the Defendants, that is all the C&W companies and TSTT, were represented by the same solicitors and counsel at all stages of this action. The Defendants' counsel were Lord Grabiner QC, Mr Nourse and Mr Patton. They were instructed by Slaughter and May. I am grateful to them for the considerable assistance they gave me on all matters arising at all stages. Their ability and industry matched that of counsel for the Claimants.

PROCEDURAL HISTORY

44. On 11th July 2007, the Claimants obtained leave from Master Winegarten to issue and serve these proceedings out of the jurisdiction on the 3rd to 6th Defendants. The proceedings were then issued on 18th July 2007.

45. In December 2007, following service of a detailed Defence, the Defendants applied for an order for the trial of certain preliminary issues, in particular, issues as to the actionability of the alleged breaches of the statutes and regulations dealing with interconnection and as to whether any such breaches amounted to "unlawful means" for the tort of conspiracy to injure by unlawful means. In January 2008, the Claimants applied for an order for a split trial so that liability would be tried before any consideration of the quantum of any damages. These applications came before Lindsay J and he gave his judgment in relation to them on 6th February 2008. He dismissed both applications and gave directions intended to lead to the trial of the entire action.

46. In the course of 2008, difficulties arose in relation to the disclosure given by the Defendants. In September 2008, I heard an application by the Claimants for an order that the Defendants do give specific disclosure of certain classes of documents. I gave my ruling on that application in a judgment delivered on 23 October 2008: see [2008] EWHC 2522 (Ch), [2009] 2 All ER 1094. I made a detailed order for further disclosure by the Defendants. In the course of hearing that application, I raised with the parties the desirability of splitting the trial so that issues as to quantum would be tried after the trial of issues as to liability and causation. Following argument on that subject, I directed that the first trial in this action should be restricted to issues of liability and causation with any issues as to quantum to be postponed to a later stage. In particular, I directed that the issues to be tried at the first stage were (a) issues as to liability; (b) issues as to causation, including ascertaining the period of delay (if any) suffered by each Claimant to the launch of its mobile network service for which the relevant Defendant(s) is/are liable; (c) issues of principle as regards any Claimant's entitlement to recover: (i) compensatory damages, (ii) restitutionary damages and/or an account of profits, including whether any Claimant is entitled to restitutionary damages and/or an account of profits and, if so, the basis upon which the same is to be calculated and/or assessed, and (iii) an award of exemplary damages, including whether any Claimant is entitled to exemplary damages as against any of the Defendants. The trial before me has proceeded in accordance with that direction.

47. In March 2009, Arnold J conducted a pre-trial review of this action. Each side asked the judge to order the other side to give further disclosure. It seems that some progress was made in the course of the pre-trial review and it was agreed that some further disclosure would be provided. The judge declined to order disclosure beyond the scope of that agreement. He gave his reasons in his judgment of 3 April 2009: [2009] EWHC 731 (Ch).

48. In the course of the trial, the Claimants applied to me for an order that the Defendants give further disclosure. The documents which were sought were admitted to have been, initially at any rate, the subject of legal professional privilege, as they contained legal advice given to the Defendants by their lawyers. Nonetheless, it was argued that privilege in those documents had been waived. That argument was advanced

on two bases. The first was that the Defendants had referred to the contents of the legal advice and had waived privilege therein. The second basis involved the assertion that the Defendants were putting forward a positive case as to their state of mind on a matter of law, in circumstances where they had received legal advice on that matter, and the result was that the Defendants had waived privilege in such legal advice. I declined to order disclosure on either basis, for the reasons given in my judgment of 17th July 2009: [2009] EWHC 1437 (Ch).

49. During the course of the trial, notwithstanding sustained opposition from the Defendants, I granted the Claimants permission to make various amendments to their pleadings. These resulted in consequential amendments to the Defence.

LIBERALISATION

50. The last decade of the 20th century saw vast changes in the global telecommunications industry. Across the world, numerous state-owned telecommunications operators were privatised. A wave of pro-competitive and deregulatory telecommunications policies swept the globe. Competition was perceived to be beneficial as a spur to technological innovation, as leading to reduced prices and leading to growth in the economies of countries with advanced telecommunications. The process of opening up the market to competition was called "liberalisation".

51. Liberalisation led to certain identified consequences. In liberalised markets, the penetration of mobile telephony grew very quickly. As predicted, this led to a growth in the economy of the relevant country. New entrants into the market *benefitted* significantly. Incumbents also *benefitted*. First, an incumbent with a fixed network sold its services to the new entrant into the mobile market. Secondly, an incumbent with a mobile network *benefitted* from the expansion of the entire mobile market.

52. On 4th May 2000, certain states in the Eastern Caribbean entered into what has been called the ECTEL Treaty. In particular, St Lucia, St Vincent and the Grenadines, and Grenada were signatories to this treaty. The recitals to the treaty referred to the desirability of creating a competitive environment for telecommunications in their states, to the benefits of competition for the public and to the perception that competition was essential for the future economic and social development of their states.

INTERCONNECTION

53. Where the telecommunications market consists of an incumbent with a fixed network (and often a mobile network as well) and a new operator wishes to enter that market, the new entrant will wish to interconnect with the incumbent. It would be technically possible for the new entrant to build its own mobile telecommunications network and run that network without interconnecting with the incumbent. That would mean that the customers of the new entrant could telephone other customers of the new entrant but they could not telephone customers (fixed or mobile) of the incumbent, or indeed anyone else. In the present case, the Digicel company which wished to enter one

of the markets in question always wished to interconnect with the incumbent before launching its service.

54. It is necessary to understand something of what is involved in interconnection. The word "interconnection" is defined in the legislation of all of the states with which this case is concerned and those definitions, as they appear in the legislation, are set out in the Annexes to this judgment. It is helpful to consider what is involved in more general terms before, in due course, seeking to construe and apply the relevant legislation.

55. Interconnection has two elements. One can be called "contractual interconnection" and the other "physical interconnection".

CONTRACTUAL INTERCONNECTION

56. It is useful to refer to the first interconnection agreement made between some of the parties in this case to illustrate the type of thing involved in contractual interconnection. On 13th March 2003, CWWI entered into an interconnection agreement with Digicel SLU. This agreement consisted of the principal agreement to which were attached 6 schedules. The principal part was the Legal Framework agreement extending to 26 pages. The clauses of the Legal Framework agreement dealt with such matters as duration, the nature of interconnection, forecasting, ordering and provision of interconnection capacity, testing, operation and maintenance, charges, billing and many other matters. Schedule 1 consisted of 10 pages of Definitions. Schedule 2 consisted of 28 pages of Service Descriptions. Schedule 3 was the Service Schedule, running to 6 pages. Schedule 4 was the Parameter Schedule consisting of 4 pages. Schedule 5 was the Joint Working Manual consisting of 52 pages. Schedule 6 was the Tariff Schedule and ran to 9 pages. The tariffs set out in that schedule include a tariff for a Digicel call terminating on the CWWI fixed network (payable to CWWI), a tariff for a Digicel call terminating on the C&W Caribbean Cellular (Saint Lucia) Ltd mobile network (payable to CWWI), a tariff for a CWWI call from its fixed network terminating on the Dicicel network (payable to Digicel), a tariff for a call from the C&W Caribbean Cellular (Saint Lucia) Ltd mobile network terminating on the Digicel network (payable to Digicel) and a tariff for a Digicel call crossing the CWWI fixed network to terminate on a mobile network (whether the mobile network of C&W Caribbean Cellular (Saint Lucia) Ltd or another network provider) (payable to CWWI).

57. It should also be noted that when the parties have negotiated a draft interconnection agreement and are both content to be bound by its terms, it is necessary in three of the states the subject of these proceedings (SLU, SVG and Grenada) that the draft agreement is submitted to an independent regulator for approval before the parties are free to give effect to those draft agreed terms. The regulator plainly has regard to interests other than the interests of the negotiating parties. An obvious example of the interests which will be considered by the regulator will be the public interest, in particular the interest of consumers in avoiding high prices. The interests of the negotiating parties and the public may well be conflicting on that question. In Barbados and TCI, the parties may enter into an interconnection agreement but the agreement must then be submitted to the regulator for its review. In Cayman, the parties may enter into an interconnection

agreement but the agreement must then be filed with the regulator who has power to reject the agreement. It is only in Trinidad and Tobago that there is no express provision in the legislation for prior approval, or subsequent review, by a regulator.

58. When I described the interconnection agreement that was entered into in SLU, I referred to the Tariff Schedule and the various rates or tariffs. I will now expand a little on that description. The fixed termination rate is paid for calls from a mobile network to the fixed network; the originating mobile network pays the termination rate to the fixed network. The mobile termination rate is paid for calls either from one mobile network to another mobile network or from a fixed network to a mobile network. The originating network pays the charge to the recipient mobile network for terminating the call. Where there is no direct interconnection between one mobile network and another mobile network (and that was the case in the jurisdictions with which this litigation is concerned), it is necessary for such calls to cross or "transit" the fixed network to which both mobile networks are connected. A transit rate is in such a case payable by the originating mobile network to the fixed network.

59. When I come to consider the detailed facts of the case and the specific allegations made, I will consider in more detail the way in which the interconnection agreements were negotiated, the nature of the process and the time involved.

PHYSICAL INTERCONNECTION

60. I will next attempt to give an overview of what is involved in physical interconnection. I stress that this is only a brief summary and it may be necessary when considering what happened in the individual cases to discuss in a more technical way some of the steps involved. Nonetheless, an overview is helpful at this stage. This process can be broken down into a number of key steps.

61. The first step is for the representatives of the incumbent and the new entrant to exchange technical information about each other's network. It is essential that each party understands the network topology or layout of the other's network so that interconnection between the two networks can take place at the right level in the network hierarchy and is simple and efficient. The parties also need to assess the technical standards applied to their networks and the capacity of those networks. The two networks must be compatible or made to be compatible. This process of exchanging information should lead to the selection of an appropriate point of interconnection ("POI").

62. The next step is to consider the appropriate method of connecting the switch site of the incumbent to the switch site of the new entrant. This may, and usually will, involve a survey of the sites. The options to link the sites are either by a digital microwave link or by fibre optic cable. The latter method is usually preferred and was chosen in each of the cases with which I am concerned. This method of connection can be speedy if there is an easy access point on an existing fibre route but a longer period of time may be required if a new cable has to be laid between the sites. It will then be necessary to dig a trench. It may be necessary to obtain permissions and approvals from the local authority. It may even be necessary to obtain the consent of a third party land owner whose land is being

crossed by the trench. There is an issue in this case as to whether the incumbent ought to have started work on digging the trench and laying the cable before the parties had entered into a binding interconnection agreement.

63. The next step in relation to physical interconnection is the assessment of the equipment required to make the interconnection. The parties must first assess the capacity of the incumbent's existing switch equipment. Additional equipment may be needed to increase that capacity to handle the traffic following interconnection. It is also necessary to consider what interconnection-specific equipment is needed. It is normally necessary to have multiplexor ("MUX") equipment and its associated cabling. The MUX is a key piece of equipment. The parties need to assess the type of MUX and the size of MUX. The type of MUX varies with the standard applicable, American or European, but this is a simple matter to determine in any case. The type of MUX also depends on the supplier of the MUX. The size of the MUX depends on forecasts as to future volumes of traffic across the POI. In some of the jurisdictions with which this litigation is concerned, there was argument as to whether a forecast from the entrant should be for a three year period or whether a forecast for a lesser period (perhaps one year) would suffice.

64. The most usual method of interconnection involves using an existing digital distribution frame ("DDF") or optical distribution frame ("ODF") at the fixed network operator's switch and at the proposed site of the entrant's switch. This is the equipment which allows cables connected to one side of it to be routed to wiring on its other side. The incumbent's existing equipment may have sufficient capacity or may need to be enhanced. Normally, this interconnection specific equipment for both the incumbent and for the entrant will need to be ordered from a supplier, unless there is spare equipment in store and available to either the incumbent or the entrant. If ordered from a supplier, the equipment will need to be delivered to the state in question, to clear customs and to be collected by, or delivered to, the purchaser of the equipment. There is a major issue between the parties as to whether the incumbent should have ordered the necessary equipment before the parties entered into an interconnection agreement.

65. The next step towards physical interconnection is the installation and commissioning of the new equipment.

66. The last step towards physical interconnection is the testing and commissioning of the interconnection link in readiness for the passing of traffic between the two networks. There is a number of very important aspects of the interconnection that need to have detailed testing before the interconnection can "go live". The tests must be two-way tests to ensure network integrity. The tests should include the following: (1) service tests; (2) routing tests; (3) tests of the charging mechanism; (4) tests as to billing; and (5) tests of the procedures as to maintenance and error.

REGULATION OF INTERCONNECTION

67. At an early stage it was recognised around the world that the legislation and regulations which provided for liberalisation of telecommunications market should specifically regulate the process of interconnection.

68. Much of the legislation and regulations in relation to interconnection between an incumbent and a new entrant owes its origin to the 1997 WTO Agreement on Basic Telecommunications (formally known as the Fourth Protocol of the General Agreement on Trade in Services or "GATS"). This was the first widely accepted multilateral trade agreement to include binding interconnection rules. These rules were included in a document called the Reference Paper which set out regulatory principles negotiated and agreed by WTO members. Mr Logan, an expert witness instructed by the Claimants, prepared a report which stated that the signatories to the WTO agreement included St Lucia, St Vincent and the Grenadines, Grenada, Barbados and Trinidad and Tobago whereas Mr Webb, an expert witness instructed by the Defendants prepared a report stating that, of those five states, only Grenada, Barbados and Trinidad and Tobago were bound by the terms of the Reference Paper. Those statements are not necessarily inconsistent for reasons which I need not explain and it is not essential to investigate that point of detail any further. The Reference Paper's central principles were non-discrimination, transparency and the availability of reasonable interconnection terms, including cost-oriented rates and unbundled access from persons defined as "major suppliers" or persons with a relevant dominant position in relation to essential infrastructure.

69. In the seven states which are the subject of these proceedings, the relevant government introduced legislation and regulations dealing with liberalisation of the telecommunications market in that state and that legislation and those regulations contained provisions in relation to interconnection. I have set out in the Annexes to this judgment, the relevant provisions in each state.

THE EVIDENCE

70. The evidence before the court comprised voluminous documentary evidence together with witness statements and three expert's reports. I heard oral evidence from eighteen witnesses for the Claimants and twenty five witnesses for the Defendants. By agreement between the parties, the experts were not called to give oral evidence. I will comment on various features of the evidence.

THE DOCUMENTS

71. At various points during the interlocutory stages and during the trial, the parties fought a number of battles in relation to disclosure of documents. In the event, the Claimants have disclosed a large number of documents and more than the Defendants have disclosed. At the end of the trial, all outstanding applications for disclosure had been dealt with.

72. At various stages in their closing submissions, the Claimants have commented on the absence of disclosure from the Defendants on various matters. If the Claimants had wanted to say that the Defendants had failed to disclose something which they ought to have disclosed, then the proper course was for the Claimants to seek disclosure of the allegedly missing disclosable documents. Indeed, the Claimants did make such applications and the court ruled on all such applications. There is no outstanding

application by the Claimants based on an allegation that an order for disclosure has not been complied with. In these circumstances, I will proceed on the basis that this litigation is to be decided on the basis of the documents which have now been put before the court. I do not draw any inferences, one way or the other, as to what has happened to documents which might at one time have existed but which no longer exist, according to the disclosure statements of the parties.

73. The Defendants have claimed legal professional privilege in relation to certain classes of documents. One such class related to documents which might have revealed the legal advice given to various of the Defendants as to: (1) the existence or non-existence of an obligation to negotiate with a new entrant, on the subject of interconnection, before that new entrant had a telecommunications licence; and (2) the existence or non-existence of an obligation to order interconnection equipment and do other things, such as civil works to join the parties' switch sites, before the parties had entered into an interconnection agreement dealing with such matters. As I have already explained, the Claimants applied to me in the course of the trial for an order for disclosure of such documents and I rejected that application. In accordance with the established law in this area, I do not draw any adverse inferences against the Defendants by reason of the fact that they have claimed legal professional privilege. In particular, I do not reach the conclusion that the documents, if disclosed, would show something adverse to the Defendants' case. Conversely, as the Defendants fully accept, since they have chosen not to put these documents before the court, the Defendants are not in a position to ask the court to infer that the contents of these documents support the Defendants' case. When the Claimants made their application for disclosure of this class of documents, although I rejected the application, I was concerned that the Claimants might be placed at a disadvantage because they were facing an allegation by the Defendants that some of the Defendants had an honest belief as to the legal position, in relation to the existence or non-existence of the obligations referred to above, but yet the Claimants would not be able to see, and cross-examine upon, relevant documents. I was also concerned as to the ability of the court to make findings of fact on the alleged honest belief in this respect when the court was not able to see documents which might be relevant to such findings. As it has turned out, I have made findings on this question of honest belief and I did not find it difficult to do so. I have fully taken into account the fact that the Claimants were not able to cross-examine witnesses by reference to such documents. However, in making my findings, I was assisted by the inherent probabilities of the matter and the conduct of the individuals concerned and the degree to which that conduct was consistent with the existence of such a belief.

74. Altogether, the parties have disclosed a large number of documents. All of the documents disclosed were copied electronically and a hard disk containing all of the electronic copies was provided to the court. This source was also used for the purpose of cross-examining witnesses. I was provided with a screen on which was displayed any document being put to a witness. The witness and counsel and the solicitors also were provided with screens. This meant that it was not necessary to prepare a witness bundle containing these documents. I indicated at an early stage that electronic copies of documents would not suffice for my purposes. The Claimants had anticipated this indication by preparing for my use, some 50 or so lever arch files of these documents, in

addition to many other files containing pleadings, witness statements, experts' reports and yet further documents. In the course of the trial further documents were regularly supplied to be placed in the 50 or so files to which I have referred. When the parties prepared closing submissions, they added to the documents which had earlier been provided. The Claimants provided three further lever arch files and the Defendants provided one further file. In the course of considering my judgment, I asked the parties to make further submissions which provoked the delivery of another file of documents, in addition to the submissions.

75. This method of presenting the documents had implications for the reading which the court could be expected to undertake. When the court is provided with bundles of documents, the court can, if it thinks it is appropriate, read documents in those bundles even though they are not referred to in the course of the trial, either by the witnesses or by counsel. It is sometimes useful for the court to see what happened before and what happened after a particular event, which is examined in detail at the trial, even though the parties do not themselves invite the court to review that material. In this case, I have read documents in the bundles in addition to the documents to which I was specifically referred. I have made my findings on the documents which are in the bundles which were provided to me. However, I considered it to be impracticable and disproportionate to make any attempt to explore what was in the tens of thousands of pages of documents which existed in electronic form on the disk supplied to me, when such pages had not been provided in the court bundles.

76. The documents before the court contained many internal documents, in particular, emails. On some issues of fact, these internal documents were of great assistance to me in seeking to discover what was really going on, what people really thought and what their motives were. It was possible to contrast statements made for internal consumption with statements made to the other party to the dispute or to a regulator or to a government minister or official. Speaking generally, the internal comment was likely to be more reliable than any public statement on the same subject. This comment is not only applicable to statements which are adverse to a particular party's interest. If it is said that a particular person was acting or failing to act for a reason hostile to the opposing party and the contemporaneous internal documents clearly show the reverse, I believe that I am entitled to rely upon the supportive documents to make my findings on the issue. The internal documents, which were not prepared to be used as self serving documents, are not to be dismissed on account of the fact that they support the case now being put forward by the maker of the document.

77. In this litigation, there have been very many allegations that representatives of the Defendants said one thing to the Claimants or publicly, but privately acted in a different way. For example, it is said by the Claimants that more or less throughout the relevant period the Defendants were plotting to cause delay to the Claimants while at the same time the Defendants were protesting that they welcomed the arrival of competition and were doing all that they properly could to facilitate interconnection and the resulting competition. Further, many witnesses for the Defendants said in evidence that they were in favour of competition and wished to facilitate interconnection. On an issue such as that, I have obviously looked closely at the Defendants' internal documents in order to

form an assessment of the situation. I have also been on my guard against the possibility that any plotting which might have been going on is obscured from the court under the cloak of legal professional privilege. It is a fact that legal advisers were involved with some of the matters in dispute and legal professional privilege has been claimed for communications between the legal advisers and others. I do not draw any adverse inference against the Defendants because of the assertion of this privilege. Nonetheless, I believe that I am entitled to bear in mind, when I consider the internal documents of the Defendants and seek to compare those documents with the external statements and conduct of the Defendants, that I may not have been given a complete set of all internal documents, privilege in some having been successfully claimed.

THE CLAIMANTS' WITNESSES

78. I heard the evidence of eighteen witnesses called on behalf of the Claimants. I will discuss the position of Mr Francis, Ms Turner and Mr Taylor separately below. The other witnesses for the Claimants were generally persons who were acting as employees or officers of the Claimants at the relevant time. The Defendants made sustained and sometimes fierce attacks on the credibility of these other witnesses for the Claimants. It is not necessary to set out at this point my assessment of such witnesses. As it turns out, when making my findings of fact, I was not very often required to consider the evidence of the Claimants' witnesses. There were some disputes of fact which I have to resolve and on which these witnesses gave evidence. It is more helpful to leave any necessary assessment of such a witness until the point in this judgment where I address the necessary finding of fact on the issue. As will appear, it has not even then generally been necessary to form a view as to the reliability of these witnesses for the Claimants because the resolution of the issue of fact is usually possible by reference to the documents. Even if a witness is shown by the documents to have misremembered some matter of fact, that does not mean that the evidence of that witness is entirely to be discounted. These witnesses for the Claimants spoke of their frustration at what they saw as the delaying tactics of the various Defendants. These witnesses offered their views as to the motives or other intentions of the representatives of the Defendants. If the motives or the intentions of the Defendants are relevant in this case, then it is for the court to make findings based on the evidence of such representatives, their cross-examination and the documents. I am not assisted by the opinions of the Claimants' witnesses as to what they think should be the appropriate findings of fact based on that material. I am of course assisted by the submissions of counsel for the Claimants but not by what are essentially the submissions of the Claimants' witnesses. In any event, many of these witnesses were caught up in the events at the time and they tended to be influenced by the feelings of hostility which were running at the relevant time. I will now consider the evidence I heard from Mr Francis, Ms Turner and Mr Taylor.

79. The Claimants called Mr Pinkley Francis who had been employed by CWWI from a date in the 1990s until September 2005. From 2000 to 2004, Mr Francis worked in the Carrier Services Team as Service Provider Operations Manager in the OECS. He was involved with the interconnection negotiations in SLU and SVG and attended a number of meetings with Digicel SLU and Digicel SVG. Although Mr Francis was dismissed by CWWI in 2005 for misconduct, it was not suggested by the Defendants in their closing

submissions that Mr Francis's evidence should be rejected on that account. The Defendants accepted that "for the most part", he was a straightforward witness. They said that his evidence was of limited relevance. I have certainly no difficulty in accepting parts of his evidence. He referred to the steps which the CWWI business unit in SLU took to compete with the new entrant Digicel SLU. I find that the business unit wanted the new entrant to enter the market later, rather than earlier. In particular, it wanted the new entrant to enter after, rather than before, Christmas 2002. In the period before the entry into the market of Digicel SLU, the business unit wanted to improve its competitive position. This attitude is exactly what one would expect of the business unit facing the likelihood of new competition. I also accept Mr Francis's evidence to the effect that the carrier services team would have been aware of the general aspirations of the business unit in this respect. As it was reasonably obvious that the business unit would want Digicel SLU to enter the market later, rather than earlier, then this is likely to have been obvious to the carrier services team also. Mr Francis also said that the approach of the carrier services team to the interconnection negotiations with Digicel SLU was one of "orchestrated inefficiency". There are two aspects to this statement. The first is that the carrier services team was inefficient; the second is that the inefficiency was orchestrated. Dealing first with the suggested inefficiency of the team, I will in due course examine the detailed allegations which the Claimants make as to the progress of the negotiations in SLU and SVG. When I do so, I will bear in mind Mr Francis's assessment that the carrier services team was inefficient. The second allegation is that the inefficiency was deliberate and on the part of more than one person and "orchestrated". Mr Francis's detailed evidence supported his suggestion that the inefficiency was deliberate, and on the part of more than one person, but did little to support his suggestion that the inefficiency was orchestrated. A fair reading of his evidence was to the effect that it was obvious that an incumbent, negotiating interconnection with a potential new entrant, would not want to put itself out to help speed up the process of interconnection. His evidence does not support the conclusion that this attitude on the part of members of the carrier services team was the result of discussion and agreement or combination and conspiracy. Rather it was simply that it was obvious to all members of the team that that was a desirable attitude to adopt. In any event, whether the carrier services team or others in SLU and SVG did cause delay and/or set out to cause delay will be the subject of detailed examination when I consider the detailed allegations as to SLU and SVG and I will approach the evidence bearing in mind Mr Francis' comments.

80. The Claimants called Ms Vonciel Turner who had been employed within the C&W group of companies. It is not precisely clear which C&W company was her employer at any particular time. She worked for a C&W company from approximately July 2001 to May 2003, although her contract of employment continued until August 2003. Ms Turner gave evidence over a video link from the United States. The Defendants say that Ms Turner was over-confident, over-bearing and bombastic. They add that she was inspired by animosity towards C&W, had a selective recall and misunderstood what was involved in the interconnection process. I find that I can accept much of what Ms Turner said. Much of what she said is inherently likely and rings true. However, she had comparatively little to say about the interconnection process as distinct from the wider subject of competition between the relevant C&W company and the relevant Digicel company. In so far as her evidence bears upon the interconnection process, it is somewhat

general and I do have some reservations about the accuracy of her generalisations. I think I ought to bear her general evidence in mind but test it against the specific evidence which describes the detail of what happened in relation to a particular feature of interconnection which is now a matter of complaint by the Claimants. I think there is force in the Defendants' criticism that Ms Turner was over ready to describe matters, which were open to interpretation, in a way which was unfavourable to the Defendants. I think it is likely that her attitude to C&W is influenced by a feeling that she was not well treated by C&W, when she worked for them. Based on her evidence, I am prepared to accept that the C&W business units saw themselves as on a war footing with Digicel as the likely new entrant. The C&W business units were determined to prepare themselves for the very stiff competition which Digicel would bring. The C&W business units saw competition as more of a threat than an opportunity, although Ms Turner herself tried to persuade the business units of the positive consequences of competition. The business units would have liked Digicel to enter the market later, rather than earlier. The business units wanted to use the time until such market entry to prepare themselves for competition from Digicel. Ms Turner stressed that the carrier services department were supposed to be separated from the business units by a Chinese Wall. I accept her evidence that the Chinese Wall was not a wholly effective barrier to communication between carrier services and the business unit and that the carrier services team probably knew of the attitudes of the business units in relation to competition. I can readily make that finding because the attitudes of the business units were entirely predictable and it is likely that with or without a Chinese Wall, the carrier services team would have worked out what those attitudes were. I also find that the business units were aware that the carrier services team were, generally, not prepared to negotiate interconnection with a possible new entrant until that new entrant had obtained a formal licence to provide a telecommunications service and that the carrier services team were not prepared to order the equipment needed for the C&W side of the interconnection until the parties had agreed the terms as to interconnection. The business units welcomed those stances on the part of the carrier services team because they did nothing to advance the time when the Digicel would enter the relevant market. Based on Ms Turner's evidence, I am not able to find that the carrier services team declined to give information to Digicel SLU or SVG after those companies had obtained their licences; her evidence appeared to describe the situation before the licences were granted. As regards her suggestion that the carrier services team would deliberately spin out the negotiations by causing difficulties with personnel being unavailable for meetings and/or sending unauthorised personnel to the negotiations with Digicel, I will bear that in mind when I consider the specific evidence as to what happened at specific meetings. I am very doubtful about her evidence that the carrier services team proposed unreasonable rates and/or terms for the principal purpose of causing delay but I will again keep it in mind when I consider the specific evidence which is relevant.

81. The Claimants called Mr Kevin Taylor in connection with the claim in relation to T&T. At the relevant time, Mr Taylor had been employed by Nortel who was to supply interconnection equipment and other equipment to TSTT. In March 2009, Mr Taylor had given evidence on deposition in Florida when he was cross-examined by counsel for TSTT. Initially, the Claimants stated that they intended to rely upon the evidence given by Mr Taylor on that occasion. Later, the Claimants stated that they would tender Mr

Taylor for cross-examination by TSTT at this trial. Later still, the Claimants delivered a witness statement signed by Mr Taylor. Mr Taylor was called as a witness, cross-examined and re-examined. He gave evidence on a number of topics which are relevant in relation to T&T. I discuss all of that evidence in detail in Annex F to this judgment, dealing with the claim in relation to T&T. One of the topics dealt with by Mr Taylor concerned a day on which there was an alleged conversation which Mr Taylor heard taking place between Ms Bejar of Nortel and Mr Espinal, the CEO of TSTT, followed by a conversation between Ms Bejar and Mr Taylor, followed by a conversation between Mr Taylor and a Mr Davy of Nortel. Mr Taylor's account of these events conflicted with the evidence of Mr Davy, who was called as a witness by TSTT. The nature of the dispute of fact is such that either Mr Taylor or Mr Davy is wrong in his evidence. Indeed, I find that there is no real possibility of one of these witnesses being wrong as a result of faulty recollection. The witness who is giving incorrect evidence must be doing so deliberately. As between Mr Taylor and Mr Davy, I have no hesitation in preferring the evidence of Mr Taylor. I find that Mr Davy had a substantial motive for giving untruthful evidence. It is possible that Mr Taylor had an incentive to give evidence on behalf of the Claimants but I think it is very unlikely that Mr Taylor would have deliberately given untruthful evidence on these issues. Further, Mr Taylor's evidence is supported by other contemporaneous material. In addition, when Mr Espinal was cross-examined, he provided further material, albeit somewhat reluctantly, which supports Mr Taylor's version. Mr Taylor also gave evidence on a question as to whether Nortel was in a position in late 2005 to expedite the manufacture and delivery of equipment ordered by TSTT for interconnection with Digicel T&T. In relation to parts of this evidence, I found Mr Taylor's evidence less reliable. I find that he was basing himself to a significant extent on his reading of documents which are material to this issue and less on his recollection of any involvement he might have had in the relevant events at the time. I will base my findings on this part of the case on my own reading of the relevant documents and any other reliable evidence and not on what Mr Taylor has said about that matter. This approach does not necessarily apply to more general evidence which Mr Taylor gave about the difficulty of assessing whether Nortel could, in certain hypothetical circumstances, have manufactured and delivered interconnection equipment more quickly than it actually did. It can be said against Mr Taylor that the part of his evidence, which was based on his reading of the documents and which might not be right, diminishes his reliability on other matters, such as the conversations I have referred to above. I agree that this is so. Nonetheless, although I have been cautious for this reason amongst others about believing Mr Taylor on his evidence about the relevant conversations, I still conclude that that part of his evidence is reliable and certainly to be preferred to the evidence of Mr Davy. I discuss the evidence on all these matters in more detail in Annex F to this judgment.

THE DEFENDANTS' WITNESSES

82. I heard the oral evidence of twenty-five witnesses called by the Defendants. I will discuss the evidence of Mr Barnes, Mr Espinal and Mr Davy separately below. I will make some general comments as to the other witnesses called by the Defendants, without mentioning all of them by name. Many of these witnesses appeared reasonable and measured in their oral evidence. They were cross-examined at length about the various

allegations in this litigation. It was put to them that they had a motive to cause delay to the Claimants, that they deliberately did cause delay to the Claimants and that they repeatedly made statements to the Claimants and to the regulator and to government ministers and officials pretending to welcome competition and to be ready to facilitate interconnection, which statements did not represent their true intentions or views. Speaking generally, in their oral evidence, these witnesses adhered to the public views they expressed at the time. Where it is relevant to make findings as to the true motives and intentions of these witnesses when involved in the relevant events, I will pay far more attention to the contemporaneous internal documents which throw light on those matters than to the way matters were described in evidence from these witnesses. If those internal documents show that the public statements did not represent the true intentions of a witness, then I will give more weight to the internal documents than I will give to the public statements which were made and, similarly, than I will give to repetitions in evidence at the trial of the public statements made at the time.

83. It is worthwhile at this point making a general comment on the likelihood that the Defendants hoped that the new entrant would enter the market later, rather than earlier. In this regard, it is useful to distinguish between the business units, the carrier services team and senior management of C&W plc. At this point, my comment is a general one and is merely to set the scene for the detailed findings of fact which I will in due course make when considering the specific allegations in each jurisdiction.

84. As regards the Defendants' business units, I think that it is inherently likely that the business units wanted to see a new entrant enter the market later, rather than earlier. First of all, I think that that attitude is to be expected. Secondly, in most if not all of the jurisdictions, there were specific reasons why the incumbent business unit wanted time to get itself more ready than it previously was to face competition. The Digicel company, which was the intended new entrant in each case, was well understood to be likely to be a formidable competitor. The incumbent business unit was usually handicapped by the fact that it had been the monopoly provider in the past and had not previously been challenged by competition. There were often technical matters concerning its network that needed attention before the incumbent business unit would feel itself ready to face competition.

85. As regards the carrier services team, I find that they were aware of the wishes of the business units as regards the time at which interconnection, and the resulting competition, was desirable. I find that it was the preference of the carrier services team that interconnection should be completed later, rather than earlier. One of the reasons that the carrier services team had for not negotiating with a possible new entrant before that new entrant had a licence, was that this approach would cause interconnection to happen later, rather than earlier. I do not say that this was the only reason. It was possible for the carrier services team to put forward other reasons for this attitude and they did so. Some of those other reasons may have been genuinely believed by the carrier services team. But that does not negative my finding that one of the reasons was the desirability, as they saw it, of interconnection happening later, rather than earlier.

86. My findings in relation to the business units and the carrier services team do not necessarily apply to the senior management of C&W plc. I will in due course make a finding that C&W plc was not involved in the detailed steps in the interconnection process. The senior management of C&W plc left such details to the carrier services team and, to the extent appropriate, to the business units. Some senior management of C&W plc may very well have seen competition as a good thing. Others may have regarded it as inevitable so that it was not worth their while bothering with the question whether it would happen a little bit later or a little bit sooner. At this stage, I record my finding that in the case of the senior management of C&W plc, I do not approach the evidence with any expectation that they wished to postpone the completion of interconnection and the arrival of competition.

87. The Defendants called Mr Barnes as a witness. He was a highly qualified technical member of the CWWI carrier services team. His evidence is relevant in a number of the jurisdictions with which this litigation is concerned. The Claimants were critical in a number of specific respects of Mr Barnes's conduct at the time and of his evidence at the trial. In particular, the Claimants said that Mr Barnes had behaved improperly and untruthfully in relation to Cayman. I have therefore had to assess Mr Barnes' evidence on a large number of topics. I have available to me a considerable amount of internal documentation involving Mr Barnes at the relevant time and throwing light on his behaviour and the reasons for it. With the assistance of that material, I have reached the conclusion that Mr Barnes generally behaved in a very responsible fashion and not with a view to delaying the Digicel new entrant for the purpose of gaining a benefit through such delay. I will discuss the detailed findings of fact I make in relation to Mr Barnes, including in respect of Cayman, when I consider the detailed evidence on the matters of complaint.

88. Mr Espinal was the CEO of TSTT. His evidence is only relevant in relation to the case concerning T&T, but there it is of central relevance. As will be seen, I will have to consider Mr Espinal's evidence in detail and to decide how much of it I can accept. Mr Espinal was plainly highly intelligent. Although his first language was Spanish, he had a very good grasp of English. Much of his evidence was quite frank about TSTT's desire to have time to get itself ready for competition with Digicel T&T. However, I do not think that Mr Espinal was prepared to be candid in all respects when giving evidence. I found that he tended to give explanations which were designed to draw the focus away from the real point in issue and he would decline to accept things which were obviously correct. An example of this tendency came at the very beginning of his evidence. Mr Espinal gave oral evidence in chief in addition to the evidence contained in his witness statement. The reason he was asked to do so was that during the trial, before Mr Espinal was called to give evidence, the Defendants disclosed documents which had not earlier been disclosed. These documents included appraisals of the performance of a number of employees of TSTT, including Ms Agard and Mr Kurleigh Prescod. The self-assessement part of Ms Agard's appraisal included under "Performance Highlights" the comment: "Successfully delayed the introduction of interconnection". Under the heading "Targets Missed" was the comment: "Competition delayed the ability to sell interconnection services but has resulted in an enormous benefit to the Company overall". The parties agreed that this last comment should be understood as if it were preceded by the words: "Lack of" or "Delay

in". Ms Agard's self-assessment was written by her in March 2006 and it was shown to Mr Espinal at that time. The appraisal documents in relation to Mr Prescod contained the same comments in relation to his performance and his missed targets. His appraisal form was counter-signed by Ms Agard in May 2006. These appraisals clearly showed that TSTT had wished to delay interconnection with Digicel T&T and had believed that it had been successful in achieving that delay. It is also clear to me that these comments correctly described the situation. It is apparent from the documents before the court that TSTT did not do things which it could have done which would or might have brought forward the time when Digicel T&T were ready to launch in T&T. An obvious example is that when Digicel T&T requested interconnection as early as 24th June 2005, TSTT responded that it would be premature to discuss interconnection. Of course, TSTT was right in the sense that it was not at that stage under a legal obligation to discuss interconnection but the principal reason for not discussing interconnection was that TSTT did not at that stage wish to take action to bring forward the date of Digicel T&T's launch. As I have described, Mr Espinal was asked about the appraisal documents when giving evidence in chief. He explained at great length how the appraisal system worked. This explanation was obviously designed to suggest that the comments in the appraisal documents, to which I have referred, were somehow not significant and they could be ignored in this litigation. To my mind, this evidence was largely pointless and did nothing to encourage me to be receptive to other explanations which Mr Espinal gave, instead of facing up to the real issue which needed to be addressed. I bear in mind, in Mr Espinal's favour, that the questions in examination in chief were selected by counsel and it was Mr Espinal's job to answer the specific questions put to him. However, I do not on that ground acquit Mr Espinal of what I have described as the tendency to give explanations which were a distraction from the real point. When he was cross-examined directly about the appraisals, he built on his evidence in chief about the way in which the system worked and avoided the real point which clearly emerged from the appraisals. Given that the case which is made against Mr Espinal is that he said one thing publicly, and privately thought and did the reverse, I was very much on my guard as to whether I was also being treated to self justificatory explanations which were not wholly candid. As will be seen, when I consider the detailed evidence in relation to T&T, I have not felt able to accept everything that Mr Espinal told me. Indeed, I find in that part of the judgment that Mr Espinal acted "contrary to honest practices".

89. The last witness to whom I refer is Mr Tony Davy, called by the Defendants. I have considered something of his position when discussing the evidence of Mr Taylor, called by the Claimants. I am satisfied that Mr Davy deliberately lied to me about the conversation he had with Mr Taylor about Mr Espinal's instruction to Ms Bejar of Nortel that Nortel was to provide for interconnection between TSTT and the new entrants, not earlier and not later than the end of March 2006. I find that Mr Davy gave untruthful evidence out of a desire to help TSTT, which he regarded as being in his own interests also. Mr Davy gave further evidence on other topics. Although I will reject his evidence on the conversation he had with Mr Taylor and topics closely associated with that evidence, it does not necessarily follow that I must reject his evidence on all points. For example, he gave evidence which I will have to consider in relation to the issue whether Nortel were in a position in late 2005 to bring forward the date of delivery of interconnection equipment to TSTT. I can unreservedly accept one statement which I find

Mr Davy did make to Mr Taylor, although Mr Davy denied it in evidence, that he would "sell guns to the Indians".

THE EXPERTS

90. I received the reports of three expert witnesses. The Claimants had instructed Mr Logan and the Defendants had instructed Mr Short and Mr Webb. Each prepared a very detailed report. The experts had been asked to direct themselves to the following question: "what is the minimum period (if any) and what is the maximum period (if any) in which all aspects of interconnection (i.e. both physical and contractual interconnection as explained in paragraph 19 of the Amended Particulars of Claim) should reasonably be completed in a jurisdiction?"

91. Mr Logan stated that the answer to the question posed was a minimum period of seven weeks and a maximum period of thirteen weeks. He identified six specific assumptions which he made for the purpose of answering the question posed. In particular, he assumed that the parties involved in the interconnection process were reasonable commercial parties negotiating in good faith and were not intent on delaying the interconnection process. In the course of his report he stated that if the parties were having difficulty in agreeing termination rates (the tariffs) then it would be reasonable for them to enter into an interim agreement which allowed interconnection to take place, with the final position on the termination rates to become established by further negotiation or in some other way. He also stated that it would be reasonable for the incumbent to carry out the necessary civil works before conclusion of the negotiation of the interconnection agreement. Similarly, he stated that it would be reasonable for the incumbent to order the interconnection equipment before the conclusion of those negotiations. Indeed, he added that it would not be rational to wait for the conclusion of the negotiations in respect of the interconnection agreement. In a joint statement issued by the 3 experts, Mr Logan added, in relation to the assumption to be made about the attitude of the parties, to which I have referred above, that the commitment of both parties to conclude the interconnection agreement was key to their joint success in the future. He took the view that reasonable parties would conduct hard but fair negotiations, but not obstruct the process, and they would be aware that they would both benefit from a timely conclusion to the negotiations.

92. Mr Short, one of the two experts instructed by the Defendants, dealt with physical rather than contractual interconnection. He described in detail the various stages on the way to completion of physical interconnection and the technical issues that would, or might, arise. He stated that physical interconnection was a complex process requiring exchange of detailed information, careful planning, construction, testing and implementation. He identified a number of factors which could impact on the time taken to complete the process. Accordingly, he concluded that it was not possible to set firm minimum or maximum periods for physical interconnection. He referred to experience in various other countries, mentioning one case which took three months and another which took twelve months. He suggested that a more typical time scale would be in the region of five to seven months.

93. Mr Webb was the second of the two experts instructed by the Defendants. His report discussed the process of contractual interconnection. He stressed that the incumbent and the entrant were subject to different incentives in negotiating an interconnection agreement. Mr Webb dealt with these incentives in some detail. It was not submitted that his comments on those matters were inadmissible on the ground that they were not truly expert evidence. It might have been said in response to any such challenge that Mr Webb was able to describe his experience of a large number of interconnection negotiations around the world. In any event, I found his comments useful in seeking to understand the reasons for the behaviour of the various participants in the interconnection process. Further, I found his comments well expressed and apposite in relation to the detailed events which occurred in the jurisdictions with which this litigation is concerned. Although the passage is a lengthy one, it is useful to set out an extract from Mr Webb's report which records his view as to these incentives. Mr Webb wrote:

*"**The negotiation process and incentives***

65. As noted above, the prevailing model for interconnection negotiations as reflected in the WTO Reference Paper, the EU Directives and the APEC Principles is one where the incumbent operator is obliged to provide interconnection to an entrant in a timely fashion. This model relies upon direct negotiations between the parties, commonly with the backdrop of a RIO and of general principles for interconnection either set out in legislation or prescribed by the national regulator. Should the negotiations fail, either party may request the regulator to intervene. The form of intervention may include a direction from the regulator to resume negotiations or to complete negotiations within a prescribed period, or alternatively, or as well as, mediation, arbitration, or a regulatory determination of the matters in dispute.

66. Faced with a legal obligation to interconnect, coupled with obligations to negotiate in good faith and to provide interconnection in a timely fashion, an incumbent fixed network operator providing both wholesale access services and retail services has an incentive to comply with those obligations and to avoid losing influence over the negotiation process as a result of a compliance failure. In addition, where governments are committed to market liberalization, as in the territories, incumbent operators face a material reputational risk if they should fail to achieve physical and contractual interconnection with credible entrants . [Footnote: In my experience, it is common for entrants to actively use the media and to lobby politicians and officials with complaints concerning the pace of interconnection negotiations.]

67. An interconnection agreement contains many terms that are likely to be uncontroversial. There are however terms with significant commercial implications, discussed earlier in this report. To the extent that these key commercial terms have not been predetermined by a regulatory decision or a published reference interconnection offer, both parties will wish to make offers and to try to maximize their commercial positions.

68. As I have noted above, generally, the most difficult commercial issue to be resolved in contractual interconnection is the charge to be made by a terminating operator to the originating operator for the termination of a call. I am instructed that in each of the territories, there were three main termination rates to be negotiated: termination on the relevant Cable & Wireless fixed network of a call from a Digicel mobile customer to a Cable & Wireless fixed customer (fixed termination); termination on the relevant Cable & Wireless mobile network of a call from a Digicel mobile customer to a Cable & Wireless mobile customer or vice versa (mobile-to-mobile termination); and termination on the Digicel mobile network of a call from a Cable & Wireless fixed customer to a Digicel mobile customer (fixed-to-mobile termination). [Footnote: I am instructed that in each of the territories, Cable & Wireless offered only interconnection with its fixed network. As a result, calls from a Digicel mobile customer to a Cable & Wireless mobile customer would transit the fixed network before termination on the Cable & Wireless mobile network. Calls originating from a Cable & Wireless mobile customer to a Digicel mobile customer would be handled in the same manner and would transit the Cable & Wireless fixed network before presentation to Digicel for termination.]

69. The fixed termination rate will compensate the fixed network operator for the use of the fixed network in terminating an inbound call. The mobile-to-mobile and fixed-to-mobile termination rates will compensate the terminating mobile operator for the use of the mobile network in terminating an inbound mobile or fixed call. Mobile-to-mobile and fixed-to-mobile termination rates are commonly the same, absent regulatory intervention, as both call types make the same use of the terminating mobile network. The two types of mobile termination rate are typically significantly higher than the fixed termination rate, reflecting the higher unit cost of call carriage on a mobile network in comparison to a fixed network.

70. I would expect that where a mobile operator seeks interconnection with a fixed operator providing termination both on the fixed network and on its own mobile network, agreement on each termination rate and on the relativities between those rates would be seen as of major importance by all parties. I refer in this regard to the discussion of call charging at paragraphs 41.5-41.12 of this report.

71. Within the scope of its legal obligations, to the extent that it is permitted to do so by the regulatory regime, an incumbent operator has an incentive to maximize its bargaining position and to use the time allowed for negotiation. There are two reasons for this.

72. First, as a response to the incentive of the entrant to shorten the negotiating period and therefore to accelerate market entry. This incentive reflects the potential benefits of market entry at a time that is favourable to the entrant, such as prior to an important marketing period, or prior to the potential entry of other competitors. It also reflects the benefit of earlier revenues to offset set-up costs. It would be rational for an incumbent operator to use the incentive of the entrant to conclude negotiations by withholding agreement on issues where an improved outcome from the perspective of the incumbent may be available.

73. Second, entry will inevitably reduce the market share of the incumbent operator and will probably lead to a reduction in retail margins as price competition erodes monopoly rents. The length of the bargaining process determines the monopoly rents retained by the incumbent operator. The incumbent operator has a weak incentive to support interconnection for the opportunity to receive interconnection revenue, but this is typically outweighed by the benefits of later competitor market entry. Competition will usually also expand the market through the introduction of pricing and service differentiation to target under-served potential users. Again though, it would be rational for an incumbent operator to seek to retain its market dominance and monopoly rents for as long as possible within the requirements of the law and the regulatory framework.

74. With a regulatory backstop, however, both parties will have an incentive to avoid regulatory intervention, since this will lead to uncertain pricing outcomes. For the entrant, intervention by the regulator remains preferable to a failure to reach a negotiated agreement. The trade-off between the incentive of the incumbent operator to preserve its monopoly position for as long as possible and that of the entrant to refer a dispute to the regulator is the middle ground that will generally result in an agreed, rather than a regulated, outcome.

75. Referral of a dispute over interconnection terms generally does not 'stop the clock' on continuing negotiations. The parties are able to continue to negotiate until the regulator has issued a final decision on the interconnection terms. This allows either party the opportunity to improve its position in the negotiations as the regulator's range of possible outcomes becomes more apparent during the regulatory process.

76. Rather than taking over a dispute referred to it, the regulator may in some jurisdictions require that the parties continue to negotiate for a fixed period after the dispute has been referred. In these circumstances, the party that has the opportunity to make the last offer before the deadline, which may be either the incumbent operator or the entrant, has the stronger bargaining position. However, if the regulator instead sets a minimum bargaining period before it will consider the dispute, the incentive of the incumbent operator is to use that entire period and therefore to gain the monopoly profits. There is then no downside for the incumbent operator in the referral to the regulator so long as the parties retain the option to negotiate post-referral.

77. In summary, where an incumbent operator is under an obligation to provide interconnection, and to negotiate in good faith and in a timely manner, the incentives faced by the parties are as follows:

77.1 The incumbent operator will prefer to comply with its obligations rather than be in breach, with both reputational risk and the risk of losing influence over the negotiation as a result of regulatory intervention;

77.2 Both parties will aim to achieve the best possible outcomes on key commercial terms, particularly related to interconnection rates for each network;

77.3 The incumbent operator will have an incentive to use the negotiating space allowed to it by the regulatory regime, both to achieve better outcomes in the interconnection terms and to preserve monopoly rents for as long as possible;

77.4 The entrant will have an incentive to shorten the negotiating period to accelerate market entry;

77.5 With a regulatory backstop, both parties have an incentive to avoid regulatory intervention, but the entrant has a greater incentive to request intervention if it appears that negotiations may fail;

77.6 Once the regulator has intervened, there is an incentive for the parties to continue negotiations if possible, shaped by the narrowing of options as the regulator's preferences become apparent;

77.7 If the regulator sets a minimum bargaining period before it will consider the dispute, the incumbent operator has an incentive to use that full period to maximize the monopoly rents or to otherwise achieve an improved commercial outcome."

94. Mr Webb went on to explain that the length of the period which would be taken in any set of negotiations should reasonably reflect the existence of these incentives. He referred to other factors which would impact on the pace of the negotiations. These factors would vary from one jurisdiction to another and that alone rendered arbitrary any attempt to set either a minimum or a maximum period for the completion of negotiations. Taking all matters together it was not possible robustly to identify in the abstract any such minimum or maximum period. Mr Webb disagreed with Mr Logan's assumptions as to the attitude of the parties to the negotiations, with his suggestion that the parties would approach the negotiations on the basis that they would both benefit from timely conclusion of the negotiations. He also disagreed with Mr Logan's suggestion that reasonable parties would enter into an interim agreement if they were having difficulty in agreeing termination rates.

95. The parties agreed in the course of the trial that the reports of the three experts would be admitted into evidence but that the experts would not attend to give oral evidence and would not be cross-examined. Neither side was to be taken to have agreed with the evidence given by the other side's expert or experts. In the course of closing submissions, I raised with the parties what courses were open to the Court in view of the fact that the experts' reports were in evidence but the experts had not been cross-examined. The parties agreed that I was able to accept or reject the evidence of an expert, providing I had good reasons for so doing and I was not disabled from rejecting a statement made by an expert simply because that expert had not been cross-examined. Accordingly, in the case of the expert witnesses, the parties have agreed a departure from the usual rule that the Court is not able to reject the evidence of a witness who has not been challenged on the relevant point by cross-examination.

96. At this stage, I can record one finding as to the attitude of the actual parties to the negotiations in the jurisdictions with which I am concerned. I hold that Mr Webb's comments about the expected behaviour of the participants in interconnection negotiations are more realistic than those of Mr Logan. It is clear that the actual Defendants did not adopt the attitude to the negotiations which was assumed by Mr Logan. As to his assumptions as to the behaviour of the participants, I do not see that the legislation in any of the jurisdictions obliges me to assume notional behaviour on their part. Instead I hold that I should make any necessary findings as to the actual attitude of the actual parties and then consider whether the attitude adopted by any Defendant and, more importantly, the behaviour of that Defendant broke any obligation owed to any Claimant.

97. As to Mr Logan's suggestion that it would have been reasonable for the incumbent operator to enter into an interim interconnection agreement (leaving issues such as the rates payable to be resolved later) and reasonable for the incumbent to carry out civil works and order interconnection equipment before the parties had concluded an interim or a final interconnection agreement, I am not necessarily concerned with what is to be regarded as "reasonable" behaviour. I will only be required to consider what is "reasonable" behaviour, if on the true construction of the legislation in question there is a legal duty on the incumbent to act in a reasonable way. If the legal duty is expressed in different terms, then I must address myself to those terms to assess whether the incumbent has complied with its duty or whether it has crossed the line into committing a breach of its duty.

PART 2: ST LUCIA

INTRODUCTION

98. In SLU, the incumbent telecommunications operator was CWWI. The licensed new entrant was Digicel SLU. The claim in relation to SLU is brought by Digicel SLU against CWWI and C&W plc. The Claimants allege that CWWI was in breach of the primary and secondary legislation in SLU, that such breaches were actionable as the tort of breach of statutory duty, that CWWI and C&W plc were joint tortfeasors and/or that they combined together such that they are liable for the tort of conspiracy to injure by unlawful means. The Claimants accept that, with one exception, these claims are statute barred. The conspiracy claim is said to be the exception where the claim is not statute barred.

99. CWWI and C&W plc deny that there were any breaches of the primary or secondary legislation. In any event, they say that any such breaches were not actionable. They also say that on the facts and as a matter of law, they are not liable in the tort of conspiracy. They further say that any breaches caused no loss. Finally, they say that all the claims, including the conspiracy claim are statute barred.

100. The parties disagree as to the meaning and effect of the primary and secondary legislation in SLU. Accordingly, I will begin by considering that legislation in detail. As I will be examining the scope of the duties imposed by that legislation, it is convenient for

me next to consider whether any breach of such duties would be actionable as the tort of breach of statutory duty, before I consider the facts. If I find that any breach of the legislation would not be actionable, then I will consider whether any breach of the legislation would be "unlawful means" for the purpose of the tort of conspiracy to injure by unlawful means, again before I consider the detailed facts.

101. Whatever I decide about the actionability of any breaches and whether any breaches could be unlawful means, I will make findings of fact on the matters of complaint which the Claimants say were breaches of the primary or secondary legislation. Finally, I will discuss the question of limitation in relation to the tort of conspiracy in SLU.

THE LEGISLATION IN SLU

102. It is necessary to refer to a large number of the provisions of the legislation in SLU. Because of its length, and because I will be referring at similar length to the legislation in the other jurisdictions which are the subject of this litigation, I have set out the relevant parts of the legislation in each jurisdiction in a separate Annex for that jurisdiction. The legislation in SLU is therefore set out in Annex A to this judgment.

103. The claim made by Digicel SLU is that CWWI acted in breach of section 46(1) of the Telecommunications Act 2000 and in breach of regulation 5 of the Telecommunications (Interconnection) Regulations 2002. Section 46 of the 2000 Act states that a telecommunications provider is not to refuse, obstruct, or in any way impede another telecommunications provider from making an interconnection with its telecommunications network. Regulation 5 of the 2002 regulations states that a telecommunications provider shall act in a manner that enables interconnection to be established as soon as reasonably practicable. The parties are very far apart as to the meaning and effect of these provisions.

104. The submissions of the parties as to the correct interpretation of Section 46(1) of the Telecommunications Act 2000 and of regulation 5 of the Telecommunications (Interconnection) Regulations 2002 involved an examination of many of the provisions of the Act and of the regulations. This examination threw up many further questions which were debated in argument. I will refer to some of the more important questions on which it is useful to comment.

105. The 2000 Act defines "interconnection" to mean "the connection of two or more separate telecommunication systems, networks, links, nodes, equipment, circuits and devices involving a physical link or interface". The Claimants say that this definition describes only the physical side of interconnection and does not extend to anything concerned with contractual interconnection. The Defendants submit that the definition refers to both physical and contractual interconnection.

106. Section 46(1) of the 2000 Act provides:

"Subject to subsection (5), a telecommunications provider who operates a public telecommunications network shall not refuse, obstruct, or in any way impede another

telecommunications provider from making an interconnection with his or her telecommunications network."

107. Some matters are relatively clear as to the operation of section 46(1). At the relevant time, CWWI was "a telecommunications provider". At the relevant time, CWWI operated "a public telecommunications network". Digicel SLU was "another telecommunications provider", but because that phrase is defined in section 4(1) of the 2000 Act by reference to a person who is licensed under the Act, it necessarily follows that Digicel SLU was only "another telecommunications provider" from the date it was granted its licence to operate in SLU. The date of grant of the licence is, beyond any serious argument, the date of 6th September 2002. Thus, although this matter was not common ground at all stages of this litigation, it later became common ground and is in my judgment clear that whatever duty was created by section 46(1) of the 2000 Act, that duty was not owed to Digicel SLU until 6th September 2002.

108. The parties disagree as to the meaning of the phrase "making an interconnection" in section 46(1). The Claimants submitted that this is a reference to the physical link involved in an interconnection and the phrase does not refer to anything involved in the process of contractual interconnection. The Defendants submit that the reference to making an interconnection is apt to refer to both physical and contractual interconnection. Neither side submitted that the reference was to contractual interconnection only, to the exclusion of physical interconnection.

109. Section 46(1) refers to a telecommunications provider not refusing, obstructing, or impeding another telecommunications provider from making an interconnection. There did not seem to be much difference between the parties as to the meaning of the three verbs, "refuse", "obstruct", "impede". Although section 46(1) is clearly expressed, as a matter of language, as a negative prohibition on refusing, obstructing or impeding, both sides in this litigation proceeded on the basis that section 46(1) in substance imposed positive obligations on CWWI. The Claimants submitted that the duty created by section 46(1) was a duty on CWWI to provide the specialist equipment needed to be installed at a CWWI switch site for the purpose of completing CWWI's end of physical interconnection. As regards the specialist equipment needed for the Digicel SLU end of the interconnection, the Claimants did not suggest that CWWI was obliged to provide that equipment; the Claimants accepted that it was for Digicel SLU to provide that equipment. The Defendants accepted that CWWI was obliged, at an appropriate time and, in particular, after an interconnection agreement had been entered into, to provide the specialist equipment needed for the CWWI end of the physical interconnection. Both parties appear to agree that CWWI's duty to provide this equipment could extend to a duty to identify the equipment which was needed, to order that equipment, to pay for that equipment, to take delivery of the same, to install the same and to test the same.

110. Both sides supported their primary contentions as to the meaning of section 46(1) by referring to other provisions in the 2000 Act. The Claimants stressed the use of the word "making" in section 46(1). This was said to be a strong pointer to the conclusion that the subsection was dealing with physical interconnection only. The Claimants also referred to section 46(4), pursuant to which the parties were to agree a date when

interconnection would be effected; it was suggested that such a provision made good sense if it applied only to physical interconnection but made less sense, or no sense, if it applied to both physical and contractual interconnection. The Claimants also referred to the different words used in other parts of the 2000 Act which referred to "interconnection service" rather than "interconnection"; it was suggested that a reference to interconnection service was apt where the physical equipment used in the interconnection was operating to permit the carriage of live traffic. Conversely, it was argued, the word "interconnection" referred to physical interconnection alone. The Claimants also submitted that section 48, dealing with the costs of establishing any interconnection, was dealing only with physical interconnection and that demonstrated that the word "interconnection" was confined to physical interconnection.

111. In relation to the regulations in SLU, the Claimants relied on the duty created by regulation 5 which again referred to "interconnection" being established. The Claimants again submitted that "interconnection" in regulation 5 was confined to physical interconnection.

112. The Defendants, as I have indicated, submitted that "interconnection" in section 46(1) of the Act and in regulation 5 referred to both physical and contractual interconnection. The Defendants also drew my attention to various other provisions in the 2000 Act and in the regulations. They dealt with the various linguistic points made by the Claimants. They drew attention to section 46(7) of the 2000 Act which refers to "providing an interconnection service in accordance with this section". They submitted that "an interconnection service" must entail the passing of live commercial traffic and that was only permissible when there had been an interconnection agreement: see section 47(1). Section 46(7) referred to the service being provided "in accordance with this section" i.e. in accordance with section 46. The Defendants submitted that that was a clear pointer to section 46(1) creating a duty as to the provision of an interconnection service with the result that section 46(1) was not confined to physical interconnection to the exclusion of contractual interconnection.

113. Before attempting to resolve this difference as to the scope of the duty imposed by section 46(1) of the Act and regulation 5, it is useful to consider the fact that section 46(1) of the Act is expressed as a negative prohibition rather than as a positive obligation. On any view, section 46(1) is not well drafted. In fact, it is not wholly grammatical. Section 46(1) seems to impose three negative prohibitions. The first prohibition is that a telecommunications provider "shall not refuse… another telecommunications provider from making an interconnection…". The second prohibition is that a telecommunications provider "shall not obstruct… another telecommunications provider from making an interconnection". The third prohibition is that a telecommunications provider "shall not… in any way impede another telecommunications provider from making an interconnection". It would have been more grammatical for the subsection to say that a provider should not refuse a request from another provider to make an interconnection and to refer to a provider not obstructing or impeding another provider in making an interconnection. Alternatively, the subsection might have stated that the provider should not "prevent" another provider from making an interconnection.

114. The second comment is that if section 46(1) is construed literally as a negative prohibition, CWWI's compliance with that prohibition i.e. not refusing, obstructing or impeding Digicel SLU would suggest a result whereby Digicel SLU could make an interconnection with CWWI's network. That result would only follow if Digicel SLU had a pre-existing right to make an interconnection which was not to be refused or obstructed or impeded by CWWI. Of course, as a matter of general law, Digicel SLU did not have a pre-existing right to install specialist equipment at CWWI's switch site.

115. I have therefore considered whether the 2000 Act conferred such a right upon Digicel SLU. Although this argument was not relied upon by either party, it is possible that section 50(1) (notwithstanding its somewhat limited heading) would allow Digicel SLU to go to CWWI's switch site and install equipment at that switch site for the purpose of interconnecting Digicel SLU's network with CWWI's network. Section 50(1) refers to a "site". That word is defined in section 4 of the 2000 Act to refer to land or a building on land or a structure on land. If section 50(1) were to be interpreted to give Digicel SLU the right to go to CWWI's switch site in that way, then section 46(1) could be construed literally to impose on CWWI a negative prohibition on any obstructing or impeding of Digicel SLU, in the exercise of that right. Read that way, section 46(1) would not impose a positive obligation on CWWI at any time to order, install and test specialist equipment to use at CWWI's end of physical interconnection.

116. I have also considered whether section 46(1) might be read as dealing primarily, if not exclusively, with contractual interconnection so that the duty upon CWWI, if there were to be such a duty, to order, install and test specialist equipment at its end of the interconnection would be a duty undertaken as one of the express terms of an interconnection agreement rather than a duty imposed by the statute itself.

117. Although I have considered the possibility that section 46(1) takes effect, in accordance with its express terms, as a negative obligation and not so as to create a positive duty and although I see some force in an argument that section 46(1) is concentrating primarily, if not exclusively, on contractual interconnection, in the end, I have decided not to pursue these possibilities any further. The Defendants have been prepared to accept that section 46(1) refers to physical interconnection as well as contractual interconnection and have further been prepared to accept that section 46(1) imposes on the Defendant a positive obligation, at an appropriate stage in the process, to order, install and test the equipment at its end of the physical interconnection. Accordingly, I will now make my choice between the stances adopted by the parties in this case and give my reasons for that choice.

118. In my view, the Claimants' contention that section 46(1) and regulation 5 are dealing only with physical interconnection is wrong. The definition of "interconnection" in section 4 of the 2000 Act is the connection of two systems etc "involving a physical link or interface". I read "involving" in the sense that interconnection must contain a physical link or interface as a necessary part. That does not mean that interconnection refers only to that physical link and not to anything else. If it had been intended to define "interconnection" to refer only to the physical link the definition would have been

expressed so that interconnection meant "the physical link or interface between two or more separate telecommunications systems etc.".

119. The principal difficulty with the Claimants' construction of section 46(1) is that, if the Claimants were right, then the Act would not have imposed on the incumbent network operator any duty in relation to contractual interconnection. If the Claimants were right, the incumbent would be obliged to provide physical interconnection between the two networks but then could refuse absolutely to agree any terms for interconnection and, in the absence of an agreement as to those terms, the incumbent could refuse to permit the passage of live traffic from the new entrant onto the incumbent's network. If that were the result, it would be clear that the Act had failed to achieve what was evidently its object, namely, to produce an outcome whereby the new entrant could pass live traffic through the interconnection onto the incumbent's network. When this point was put to the Claimants in argument, they appeared to accept that this was the result of their argument. Indeed, I understood them to accept this was the position under the regulations also, although I think that is less clear.

120. The Claimants appeared to be relatively unconcerned about a conclusion to the effect that the Act did not achieve anything in relation to contractual interconnection. That was because it suited the Claimants' case, as they saw it, to make their principal attack on the Defendants that the Defendants had failed to achieve physical interconnection as required by section 46(1), because the Defendants had refused to take any step towards physical interconnection and, in particular, had refused to order the necessary equipment, until the parties had negotiated the terms of an interconnection agreement. Although the Claimants' construction of the provisions might suit the Claimants' purpose in the present litigation, a court when construing these provisions should consider which of the rival constructions makes better sense, having regard to the evident purpose of the provisions. In this way, I readily conclude that the Claimants' construction is difficult to justify when measured against the purpose of these provisions and the court would only be minded to accept the Claimants' construction if it were driven so to do.

121. I do not feel driven to accept the Claimants' interpretation of section 46(1). I do not regard the reference to "making an interconnection" in section 46(1) as being expressed in such clear terms that it is restricted to physical interconnection only. In any event, the grammatical infelicity of section 46(1) does not encourage me to place undue weight upon the word "making" alone. The reference in section 46(4) to the parties agreeing a date when interconnection will be effected might be thought to be a little unrealistic, whether the section is dealing with physical interconnection alone or with both physical and contractual interconnection. In the case of physical interconnection, to some extent, matters could be outside the complete control of the network owner. The equipment may have to be ordered from a third party supplier. The fact that section 46 and other sections refer, some of the time, to "interconnection" and other times to an "interconnection service" is a point which merits consideration but, at the end of the day, I do not find there to be such clarity in the various uses of those phrases as to restrict "interconnection" to physical interconnection only. Indeed, section 46(7) proceeds on the

basis that an "interconnection service" is to be provided in accordance with section 46 which, elsewhere, refers to making or effecting an "interconnection".

122. As regards the regulations, I again reject the Claimants' submission that regulation 5 is restricted to physical interconnection. The various definitions in regulation 3 which refer to interconnection do not compel the conclusion that "interconnection" in the regulations is restricted to physical interconnection.

123. For the above reasons, in relation to the choice between the Claimants' submissions and the Defendants' submissions as to the operation of section 46(1) of the Act and of regulation 5, I prefer the Defendants' submissions. This means that section 46(1) and regulation 5 are not restricted to dealing with physical interconnection but refer to both physical and contractual interconnection. In view of the fact that the Defendants have accepted that section 46(1), notwithstanding its negative language, imposes on the Defendants a positive duty in relation to physical interconnection, requiring the Defendants to take action at an appropriate stage in the process, I will proceed on the basis that section 46(1) does indeed impose that obligation.

124. I have not so far discussed all of the points of detail which arise under the 2000 Act and under the regulations as regards the content of the duties imposed. Many of those detailed points are best considered in the context of the specific findings of fact I will in due course make in relation to SLU. However, there are four important subjects which require separate consideration. The first is whether the 2000 Act and/or the regulations imposed any relevant duty on the incumbent operator before Digicel SLU obtained a licence to operate a mobile telecommunications network in SLU. The second is whether the 2000 Act and/or the regulations imposed a duty on CWWI to order and, as appropriate, to install and test the specialist equipment needed to complete CWWI's side of physical interconnection before the parties had made an interconnection agreement. The third is whether the 2000 Act and/or the regulations imposed on CWWI a duty to carry out what had been described as the civil works (for example digging a trench and laying fibre to connect Digicel's switch site with CWWI's switch site) before the parties had made an interconnection agreement. Finally, the fourth subject concerns what has been called "leverage", which I will describe in more detail below.

The first question

125. As regards the first question as to any duties placed on CWWI under the Act and/or the regulations before Digicel SLU obtained its licence to operate a mobile telecommunications in SLU, the position is now clear. I have referred to the situation, in passing, when discussing the operation of section 46(1). It is clear that section 46(1) does not impose a duty on CWWI, which is owed to Digicel SLU, at any time prior to the date when Digicel SLU became licensed to operate a telecommunications network in SLU. The same comment applies in relation to regulation 5.

The second question

126. The second question is whether CWWI was under an obligation to order and install and test the specialist equipment for its side of the physical interconnection before the parties had concluded the terms of an interconnection agreement and/or before those terms were approved by the regulator. Having already reached the conclusion that section 46(1) of the Act and regulation 5 refer to both physical and contractual interconnection, this question must be addressed on that basis.

127. The Claimants contend that if section 46(1) of the Act and regulation 5 are dealing with both physical and contractual interconnection and if, as the Defendants accept, CWWI was under a positive duty at some stage in the process to order, install and test the specialist equipment for its side of the interconnection then this means, the Claimants say, that the Defendants were to take positive action to avoid obstructing or impeding physical and contractual interconnection (section 46(1)) and the Defendants were to act in a manner which enabled physical and contractual interconnection to be established as soon as reasonably practicable (regulation 5). The Claimants then say that if the specialist equipment had been ordered by CWWI, and installed and tested thereafter, in parallel with continuing negotiations in respect of the interconnection agreement, then the date by which the parties would have achieved both physical and contractual interconnection would have been an earlier date, as compared with the result of a process whereby the parties negotiated an interconnection agreement and only following completion of those negotiations and/or approval of the agreement by the regulator, did CWWI order the necessary equipment for its side of the interconnection. In short, the Claimants submit that it is obviously faster for ordering equipment and negotiating an interconnection agreement to proceed in parallel, rather than in sequence.

128. At the trial, the Claimants accepted that the equipment to be ordered by CWWI for its side of the interconnection would ultimately be paid for by Digicel SLU: see section 48 of the Act. The Claimants also accepted that CWWI could reasonably ask Digicel SLU to provide security for CWWI's right to be reimbursed the cost of the equipment. Indeed, Digicel SLU went further and accepted that CWWI could insist on more than mere security for reimbursement and could require payment up front, or a cash deposit, so that CWWI would not suffer a cash flow disadvantage by having to pay for the equipment in the first instance and then wait for reimbursement. In this way, the Claimants came to accept that if the parties, by agreement, were to take the course of ordering and installing and testing equipment before the conclusion of negotiations on an interconnection agreement, it would be necessary to agree a certain number of matters. If CWWI were to be content with security for reimbursement of the costs, then an appropriate contract providing for that security would have to be negotiated. If CWWI wished to have payment upfront or a cash deposit then again an agreement to that effect would have to be negotiated. If CWWI agreed upon a figure for payment up front, or a cash deposit, the possibility would exist that the overall charge might subsequently turn out to be higher than foreseen and even with payment up front, or a cash deposit, there might need to be further terms agreed as to any shortfall that might later emerge. As regards installation and testing, there would need to be agreement as to the standards to be adopted for those purposes although the Claimants suggested that, on the evidence, those matters would have been relatively straightforward and, indeed, much more

straightforward than would be suggested by the length of the documents dealing with those matters, which were in fact later agreed as part of the interconnection agreement.

129. The Claimants' submission was that, even if it were necessary to agree a certain number of matters to enable CWWI to proceed to ordering, installing and testing specialist equipment it needed for its side of interconnection, it would still have been worthwhile negotiating such an agreement and ordering the equipment in parallel with the wider negotiations, which could continue in relation to all the other terms of the interconnection agreement, including the all important subject of rates. In summary, the Claimants contended that there was, in effect, an obligation upon CWWI to order the technical equipment it needed unless CWWI could satisfy the Court that it had a good commercial reason for not proceeding in that way.

130. The Defendants submitted that CWWI was not obliged to take any steps towards ordering, much less installing and testing, the specialist equipment needed for its side of interconnection prior to the parties concluding an interconnection agreement and/or that agreement being approved by the regulator. Indeed, the Defendants went further and submitted that on the true construction of the 2000 Act, the parties were prohibited from making an *ad hoc* agreement dealing with the question of ordering, installation and testing and/or were prohibited from ordering the equipment without such an *ad hoc* agreement. Although the Defendants submitted that they did not have to succeed with their argument as to the existence of a prohibition, it seems to me to be logical to consider that argument first before turning to the other ways in which the Defendants put their case.

131. The Defendants' argument that they were prohibited by the statute from ordering equipment before concluding an interconnection agreement is based on section 47(1) of the Act. Section 47(1) provides:

"No person shall enter into any interconnection agreement, implement or provide interconnection service without first submitting the proposed agreement to the Commission for its approval, which approval shall be in writing."

132. The Defendants say that pre-ordering equipment, with or without an *ad hoc* agreement, would involve implementing or providing an interconnection service and that could not be done without an agreement being approved by the Commission. It was implicit in this submission that the agreement which was to be approved by the Commission was the full interconnection agreement. If that submission were correct then it would follow that the parties had to negotiate an interconnection agreement and have the same approved before CWWI would be able to order its specialist equipment.

133. Section 47(1) refers to "any interconnection agreement". "Interconnection agreement" is not defined in the Act. No doubt, the final agreement between the parties which contains all the relevant provisions as to physical interconnection and as to the provision of interconnection services into the future would be an interconnection agreement. It is much less clear whether an *ad hoc* agreement providing for the ordering of specialist equipment would itself be an interconnection agreement. I can see that it

might be said that an *ad hoc* agreement which provided not only for ordering equipment but also for installation and testing of that equipment, in accordance with detailed standards, is beginning to look more like an interconnection agreement, than not.

134. The Defendants focused on the part of section 47(1) which prevented a person implementing or providing an interconnection service. It was said that ordering specialist equipment for the purpose of interconnection and, even more so, installing and testing that equipment was providing an interconnection service. If the word "provide" were more apt to refer to the continued provision of a service which allowed commercial traffic to pass from Digicel SLU's network to CWWI's network, then the Defendants emphasised the word "implement". It was submitted that by ordering equipment and, even more so, installing and testing that equipment, one was implementing an interconnection service.

135. I can readily understand why the terms of a full interconnection agreement have to be approved by the regulator. The regulator will want to ensure that those terms are not against the public interest, even where they are perceived by the parties to the agreement to be in their private interests. This has particular relevance in connection with the rates chargeable by one party to the other party, which rates will influence the amount of the charges ultimately paid by the consumer. It is less clear why the regulator would wish to consider and, if appropriate, withhold approval to any other form of agreement, such as an *ad hoc* agreement dealing with ordering equipment or installing and testing equipment. Indeed, regulation 20, which requires the parties to submit an agreement to the regulator for approval, refers only to a proposed interconnection agreement and this phrase is more apt to refer to an agreement which deals with physical interconnection and the ongoing provision of an interconnection service. Nonetheless, it was submitted by the Defendants that an *ad hoc* agreement as to ordering equipment might deserve to be scrutinised by the regulator to ensure that the parties had complied with section 48 of the Act, which required the cost of establishing an interconnection to be based on cost oriented rates which had been arrived at in a transparent manner. Accordingly, I can see the possibility that section 47(1) might have contemplated that an agreement, which falls short of a full interconnection agreement, might need to be submitted to the regulator. That possibility is, if anything, made more likely because section 47(1) uses the phrase "the proposed agreement" and that suggests that the agreement in question might not be an interconnection agreement but some other *ad hoc* agreement.

136. I am not wholly satisfied that section 47(1) does apply to a case where the parties agree limited terms as to the ordering of equipment, before they conclude their negotiations on an interconnection agreement. I reach a similar view as to an *ad hoc* agreement providing not only for ordering equipment but also for installation and testing of equipment. If, contrary to those reservations, section 47(1) does apply to an *ad hoc* agreement providing for ordering of equipment before the conclusion of negotiation for an interconnection agreement, then in my judgment section 47(1) does not impose an absolute prohibition on the parties making such an agreement but only requires them to submit that *ad hoc* agreement to the regulator for approval before the *ad hoc* agreement is carried into effect. On that basis, section 47(1) does not prohibit pre-ordering of equipment as the Defendants contended but it would, or might, impose the requirement of

prior approval by the regulator of an *ad hoc* agreement before that agreement was implemented. It must be recognised that any such requirement for approval from the regulator would introduce some element of delay into the pre-ordering process and that might be seen as discouraging the parties from bothering with pre-ordering and might encourage them instead to concentrate upon concluding the negotiations on all aspects of the interconnection agreement rather than seeking to make an *ad hoc* agreement as a step on the way.

137. Putting the possibility of a prohibition on pre-ordering pursuant to section 47(1) of the Act on one side, the Defendants submitted that the express terms of the Act and, even more so, the regulations showed that it was contemplated that the parties would conclude an interconnection agreement, which agreement would provide for the subsequent ordering, installation and testing of equipment and then that agreement would be implemented in accordance with its terms. The Defendants submit that since section 46(1) of the Act refers to interconnection, meaning both physical and contractual interconnection, there is no express direction there, or elsewhere, in the Act that physical interconnection is to be dealt with as a priority matter in advance of negotiations on the interconnection agreement. When one turns to the regulations, it is again submitted that regulation 5 contains no direction that physical interconnection is to be attended to first. Indeed, the Defendants submit regulation 16 clearly contemplates that the parties will enter into an interconnection agreement, which will provide for the subsequent ordering, installation and testing of equipment, and those steps will then be taken by way of implementation of the agreement. The Defendants refer in particular to paragraph (b) of regulation 16(1) which refers to the capacity of the interconnection service level, to paragraph (e) which refers to "forecasting, ordering, provisioning and testing procedures", to paragraph (g) which refers to various aspects of the points of interconnection, to paragraph (p) which refers to technical specifications and standards, to paragraph (q) which refers to terms of payment, to paragraph (t) which refers to the scope and description of the interconnection services to be provided, to paragraph (u) which refers to various other technical matters and, finally, to paragraph (y) which refers to the obligations and responsibilities of each party in the event that inadequate or defective equipment was connected to a network.

138. I can now express my conclusions as to the effect of the Act and the regulations on this question of a possible obligation on CWWI to order and install and test equipment prior to the conclusion of negotiations on the interconnection agreement. My overall conclusion is that there is no provision in the Act or the regulations which specifically requires CWWI to order first and conclude negotiations on the agreement second. Conversely, there is no provision in the Act or the regulations which prohibits CWWI from acting in that way save, possibly, the provisions of section 47(1) which might mean that CWWI had to submit any *ad hoc* agreement on ordering (and installation and testing) to the regulator before it was implemented. The way in which the parties were to be expected to address these matters, and in particular, the way in which the parties were to use the time available to them is provided for in section 46(1) by use of the words "obstruct" and "impede" and in regulation 5 by use of the phrase "as soon as reasonably practicable". In section 46(1) the word "obstruct" has the sense of making progress or activity difficult. The word "impede" has the sense of restricting or retarding action or

progress by hindering or obstructing. Accordingly, the word "impede", at least, has some content which is concerned with the use of time.

139. The other relevant matter which appears from the Act and the regulations is that it was expected that the parties would engage in commercial negotiations on the terms of an interconnection agreement but that if they were unable to reach an agreement, the matter would be determined by the regulator. Section 47(3) of the Act refers to the parties negotiating an interconnection agreement. Regulation 28(1) refers to the parties negotiating in good faith for a reasonable period following which either party might request the assistance of the regulator in resolving their dispute. In such a case, the regulator might direct the parties to continue interconnection negotiations and under regulation 28(5) the regulator was able to set a time limit within which negotiations were to be completed what should happen if agreement was not reached within that time limit.

140. In summary, therefore, I hold that there was no express obligation upon CWWI to order or install or test equipment before concluding negotiations on an interconnection agreement and, conversely, there was no prohibition on them doing so, subject to the possibility that an *ad hoc* agreement on those matters might need to be submitted to the regulator for approval under section 47(1) of the Act.

The third question

141. The third question is whether the 2000 Act and/or the regulations imposed on CWWI a duty to carry out the civil works before the parties had made an interconnection agreement. In my judgment, the position in relation to the third question is the same as the position I have now considered in detail as to the second question dealing with pre-ordering and installing and testing equipment before the parties had concluded negotiations for an interconnection agreement.

The fourth question

142. The fourth question concerns what has been called "leverage". The parties have used the term "leverage" to refer to a reason which CWWI had for taking the position in negotiations with Digicel SLU that CWWI would not order the equipment needed for its side of physical interconnection (and would not carry out the necessary civil works) until the parties had agreed the terms of an interconnection agreement, which provided for the ordering of equipment and the carrying out of civil works. CWWI was influenced in taking this position by the belief that this stance would help CWWI to negotiate favourable terms with Digicel SLU, because Digicel SLU was in a hurry to complete interconnection and would therefore be under more time pressure to agree the terms of an interconnection agreement, if those terms had to be agreed before the process of ordering equipment and the carrying out of civil works would even be started. The question is whether it was permissible for CWWI, in the course of commercial negotiations, and in compliance with the duties upon it, to act in this way.

143. The issue is whether, in all the circumstances, this conduct of CWWI infringed section 46(1) because it impeded, in the sense of delayed, the date when physical and

contractual interconnection were achieved and, further, whether CWWI acted in a manner that enabled interconnection to be established as soon as reasonably practicable as required by regulation 5. Both of these provisions, insofar as they contain a time element, must be applied to a process which contemplated that the parties would conduct commercial negotiations with a view to concluding an interconnection agreement but that there was a possibility that such negotiations might not succeed and other steps might need to be taken to arrive at contractual terms binding both parties.

144. The Claimants say that a decision to postpone the ordering of equipment until the parties have agreed the terms of an interconnection agreement, for the purpose of gaining leverage in the negotiations, can never be justified. This seems to be a submission of law as to the content of the obligations imposed by section 46(1) of the 2000 Act and regulation 5 of the regulations. The Claimants submit that the use of this leverage is an unlawful collateral purpose. They say that interconnection negotiations are not like "pure" commercial negotiations in that the parties are not entitled to act in an entirely self-interested fashion. In particular, the incumbent has a statutory obligation to enter into such negotiations. The negotiations are to be against the background of the regulatory controls in the 2000 Act and the regulations. CWWI cannot use what might be otherwise normal negotiating tactics to place Digicel SLU at a disadvantage. That would be anti-competitive. The Claimants submit that CWWI's approach "inevitably" caused delay. Whilst it might be appropriate to delay ordering equipment if there were a difference between the parties as to the terms on which physical interconnection was to be allowed, this leverage must not be used to influence the negotiations as to rates. It is submitted that the illegality of CWWI's behaviour is demonstrated by the fact that CWWI was not prepared to own up to this strategy at the time.

145. The Defendants submit that when I am asked to apply the provisions of the statute and of the regulations, and in particular the provisions dealing with the time needed to achieve both physical and contractual interconnection, I should bear in mind what is ordinarily involved in commercial negotiations. It is submitted that I should not interpret, or apply, the provisions of the statute and the regulations in a way which would outlaw usual features of commercial negotiation, unless the words of the statute or regulations clearly so require.

146. The Defendants submit, and I accept, that it is very common indeed for commercial parties to negotiate and then agree the terms of a contract which will govern their relations, before they begin to implement their contract. It may be worth asking why this is normal commercial behaviour. If parties in the course of negotiating a contract seek to anticipate the result they may arrive at by taking steps which will later be governed by the concluded agreement, difficulties can arise. What rights and obligations govern those steps before the parties reach a concluded agreement on their relationship? What happens if the parties fail to reach a concluded agreement and the negotiations break down? It is of course possible for the parties to make two agreements; the first agreement being an *ad hoc* agreement dealing with the steps being taken in anticipation of a wider concluded agreement and the second agreement being the wider concluded agreement. However, it may in fact take more time to attempt to agree an *ad hoc* agreement as well as a wider agreement, as compared with simply getting on with the

negotiations for the wider agreement, leading to its later implementation. Of course, if both parties want early action before they conclude the wider agreement then both parties may choose to take those steps and to take any risks that might be involved. However, if one party wants action to be taken in advance of the wider agreement and the other party has no reason of his own to want to take those steps then the second party may see that he has a considerable bargaining advantage in insisting upon the conclusion of the wider agreement before the first party gets the benefits of the implementation of that agreement. In my judgment, these general commercial considerations would appear to be relevant considerations in the present context also.

147. Furthermore, there is, in the evidence, material which suggests that the persons negotiating interconnection agreements operate under the usual rules which apply to commercial negotiations and do use such negotiating advantages as may be available to them. On the question of whether the incumbent operator has a negotiating advantage as a result of the new entrant's eagerness to have the interconnection equipment ordered in advance of the interconnection agreement, this matter was clearly in the mind of Mr Thompson in SLU and elsewhere.

148. The existence of this negotiating advantage is also consistent with other evidence in the case. Mr Batchelor, a witness called by the Defendants, told me that his experience was that the standard behaviour was for the parties to enter into an interconnection agreement first and then to implement that agreement by, amongst other things, ordering the necessary interconnection equipment. It was suggested by the Claimants that this evidence had no relevance to the jurisdictions with which I am concerned. It was suggested that the regulatory framework which was the background to Mr Batchelor's evidence was quite different from the regulatory position in the seven jurisdictions in this case. However, I am relying upon this evidence only to the extent that it confirms the conclusion that one would reach in any event that: (1) the process of negotiating an interconnection agreement involves each party taking advantage of its bargaining points; and (2) an incumbent operator has a bargaining advantage, when negotiating the terms of an interconnection agreement, if he declines to give to the new entrant the benefit of the equipment being ordered before the interconnection agreement is finalised. Any differences in the regulatory framework do not prevent me reaching those conclusions based on his evidence.

149. Mr Batchelor's evidence was supported by the evidence of other witnesses, in particular Mr Fisher and Mr McNaughton, who gave evidence of similar experiences.

150. The Claimants relied upon the evidence of Mr Logan, an expert instructed on their behalf. He stated that he had never come across a party to negotiations as to the terms of an interconnection agreement insisting that the ordering of equipment or the carrying out of civil works should await conclusion of the interconnection agreement. The other experts, Mr Short and Mr Webb, did not refer to any experience they had had in this respect. Mr Logan was not called to give oral evidence and he was not cross-examined. The parties are agreed that I am free to accept or reject expert evidence if I have good reason to do so, even in a case where the relevant evidence of the expert was not challenged by cross-examination. I do not reject the evidence of Mr Logan in so far as he

describes the position in the cases that he has encountered. I accept his evidence that he has not himself come across a case of a party to negotiations for an interconnection agreement declining to order equipment before the conclusion of those negotiations and/or to refuse to commence civil work before the conclusion of negotiations. However, it is clear from the evidence in this case that other persons have had a different experience.

151. In these circumstances, I reach the following conclusion, as to the usual position of parties to negotiations where one party is under time pressure and wishes some step to be taken prior to the conclusion of those negotiations and the other party is not under time pressure and does not have any reason of his own to see that step taken prior to the conclusion of negotiations. In such negotiations, the second party has a bargaining advantage which it is ordinarily legitimate for that party to use to encourage the first party to agree terms which might be more favourable to the second party, so that the agreed terms can then be implemented and the step which the first party wants to see taken can then be taken in accordance with the agreed terms.

152. There is a further consideration which needs to be addressed. The criticism of CWWI is that its negotiating stance inevitably lengthened the period of time taken by the parties to complete contractual and physical interconnection. Digicel SLU submits that negotiating terms and ordering equipment in parallel will inevitably be faster than negotiating terms and ordering equipment in sequence. At first blush, this sounds right but the submission assumes that the time taken for negotiations is the same in each case. The submission ignores the possibility that CWWI's stance in the negotiations could also cause the negotiations on the terms to proceed more quickly. If Digicel SLU truly was in a hurry to complete interconnection then it might be expected to conclude negotiations by agreeing terms quickly so that it could move on to the stage of CWWI ordering and installing equipment. There is a lot of conflicting evidence as to the time taken from ordering until delivery of the necessary equipment. Let us assume that in a particular case, that period is 8 weeks. The time taken for concluding negotiations was not predictable in advance but could take some months. If CWWI's negotiating stance caused the negotiations to be concluded more quickly, by more than 8 weeks, then the result would be that its stance had led to the conclusion of both contractual and physical interconnection more quickly. The point may also have partial, if not total, validity. One might have to set off the time saved in completing negotiations against the delay caused by only ordering equipment after the completion of negotiations. Indeed, on the facts in the case of SLU, it can be argued that CWWI's insistence on agreeing the terms of an interconnection agreement before ordering equipment contributed to the parties breaking the deadlock in their negotiations in January 2003. It could be said that if the equipment had been ordered by CWWI before January 2003, Digicel SLU would have been less prepared to agree the terms which it did agree in January 2003. Of course, there are other possibilities. If the CWWI equipment had been ordered and delivered, then Digicel SLU might have been able to persuade the Ministers in SLU or the regulator to put even more pressure on CWWI to install the equipment and allow traffic to be carried. These various possibilities are speculative but the point remains that amongst the possibilities, there is the chance that CWWI's stance in the negotiations about ordering equipment did in the

end speed up the point when the parties managed to bridge what had earlier been an unbridgeable gap in the negotiations about rates.

153. I have found this fourth question difficult. There are strong competing arguments. However, my conclusion is that the 2000 Act and the regulations contemplate that the parties will engage in ordinary commercial negotiations and, if they do not agree, the relevant terms will be determined by the regulator. I conclude that there is nothing in section 46(1) or regulation 5 which says one way or the other whether a party is able to adopt, or disabled from adopting, a negotiating stance which would be a rational negotiating stance in the context of ordinary commercial negotiations. It follows that these provisions do not outlaw the negotiating stance, based on the leverage described above, adopted by CWWI in SLU. CWWI did not break the duty placed on it by section 46(1) or regulation 5 by adopting that stance.

154. The Claimants made a further point in connection with the leverage argument. They said that CWWI was not only influenced by a desire to improve its negotiating position as against Digicel SLU, it was also influenced by a desire to pressurise the regulator into approving the terms which CWWI and Digicel SLU would eventually agree. It was said that the way in which this pressure would come about was as follows. It would inevitably take a considerable time for the parties to agree terms. Those terms would have to be approved by the regulator. Only after approval was given, would CWWI be prepared to order the equipment. The regulator would be eager to see the completion of interconnection and would not want to withhold approval as that would mean that the equipment could not be ordered until the parties agreed revised terms, and those terms were approved, or the regulator stepped in and itself determined the terms. The Claimants submitted that, whatever the position about the use of leverage against Digicel SLU, it must have been a breach of the duties in question for CWWI to seek to pressurise the regulator. On the facts, I accept that CWWI did have in mind not only that its negotiating stance might improve its position as against Digicel SLU but also that it might encourage the regulator to approve the terms ultimately agreed by the parties.

155. The first point to make in relation to this submission about pressurising the regulator is that CWWI's tactic should not have any adverse effect on the time taken for the parties to reach agreement on the terms of an interconnection agreement. It is even conceivable that this tactic would speed up the time taken by the parties to reach an agreement. That time taken to reach an agreement should not be lengthened because CWWI is influenced by two considerations, namely, leverage against Digicel SLU and, in addition, a desire to put pressure on the regulator as compared with CWWI being influenced by only the first of those two.

156. The second point is that in SLU, CWWI did order equipment before the agreed terms were submitted to the regulator for approval.

157. The third point is that the Claimants' criticism of CWWI's desire to pressurise the regulator is being put forward to show that CWWI acted in breach of a duty not to delay interconnection. But the way the submission is put by the Claimants shows that, if it were possible that CWWI's tactic might work with the regulator, it would produce the result

that the tactic would speed things up in some respects, rather than slow them down (as well as giving CWWI and Digicel SLU the benefit that the agreed terms would be approved). The possibilities of the tactic being successful would be that the regulator would approve the agreed terms more quickly or that he would approve them rather than decline to approve them. Both possibilities involve that aspect of the matter proceeding more quickly. Accordingly, one would have to consider whether the delay caused by not ordering equipment after the parties had agreed terms was counterbalanced in whole or in part by any time saved in relation to obtaining the regulator's approval to the agreed terms.

158. Accordingly, I conclude that the use by CWWI of leverage as against Digicel SLU was not a breach of section 46(1) of the 2000 Act, nor of regulation 5. I also conclude that insofar as CWWI's behaviour was influenced by the possible effect on the regulator, that did not affect the passage of time up to the point when the parties agreed terms and, on the facts, CWWI did not delay ordering the equipment after making the interconnection agreement (as it in fact ordered the equipment just before making that agreement).

ARE BREACHES OF THE LEGISLATION ACTIONABLE?

159. The next question is whether any breach of the primary or secondary legislation in SLU gives rise to a cause of action for that breach. That question arises not only in SLU but also in some of the other jurisdictions with which this litigation is concerned. To answer the question, it is necessary to consider, first, the general legal principles which apply in this area and then to consider the detailed provisions in SLU itself.

160. The parties do not significantly disagree as to the general legal principles which apply for the purpose of answering the question whether a breach of a statutory duty is actionable. The parties differ as to the emphasis they place on the various considerations in play. Because the general legal principles are relevant not only in SLU but also in some of the other jurisdictions, I have set out those principles in Annex H to this judgment. In Annex H, I refer to some of the more important authorities on this question and I identify the various matters to which attention needs to be given when one examines the individual statute or the regulations in question.

161. Having reviewed the authorities, as explained in Annex H, when I come to examine the individual statute or the individual regulations in question, I consider that I should address myself to the following principal matters:

(1) for whose benefit was the statute or the regulations passed?

(2) if the statute or regulations were passed to benefit public and private interests, which was the primary object?

(3) for whose benefit was the particular provision enacted?

(4) if the particular provision was passed to benefit both public and private interests, which was the primary object?

(5) has the duty been expressed in terms which make it suitable for actionability?

(6) what is the class of persons who might suffer harm as a result of a breach of duty?

(7) does the expected harm take the form of economic loss or damage to the person or damage to property?

(8) on what type of person is the duty imposed – is it a public authority or a private entity?

(9) does the statute or the regulations impose a sanction for breach of duty: the sanction may be a criminal sanction or something else, such as the suspension or revocation of a benefit?

(10) how adequate is the sanction imposed?

(11) does the statute or the regulations provide a means of enforcement of the duty?

(12) if so, does the omission to provide for a right to claim damages point to an intention not to allow a claim to damages?

(13) do the means of enforcement raise questions of discretion or policy with the result that actionability in the courts would or might proceed on a different basis?

(14) how adequate are the means of enforcement?

(15) overall, having regard to the above and any other relevant matters, what did the legislature intend as regards actionability of a breach of duty?

162. The relevant provisions of the Telecommunications Act 2000 in SLU are set out in Annex A to this judgment. I have set out above the matters which require attention when considering whether a breach of section 46(1) of the 2000 Act is actionable. I will now discuss those matters in turn.

163. In my judgment, the 2000 Act was primarily passed in the public interest rather than for the benefit of telecommunications operators. That appears clearly from the provisions of the ECTEL Treaty and section 3 of the 2000 Act. Section 3 spells out in some detail the objects of the Act. As regards the object of the particular provision, section 46(1) of the 2000 Act, in my judgment, that provision was enacted to advance the general purposes of the Act as a whole. The primary object of section 46(1) was to advance the public interest although it is clear that compliance with the statutory duty is also for the benefit of the telecommunications provider who requests interconnection.

164. As to the terms in which section 46(1) is expressed and whether those terms make the duty suitable or unsuitable for actionability, I have considered in some detail earlier in

this judgment the meaning and effect of section 46(1). Whilst the sub-section is challenging to construe, I would not on that account hold that the duty is not suitable for actionability. The construction I have placed on section 46(1) does not mean that section 46(1) is to be re-written as an obligation to negotiate in good faith as the parties from time to time have argued in this case. If the duty had been a duty to negotiate in good faith, that would be a reason for my hesitating before holding that there was an intention to make a breach of that duty actionable.

165. The class of persons who will suffer harm as a result of a breach of section 46(1) can be described as follows. Consistent with my conclusion that the primary object of section 46(1) is to benefit the public, then the public will suffer harm if the duty is broken. In addition, the particular telecommunications provider who requests interconnection will suffer harm to its enterprise. The harm is economic loss rather than damage to the person or damage to property. The person on whom the duty is imposed is not a public authority administering public welfare legislation, but is a private entity.

166. The 2000 Act does impose a sanction for a breach of section 46(1). That sanction is not a criminal sanction but a sanction exists pursuant to section 41 of the 2000 Act, whereby the Minister may suspend or revoke the licence of the incumbent operator if the licensee contravenes section 46(1) of the Act. This sanction is an important deterrent against a contravention of section 46(1). It may be that the Minister would hesitate before suspending or revoking the licence of the operator of the fixed telecommunications network and this consideration may lessen the impact of the deterrent of suspension or revocation. However, the Minister may be persuaded to revoke the existing licence and offer a new licence to the operator on more stringent terms and that could operate as a worthwhile deterrent. The power to suspend or revoke a licence conferred by section 41 is a penalty provision by reason of the contravention and is not designed to be a remedial provision. A remedial provision would be a provision which directly provided for the party in breach of duty to perform the duty. The fact that section 41 is not a remedial provision is shown by the fact that if the fixed network operator's licence was revoked then that operator would cease to be under the duty imposed by section 46(1) until the time came when the operator was granted a new licence, possibly on more stringent terms as referred to above.

167. It is of the greatest significance, in my judgment, that the 2000 Act provides in considerable detail for a means of enforcement of the relevant duty, principally through the involvement of the regulator. The 2000 Act contains numerous relevant provisions, the principal ones being section 12(1)(k), section 13(2)(c), sections 16 to 24 and the power to make regulations in section 74(2) (see, in particular, paragraphs d), e), n), o).) In addition to these provisions, it is necessary to consider carefully the meaning and effect of sections 58 and 72 of the 2000 Act, to which I refer in more detail below. On the question whether the means of enforcement through the medium of the regulator could raise questions of discretion or policy with the result that actionability in the courts would proceed on a different basis, I refer to section 15 and section 24 which do indeed give rise to this possibility.

168. Section 58 provides that the court may on the application of the Commission, "or an interested party", "grant an order restraining a person from engaging in activities contrary to this Act". In a case where an intending new entrant has requested interconnection in accordance with section 46(1) of the Act and the incumbent operator has contravened section 46(1), there would seem to be little doubt but that the intending new entrant is "an interested party". Section 58(b) refers to an order "restraining" action contrary to the Act. This is the language of a prohibitory injunction rather than a mandatory injunction. However, the particular duty currently being considered is the duty in section 46(1) which refers to "the operator not refusing or obstructing or impeding the making of an interconnection". There must be considerable room for doubt whether section 58(b) allows the court to make a mandatory order but in view of the fact that section 46(1) is itself expressed in negative terms, that consideration somewhat lessens the doubt on that score. Thus, there are two possible conclusions as to the applicability of section 58(b) in relation to a breach of section 46(1). The first is that section 58(b) does allow someone such as Digicel SLU to seek an order requiring CWWI to comply with section 46(1). The other possibility is that section 58(b) would permit the court to make such an order but only in a negative form and would not permit the court to make a mandatory order against a party in default. Either way, the result is that section 58(b) does provide a means of enforcement in relation to breaches of the Act including a breach of section 46(1). If section 58(b) is given a wider interpretation then the availability of the remedy of an injunction is highly relevant. If section 58(b) is interpreted narrowly, then it follows that the legislature in SLU intended to confer a remedy to the extent of prohibitory injunction but has decided not to confer a remedy in the form of a mandatory injunction.

169. Section 58 does not mention damages or compensation for breach of duty. It is not clear, on the material before me, whether a court in SLU has power to grant damages in lieu of the grant of an injunction, in the same way as can be done in England and Wales, pursuant to section 50 of the Senior Courts Act 1981. In their written closing submissions, the Claimants argued for the existence of this power for the court in St Lucia. The Defendants argued against the existence of such a power. In their oral closing submissions, the Claimants withdrew the contention that the court in SLU had such a power. In view of the way the matter has been argued, I am not able to decide one way or the other whether the court in SLU does have a power to award damages in lieu of an injunction. Of course, a power to award damages in lieu of an injunction can in some circumstances be a narrower power than the power to award damages for an actionable breach of statutory duty. It seems to me that I ought to consider section 58 on alternative bases, first, that there is a power to award damages in lieu of an injunction and, secondly, that there is no such power.

170. If the court in SLU does have power to award damages in lieu of an injunction and section 58 confers a power to grant an injunction, then that seems to me to point very strongly against the legislature in SLU intending to create a tort of breach of statutory duty, entitling a court to award an injunction and damages in respect of such a tort. Further, even if the court in SLU does not have the power to award damages in lieu of an injunction, the fact that the legislature had set out in section 58 the extent to which the court is given an express power to intervene in a case of a breach of statutory duty

suggests to me that the legislature did not intend to make a breach of statutory duty a tort and thereby entitle the court to award an injunction or damages in respect of that tort.

171. The last section of the 2000 Act which needs to be considered is section 72. Section 72 is in part VII of the Act. Part VII has the heading "Miscellaneous". Section 72 has the heading "Liability of public and private officials". Section 72 provides:

"Where a breach of this Act or licence has been committed by a person other than an individual any individual including a public officer who at the time of the breach was director, manager, supervisor, partner or other similarly responsible individual, may be found individually liable for that breach if,

(a) having regard to the nature of his of St Lucia or her functions;

(b) and his or reasonable ability to prevent that breach;

the breach was committed with his consent or connivance or he or she failed to exercise reasonable diligence to prevent the breach."

172. I confess that I find this a puzzling provision. The position is not exactly helped by the fact that there are some obvious errors in the wording. The words "of St Lucia" in section 72(a) appear to have been wrongly inserted. The word "her" appears to be missing before the words "reasonable ability" in section 72(b).

173. It is clear that section 72 does not expressly create civil liability for a breach of the Act or a breach of a licence granted under the Act. Section 72 does not say that where there is a breach of the Act, the person in breach of the Act is liable to pay damages or is liable in any other specified way. The Claimants say, however, that section 72 does place civil liability on certain individuals and it is inconceivable that those individuals would be liable without there also being civil liability on the part of the corporate body with which that individual is connected and which corporate body is directly under the duty imposed by the Act. In order to see whether the civil liability of the person subject to the duty is implicit in section 72, one has to attempt to understand what section 72 does expressly provide.

174. Section 72 refers to a breach being committed "by a person other than an individual" and then refers to "any individual including a public officer". It seems unlikely that there will be a public officer connected with the telecommunications provider so the reference to a public officer would seem to be a reference to the case where there is a public officer responsible for the activities of a public body, where that public body has a duty under the Act or under a licence. If the implication contended for by the Claimants is correct then it must apply in the case of a public officer as it applies in the case of other individuals. The Claimants' implication must therefore be that if a public body commits a breach of the Act or a breach of the licence then not only is the public officer liable in damages for the breach but so is the public body itself liable in damages for the breach. The 2000 Act does in various places impose duties on a public body but I am far from satisfied that it could have been the intention of the legislature to give a claim in damages against the public body, and against the public officer, in the

event of a breach of any such duty. Section 72 also refers to a breach of a licence. The second schedule to the Act identifies the conditions that may be included, and the conditions that must be included, in such licences. Again, it is not clear what type of duty would be imposed on a public body under a licence and it is even less clear that the legislature would have intended that a breach by a public body of any such condition would give the telecommunications provider a right to sue the public body, and its public officer, in damages for that breach.

175. Turning then to the other way in which section 72 might operate, how does it apply to a case of a breach of the Act or a breach of a licence committed by a telecommunications provider? Section 72 provides that an individual including a director, manager, supervisor, partner or other similarly responsible individual, can be individually liable for the breach. Thus, the Claimants argue, if a director of a company which is a telecommunications provider contravenes section 46(1) of the Act then that director is "individually liable" for that breach. The Claimants then argue that it is inconceivable in such a case that the telecommunications provider, the corporate body, would not also be liable for the breach. I would agree that it would be surprising if the individual were liable for a breach to a different extent from the liability of the telecommunications provider. The question therefore arises to what extent are the telecommunications provider and the individual "liable". Are both liable for a tort of breach of statutory duty or are both liable to the remedies which a court can grant under section 58, or are they liable in some other way?

176. There is a further difficulty with section 72 referring to the liability of an individual which arises from the reference to a breach of a licence. The conditions that may, and the conditions that must, be included in the licences are in the second schedule to the Act. One of the important liabilities of a licensee is to pay a fee to the Government. I find it difficult to envisage that the legislature intended that a responsible individual would be liable for the fee in addition to the liability of the licensee itself.

177. The Defendants submit that section 72 is not concerned with civil liability at all but is concerned with criminal liability. The Defendants are able to point to examples of a section not wholly dissimilar from section 72 which imposes criminal liability on a responsible individual. Examples are section 67 of the Information and Communications Technology Authority Law 2002 in Cayman and section 59 of the Telecommunications Ordinance 2004 in TCI. Indeed, a provision of that kind appears to be a relatively usual provision; reference can be made to section 29 of the Betting and Lotteries Act 1934, considered in Cutler v Wandsworth Stadium Limited [1949] AC 398. To my mind, there are considerable difficulties in saying that section 72 is dealing with criminal liability and, indeed, criminal liability only, to the exclusion of civil liability. Nothing in section 72 expressly refers to criminal liability. Further, section 72 is in part VII dealing with miscellaneous matters and not in part VI dealing with offences. Further, if section 72 is dealing with criminal liability then the reference to a public officer being responsible is only explained if the Act or a licence created a criminal offence for a public body and there is no sign in the Act of that possibility. Further, even if section 72 did extend to criminal liability, I do not see any real warrant for restricting section 72 to criminal liability only to the exclusion of civil liability.

178. The question whether a breach of section 46 is actionable has in fact been decided in the Eastern Caribbean Supreme Court. On 5 March 2006, Mason J decided the case of Cariaccess Communications (St Lucia) Ltd v Cable and Wireless (West Indies) Ltd. Amongst the several points dealt with in her judgment, the learned judge considered whether section 46 of the 2000 Act created an actionable duty in tort. She referred to the decisions of the House of Lords in Cutler v Wandsworth Stadium Ltd [1949] AC 398, Lonrho Ltd v Shell Petroleum Co Ltd (No. 2) [1982] AC 173 and X v Bedfordshire CC [1995] 2 AC 733. She held that the 2000 Act was passed for the benefit of the public interest and not for the benefit and protection of private rights and interests. She concluded that a breach of section 46 of the 2000 Act was not actionable as a breach of statutory duty. It is not necessary to spend any time considering whether her decision was part of the ratio of the case or was obiter. Both sides in the case before me have accepted that I am not strictly bound by that decision but I am free to decide for myself the extent to which the decision has persuasive authority in the present case.

179. Having considered the detailed provisions of the 2000 Act and having paid attention to the matters which need to be considered to determine this issue of actionability, my conclusions are as follows. The indicators in favour of a breach of section 46(1) not being actionable are very much stronger than the indictors the other way.

180. The indicators against actionability are the purpose of the statute, the purpose of section 46, the terms of section 58, the fact that the loss is economic loss, the existence of sanctions and the existence of detailed provisions for enforcement of the relevant duty. When considering whether the sanctions provided for in the legislation and/or the means of enforcement are adequate to secure the objects of the legislation, or whether they are inadequate for that purpose so that they need the addition of actionability of the duties to make the consequences of a breach adequate to secure those objects, it is relevant to note the following. It is a somewhat odd thing to hold that the legislature, when considering what to specify as the consequences of a breach of duty and when making detailed provision for sanctions for breach of the duty and means of enforcement of the duty, must have understood that those sanctions and those means of enforcement were inadequate, from which one can deduce that the legislature must also have intended to make the breaches of duty actionable, even though it did not expressly provide for that consequence.

181. The arguments in favour of actionability are that the duty is placed on a private entity and that identifiable persons will suffer harm as a result of a breach of duty. The fact that the duty is expressed in terms which are not unsuitable for actionability is neutral on the question as to whether the duty is actionable.

182. In addition, I have to assess any implications which might be appropriate from the express terms of section 72, which section is very problematical to construe. In the end, I am not persuaded that I should draw such implications from section 72 so as to override all the other indicators to which I have referred and which point to the duty in question not being actionable. I conclude that a breach of section 46(1) of the 2000 Act is not actionable.

183. The Claimants also contend that the duty imposed by regulation 5 of the Telecommunications (Interconnection) Regulation is actionable. It is appropriate, again, to consider the general matters which are relevant for the purposes of determining this question. In my judgment, the purpose or object of the regulations, including regulation 5, was primarily to benefit the public interest. I reach the same conclusion in this respect in relation to the regulations as I did in relation to the 2000 Act. The regulations are made pursuant to section 74 of the 2000 Act "to give effect to this Act". The way in which regulation 5 is expressed does not make it inappropriate for the imposition of actionability. The persons who might suffer harm as a result of a breach of regulation 5 are, first, the public and, secondly, the interconnecting operator. Regulation 5 imposes a duty on a private entity. The loss to the requesting operator will be economic loss. The regulations do not impose a criminal sanction and the power contained in the 2000 Act to suspend or revoke a licence does not arise unless the breach of the regulations is a breach of the licence or suspension or revocation is necessary for reasons of public interest: see section 41(2)(b) and (f). The regulations do provide a means of enforcement: see regulations 28 to 30, 32 and 34. It is possible that the guidelines imposed by regulation 32 on the regulator would not apply to the determination of a dispute by the court (if that were possible) and so there is a possibility of a different approach being taken by the regulator when resolving a dispute and by the court when determining liability for the alleged tort of breach of the regulations. Looking at the matter in the round, in my judgment, the factors in favour of non-actionability are considerably stronger that the factors in favour of actionability. My conclusion is that a breach of regulation 5 is not actionable.

184. As the regulations do not provide for the duties they impose to be actionable, it is not necessary to consider whether any regulation which did impose an actionable duty would be *ultra vires* the regulation making power conferred by the 2000 Act.

185. My conclusion as to the actionability of any breaches of the legislation in SLU means that I could not find that CWWI was liable for any breach of that legislation. Nor could I find that C&W plc was a joint tortfeasor with CWWI in relation to any such breach. This means that it becomes essential, in order for the Claimants to succeed in SLU, that they establish that a breach of the legislation in SLU, or a breach of CWWI's telecommunications licence, amounts to "unlawful means" for the tort of conspiracy to injure by unlawful means. Of course, because all claims in SLU except (the Claimants argue) the conspiracy claim are statute barred, it has always been essential for the Claimants' success in relation to SLU for them to establish their conspiracy claim. The first requirement of the conspiracy claim is that the matters complained of amount to "unlawful means". If the Claimants do not establish that matter, then they have no cause of action in SLU. Although I will, in any event, make findings of fact on the matters of complaint that have been been argued in SLU, I have decided that it would be convenient to deal with the issue as to the scope of "unlawful means" before I make my findings of fact in SLU.

ARE BREACHES OF THE LEGISLATION "UNLAWFUL MEANS" FOR THE TORT OF CONSPIRACY TO INJURE BY UNLAWFUL MEANS?

186. This question arises not only in SLU but also in some of the other jurisdictions with which this litigation is concerned. I have therefore set out in a separate annex to this judgment (Annex I) my understanding of the legal principles relating to this question and indeed other relevant legal principles in relation to the tort of conspiracy to injure by unlawful means.

187. My conclusion in relation to the scope of "unlawful means", for the purpose of the tort of conspiracy to injure by unlawful means, is that a breach of a statutory obligation, which is not an actionable breach, and which is not a criminal offence, does not constitute "unlawful means".

CWWI'S LICENCE

188. In SLU, the Claimants rely upon the terms of the licence granted to CWWI in so far as those terms prohibit certain specified anti-competitive behaviour. The Claimants say, first, that CWWI contravened the terms of its licence, secondly, that a breach of the licence is a breach of the statute, thirdly that this breach of the statute is actionable and fourthly, that a breach of the licence amounts to unlawful means for the tort of conspiracy to injure by unlawful means and that this is the position whether a breach of the licence is a breach of the statute or not.

189. The licence to CWWI in SLU contains clauses 6.4 and 6.5 which provide:

6.4 The Licensee shall not engage in any activities, whether by act or omission, which have, or are intended to or likely to have, the effect of unfairly preventing, restricting or distorting competition in any market for the Licensed Services as specified in Regulations issued by the Minister.

6.5 Without limiting the generality of clause 6.4 above, any such act or omission shall include:

6.5.1 any abuse by the Licensee, either independently or with others, of a dominant position; or

6.5.2 entering into any contract or engaging in any concerted practice with any other party;

where the effect of the conduct defined in clauses 6.5.1 and 6.5.2 is, or is likely to be, a substantial lessening of competition in that or any other market."

190. Clause 6.6 of this licence provides that for the purposes of clause 6.5.1, a licensee may be considered as having a dominant position if the Commission has designated the Licensee as a dominant telecommunications provider.

191. Although the Claimants rely upon these provisions in the licence, the allegations of breach in the Claimants' pleading are unparticularised and the Claimants did not give

further particulars when asked for further information. The position in this respect is similar to the position of the pleadings in Barbados, as to abuse of dominant position pursuant to section 16 of the Fair Competition Act 2002. Nonetheless, the Defendants did not press for an order for further particulars to be given and did not apply to strike out the allegations. For the reasons which I spell out in more detail when dealing with the unparticularised claim based on section 16 of the 2002 Act in Barbados, the claim is one which the court must deal with, even though it is not properly particularised.

192. As will be seen, when I consider the allegation of abuse of dominant position pursuant to section 16 of the Fair Competition Act 2002 in Barbados, I discuss the extent to which general provisions preventing anti-competitive conduct, such as section 16 of the Fair Competition Act 2002, and such as these provisions in the licence, add anything to the specific provisions in the telecommunications legislation and regulations in the relevant jurisdiction, which specifically deal with the question of competition between an incumbent and a new entrant by making detailed provisions as to interconnection between those persons.

193. For the reasons which I give in relation to section 16 of the Fair Competition Act 2002 in Barbados, I conclude that the relevant competition rules on the subject of interconnection between an incumbent operator and a new entrant are to be found in the specific rules as to interconnection and the general references to prohibitions on anti-competitive practices do not add anything to the specific rules.

194. In view of my conclusion in the last paragraph that the terms of CWWI's licence in SLU, dealing generally with anti-competitive conduct, do not add anything to the specific rules contained in the statutes and regulations in SLU, as to interconnection between operators, it may not be strictly necessary to ask whether CWWI's breach of its licence is also a breach of the statute or the regulations in SLU. However, for the sake of completeness, I will state my conclusion on that subject.

195. In SLU, the Claimants rely on section 72 of the Telecommunications Act 2000. Section 72 is somewhat challenging to interpret and I have considered it in detail above when considering the question of whether a breach of the 2000 Act is actionable. My conclusion is that section 72 does not have the effect of making a breach of the licence by CWWI a breach of the 2000 Act. Further, I have held that a breach of the statute is not actionable.

196. In view of my earlier conclusion that the general prohibitions on anti-competitive conduct do not add anything to the specific obligations as to interconnection imposed by the 2000 Act and by the regulations, it is not strictly necessary to consider whether a breach by CWWI of its licence amounts to unlawful means for the tort of conspiracy to injure by unlawful means. As I have explained above, I am not prepared to extend the scope of "unlawful means" in this context so that it covers a breach of a statute or a regulation, when such breach is not actionable and not a criminal offence. It seems to me that it is consistent with that approach to hold that a breach of a public licence, such as the telecommunications licence in this case, similarly does not constitute unlawful means for the purposes of the tort of conspiracy.

197. The result of the above conclusions is that the Digicel SLU does not have a cause of action in SLU even if it establishes that CWWI committed breaches of the legislation or the licence in SLU and that CWWI and C&W plc combined in relation to those breaches with the necessary intention to injure Digicel SLU.

WERE THERE BREACHES OF THE LEGISLATION?

198. Although I have now held that Digicel SLU does not have a cause of action in SLU, I have heard detailed evidence and submissions in relation to the matters of complaint in SLU. I will therefore make findings of fact on those matters.

199. A discussion of the matters of complaint in SLU and my findings of fact in respect of those matters are somewhat lengthy. I have decided that it is convenient to set out that discussion and my findings separately in Annex A dealing with SLU.

200. In reaching my conclusions on the matters of complaint in SLU, I have directed myself in accordance with my earlier rulings on the meaning and effect of the legislation in SLU. In particular, I have held that CWWI was not in breach of that legislation by failing to order interconnection equipment earlier than it actually did. My overall conclusion in relation to the allegations in respect of SLU is that the Claimants have failed to establish that CWWI was in breach of duty in relation to physical interconnection. Further, I have held that while it is possible that CWWI was guilty of dragging its feet in relation to contractual interconnection, any such conduct did not in the end delay the time when the parties ultimately reached agreement on interconnection.

JOINT TORTS AND CONSPIRACY

201. In SLU, the Claimants' case was that the breaches of the legislation were committed by CWWI and that C&W plc was a joint tortfeasor and/or a conspirator with CWWI. In view of my earlier findings, no question of joint torts or conspiracy to injure by unlawful means arises. However, I will deal with these matters briefly and make some comments on the position of C&W plc.

202. The legal principles as to when persons are joint tortfeasors can be taken from the judgment of Hobhouse LJ in Credit Lyonnais Bank Nederland v Export Credit Guarantee Department [1998] 1 Lloyd's LR 19, in particular at 46. If A commits a tort, then B will be liable with A as a joint tortfeasor if A and B have combined together to commit the tort or if B has procured or induced A's commission of the tort. However, B is not liable if he does neither of the above things but only assists (even knowingly assists) A in the commission of his tort.

203. In SLU, I have held that there was no conduct on the part of CWWI which caused delay to the completion of interconnection and therefore there were no breaches of the legislation in SLU. Further, I have held that any breaches of the legislation were not actionable and so were not torts. Accordingly, the suggestion that C&W plc was a joint tortfeasor with CWWI in SLU must fail.

204. The Claimants also argued that C&W plc conspired with CWWI to injure Digicel SLU by unlawful means. I have already held on the facts and on the law that there were no unlawful acts and therefore no unlawful means. The legal principles as to what amounts to a combination for the purposes of the tort of conspiracy are set out in Annex I to this judgment. It is difficult to discuss in the abstract the question of whether C&W plc combined in a relevant way with CWWI when I have held on the facts that there were no breaches of the legislation in SLU. However, in view of the considerable amount of time taken at the trial in investigating the nature of the involvement of C&W plc in the process of interconnection in SLU and the other jurisdictions, I will make the following comments. These comments apply not only in SLU but also to the other jurisdictions with which this litigation is concerned and I will not repeat them when I come to consider the other jurisdictions.

205. The Claimants make a number of submissions as to the role of C&W plc. They say that C&W plc was the 100% owner of CWWI and therefore had effective control over the telecommunications business in the Caribbean. It is said that "head office tentacles reached far and wide". Conversely, it is accepted that there was no formal or visible head office presence in the negotiations in relation to interconnection. The Claimants seek to rely on the absence of any apparent involvement in the negotiations as actually supporting their case in that they say that it showed that C&W plc did not wish to be seen as involved in connection with interconnection while it in reality controlled matters "behind the scenes". The Claimants then say that C&W plc had an obvious vested interest in delaying competition in the various jurisdictions, that it had been involved in the negotiation of the terms as to liberalisation with the various governments and that it developed cost models and pricing strategies. It is also said that C&W plc can be detected as being involved in a strategic debate as to levels of rates payable for interconnection and it is said to have been involved in a strategic retreat from obstructive positions in Barbados.

206. The Claimants developed their case in considerable detail as to the alleged conspiracy in the various jurisdictions and some of the time the Claimants' case involved allegations against C&W plc in addition to allegations against CWWI and the other C&W subsidiaries. In this context I ought to record one important point which is that the Claimants accepted that the work of the carrier services team was to be identified with CWWI and not with C&W plc, even though the latter was the formal employer of some of the individuals who were part of the carrier services team.

207. In my judgment, the Claimants have failed to show that C&W plc combined in any relevant way with CWWI in SLU, or indeed with CWWI or the other C&W subsidiaries in any of the jurisdictions with which this litigation is concerned. The fact that C&W plc owned 100% of CWWI does not of itself say anything about whether C&W plc combined with CWWI in any relevant respect. The fact that C&W plc wanted to put itself into a strong position to face the competition, when the competition arrived, is entirely to be expected. That behaviour is the consequence of the arrival of the competition which the various jurisdictions wished to introduce and is inherently lawful. The fact that C&W plc may have been involved in devising the retail strategy to be adopted following competition is to be regarded in the same way. Those facts do not

themselves show that C&W plc involved itself in anything which was unlawful. The fact that C&W plc would have preferred to have time before the competition arrived is again to be expected and does not show it combined to commit unlawful acts. The evidence showed that C&W plc was not generally involved in the question of interconnection in any of the jurisdictions. This is what I would have expected. The process of interconnection was a detailed one. Senior management at C&W plc did not generally concern themselves with that level of detail in the operations of its subsidiaries and, consistently with its general approach, they did not concern themselves with the details of interconnection.

208. This general finding is subject to four further comments. The first is that, at one stage, Mr O'Brien of the Digicel Group wrote on a number of occasions to the Chairman of C&W plc complaining about the conduct of the carrier services team in relation to interconnection. The senior management of C&W plc replied to Mr O'Brien's letters seeking to answer his concerns and stating that the carrier services team were not acting in any way improperly. I do not regard that limited involvement on the part of senior management of C&W plc as involving them in a combination with the carrier services team in any relevant way. The second comment is that the public relations department of C&W plc were called upon by the local subsidiaries to assist in countering a publicity campaign waged by the Digicel companies. The third comment is that there clearly was some contact between the carrier services team and employees of C&W plc in London. These employees were described as "high level" regulatory lawyers or economists. I find that the carrier services team used these employees of C&W plc as a resource to be consulted on technical and specialist matters. The use of the C&W plc public relations department and the regulatory lawyers and economists did not involve C&W plc combining in any relevant way to commit unlawful acts. The fourth comment concerns the involvement of Mr Loosemore in Barbados. Mr Loosemore was a director of C&W Barbados so it may not even be right to regard his involvement in Barbados as the action of C&W plc. Further, his involvement, if it relates to C&W plc at all, is consistent with senior management of C&W plc not endorsing in one respect the conduct of the carrier services team of which the Claimants complain.

209. The Claimants were right to accept that there was little or no visible involvement of C&W plc in the process of interconnection in SLU and the other jurisdictions. Although the Claimants seek to make a virtue out of this feature and suggest that C&W plc was trying to create an impression that it was not involved in interconnection, I find that the truth of the matter accords with the appearance, namely, that C&W plc had little or no involvement in the process of interconnection in SLU and the other jurisdictions. Even if I had held that CWWI or another C&W subsidiary had been guilty of conduct which constituted unlawful means, I would not have been able to find on the evidence presented to me that C&W plc had combined with CWWI or any other C&W subsidiary to injure a Digicel company by the use of unlawful means.

210. In relation to the allegation of conspiracy, the only other matter I will deal with is the question whether certain persons acting on behalf of CWWI had an honest belief that the actions of CWWI were lawful. Although this point does not strictly arise in view of

my earlier findings, I heard evidence and argument on it and I will therefore deal with it briefly.

211. In their closing submissions the Defendants invited me to find that Mr Thompson and Mr Batstone both believed at all relevant times in SLU that CWWI: (1) was not under a legal obligation owed to Digicel SLU to negotiate on the subject of interconnection with Digicel SLU prior to the latter obtaining a licence in SLU; and (2) was not under a legal obligation owed to Digicel SLU to order the equipment needed for CWWI's side of the interconnection before the parties had entered into an interconnection agreement which provided for the ordering of such equipment.

212. As to (1), I find that Mr Thompson and Mr Batstone did have that belief as to the legal position. They both gave evidence to that effect. There was no, or next to no, cross-examination in relation to that evidence. I appreciate that the Claimants might have been hampered in relation to such cross-examination because I had refused an application by the Claimants for disclosure by the Defendants of documents which would have revealed the legal advice which the Defendants obtained on this subject. Nonetheless, I must make my findings of fact on the basis of the evidence before me. In any event, I find that the evidence is overwhelmingly likely to be correct. I have already held that there was no such obligation on CWWI. The Claimants sought to outflank the evidence which was given by asserting that the two witnesses had not applied their minds to the possibility that it was the licence to CWWI, rather than the legislation, which imposed on CWWI an obligation to negotiate with Digicel SLU before it obtained its licence. Thus the Claimants say, if I were to hold that there was such an obligation in the licence to CWWI (which I do not), then I should hold that the relevant witnesses did not have an honest belief that there was no such obligation. In my judgment, even if the witnesses did not apply their minds to the argument now advanced by the Claimants as to the effect of the licence to CWWI, that would not negative the fact that they believed that there was no legal obligation of the kind now alleged, whatever is now alleged to be the source of that obligation.

213. As to (2), I find that Mr Thompson and Mr Batstone did have that belief as to the legal position. I accept their evidence to that effect.

DAMAGES

214. There was a lengthy and detailed dispute on the issue of fact whether, if CWWI had been in breach of duty in SLU and that breach of duty had caused delay to interconnection in SLU, any such delay in interconnection had caused delay to Digicel SLU's launch of its telecommunications service in SLU. The Claimants said that Digicel SLU was delayed in relation to its launch for more or less the full period of any delay in relation to interconnection. CWWI said that Digicel SLU had many other matters to deal with, apart from interconnection, before it could be ready to launch and, on the detailed facts, Digicel SLU was not ready to launch before it actually did so. Accordingly, any delay on the part of CWWI in relation to interconnection had not made any difference to the date when Digicel SLU launched in SLU.

215. I have decided that I will not attempt to determine the very many issues which arose in this respect. First of all, I have determined that there was no delay to interconnection in breach of any obligation on CWWI . Secondly, I have held that even if CWWI had been in breach of its obligations, the Claimants would not have had a cause of action. Thirdly, I have held on the facts that there was no conspiracy between CWWI and C&W plc in relation to SLU. Fourthly, I have held that even if there had been a conspiracy in relation to SLU, it would not have been actionable. Fifthly, if there had been an actionable conspiracy it is likely that any claim in relation to it would be statute barred (I deal below with the law in relation to that topic). Further, if I attempted to deal with the many points of detail as to a possible delay to the launch in SLU, I would immediately face the difficulty of having to make an assumption of fact, which I have not held to be well founded, as to when interconnection should have been completed and then to ask whether interconnection on such an assumed date would have allowed Digicel SLU to launch earlier than it actually did. Indeed, I think that I would have to deal with a number of possible assumed dates depending on what conduct on the part of CWWI is to be assumed (contrary to my actual findings) to have been a breach of duty on its part. The assumed dates of interconnection could have a bearing on the effect of the allegedly delayed interconnection on a planned launch. Any attempt to make findings of fact on the question of a possible delayed launch in SLU would involve a very considerable amount of time and delay in concluding my judgment. In these circumstances, I conclude that it is not proportionate to go further than I have done and I will not make findings on the allegation that a delay in interconnection did cause delay to Digicel SLU's launch.

216. Quite apart from the fact that an attempt to make findings of fact on the question of possible delay to a launch in SLU would be disproportionate for the above reasons, there were significant arguments as to whether I should permit the Claimants to advance a case that they were delayed from a specified date or alternative specified dates when those dates were not pleaded and the date of commencement of delay, which was pleaded in relation to SLU, was not contended for by the Claimants in their closing submissions. If I were otherwise minded to make findings of fact as to a possible delay to the launch in SLU, it would be necessary to set out in some detail the procedural history in relation to this question and to examine the legal basis for the Defendants' proposition. This is an additional reason why it is disproportionate to go further into the facts as to any such delay to launch.

217. There is one final reason which I have taken into account in reaching my conclusion that it would be disproportionate to attempt to make findings as to when Digicel SLU might have been able to launch in certain hypothetical circumstances. When the Claimants delivered their written closing submissions, they also delivered three lever arch files of documents which they said were relevant to this question of when the relevant Claimant company would have been ready to launch its network in the jurisdictions with which this litigation was concerned. The Claimants acknowledged that these documents had not been referred to at any earlier stage of the trial and, in particular, had not been spoken to by any witness in evidence in chief and had not been put to any witness in cross-examination. The Claimants suggested to me that I should simply read my way through this material and draw my own conclusions as to its relevance to the present issue. The Claimants suggested that the documents tended to support their case on

the matters in dispute. In my view, taking that step would be burdensome and in view of all the other reasons why it would be disproportionate to make findings on some hypothetical basis as to when Digicel SLU would have been able to launch its network, I decline to take on this additional burden.

218. In these circumstances, it is not appropriate to discuss the law or the facts as to whether the present is a case of exemplary damages or what have been called restitutionary damages.

LIMITATION

219. The Claimants have throughout accepted that, with one alleged exception, their claims in SLU are all statute barred by reason of section 2122 of the Civil Code of SLU, which prescribes a 3 year limitation period for a claim in delict or quasi-delict. The Defendants allege that by reason of the provisions of section 2129 of the Civil Code any wrongdoing that might have been involved is "extinguished" and so after the 3 year period has expired, the Claimants cannot say that any relevant wrongdoing could be "unlawful means" for the tort of conspiracy to injure by unlawful means. If it had been necessary to deal with that point, I would not have accepted the Defendants' submission on it.

220. The Claimants say that their claim against CWWI and C&W plc in the tort of conspiracy to injure by unlawful means is not governed by SLU law and is therefore not subject to a 3 year limitation period under section 2122 of the Civil Code. They say that the law as to the limitation period for that claim is the law of England & Wales, or the law of Jamaica, and applying either of those laws, the claim in conspiracy is not statute barred. The Claimants say that the case is governed by sections 11 and 12 of the Private International Law (Miscellaneous Provisions) Act 1995 and applying section 11(2)(c) to this case I should reach the conclusion that the most significant elements of the events on which the claim in conspiracy is based were not in SLU but were in England and Wales, or in Jamaica. To advance that proposition, the Claimants say that the most significant element in the relevant events is the combination between CWWI and C&W plc and that event did not occur in SLU or did not occur only in SLU. The other events which would have to be considered for this purpose would include the conduct of CWWI which was said to be unlawful and the harm to Digicel SLU, all of which did occur in SLU.

221. As explained above, I have held that there was no relevant combination between CWWI and C& W plc in relation to the events in SLU. It is therefore difficult to discuss how significant such a combination might have been and whether it was a more significant element than the other relevant elements. For that purpose, I would have to make assumptions as to what the combination might have consisted of and where it took place. Accordingly, I will not decide, even on a hypothetical basis, what answer would be produced by applying section 11(2)(c) of the 1995 Act to possible versions of hypothetical facts. I will however comment that the Claimants would have had an uphill task in persuading me that for the purposes of section 11(2)(c) of the 1995 Act the limitation period for the conspiracy claim was not governed by SLU law. Similarly, I will not discuss how section 12 of the 1995 Act would apply to the hypothetical facts of a

combination which was not made in SLU, or not only in SLU, and how taking account of "all the circumstances" referred to in section 12, I would have decided what was more appropriate as to the choice of law. Again, I will comment that the Claimants would have had an uphill task in persuading me that it was more appropriate to hold that the relevant law was not SLU law.

THE RESULT IN ST LUCIA

222. The result which emerges from the above conclusions is that the claim by Digicel SLU against CWWI and C&W plc fails on the facts and on the law. The claim will therefore be dismissed.

PART 3: ST VINCENT AND THE GRENADINES

INTRODUCTION

223. In SVG, the incumbent telecommunications operator was CWWI. The proposed new entrant was Digicel SVG. Digicel SVG is wholly owned by Digicel. The government of SVG did not initially grant a licence to Digicel SVG; it initially granted a licence to Digicel. Digicel SVG is the Second Claimant and Digicel is the Eighth Claimant. The Claimants say that it was not their intention that the licence should have been granted to Digicel rather than Digicel SVG. Digicel SVG intended to launch a telecommunications service in SVG and did launch such a service. Digicel never had that intention. Digicel later assigned its licence to Digicel SVG. The Defendants did not take any point on the fact that the licence was originally to Digicel rather than to Digicel SVG. I was invited to proceed on the basis that Digicel SVG had a licence in SVG and therefore the duties which were imposed by the legislation in SVG for the benefit of new entrant licensees should be understood to have applied to Digicel SVG after the grant of the licence to Digicel.

224. The claim in relation to SVG is brought by Digicel SVG against CWWI and C&W plc. Digicel is the Eighth Claimant but if it is accepted (as it has been) that Digicel SVG is to be treated as a licensee, following the grant of a licence to Digicel, no-one argues that Digicel had any relevant claim. The Claimants allege that CWWI was in breach of the primary and secondary legislation in SVG, that such breaches were actionable as the tort of breach of statutory duty, that CWWI and C&W plc were joint tortfeasors and/or that they combined together such that they are liable for the tort of conspiracy to injure by unlawful means.

225. CWWI and C&W plc deny that there were any breaches of the primary or secondary legislation. In any event, they say that any such breaches were not actionable. They also say that on the facts and as a matter of law, they are not liable in the tort of conspiracy. They further say that any breaches caused no loss. There is no suggestion in SVG that any of the claims are statute barred.

226. The parties disagree as to the meaning and effect of the primary and secondary legislation in SVG. Accordingly, I will begin by considering that legislation. As I will be examining the scope of the duties imposed by that legislation, it is convenient for me next

to consider whether any breach of such duties would be actionable as the tort of breach of statutory duty, before I consider the facts. If I find that any breach of the legislation would not be actionable, then I will consider whether any breach of the legislation would be "unlawful means" for the purpose of the tort of conspiracy to injure by unlawful means, again before I consider the detailed facts.

227. Whatever I decide about the actionability of any breaches and whether any breaches could be unlawful means, I will make findings of fact on the matters of complaint which the Claimants say were breaches of the primary or secondary legislation.

THE LEGISLATION

228. The legislation and regulations in SVG are closely based on the legislation and regulations in SLU. The relevant parts of the legislation in SVG are set out in Annex B to this judgment.

229. The Claimants rely on the duties on CWWI imposed by section 44(1) of the Telecommunications Act 2001 and by regulation 4 of the Telecommunications (Interconnection) Regulations 2002. Section 44 of the SVG Act is equivalent to section 46 of the SLU Act. Regulation 4 of the SVG Regulations is equivalent to regulation 5 of the SLU Regulations.

230. My conclusions as to the scope of the duties imposed on CWWI in SLU apply in all respects to the scope of the duties imposed on CWWI in SVG.

ARE BREACHES OF THE LEGISLATION ACTIONABLE?

231. The Claimants contend that the duty imposed by section 44(1) of the Telecommunications Act 2001 in SVG is privately actionable. The 2001 Act in SVG is in essentially the same terms as the 2000 Act in SLU. There is a slight difference in that section 70 of the 2001 Act in SVG does not repeat the obvious printing errors in section 72 of the 2000 Act in SLU. Apart from that matter, I can detect no difference between the SVG statute and the SLU statute. Accordingly, for the reasons I gave in detail in relation to SLU, I conclude that a breach of section 44(1) of the 2001 Act is not actionable.

232. The Claimants contend that regulation 4 of the Telecommunications (Interconnection) Regulations 2002 is actionable. The 2002 regulations in SVG are in the same terms as the 2002 regulations in SLU. For the same reasons as those which apply in SLU, I conclude that regulation 4 of the 2002 regulations in SVG is not actionable.

233. My conclusions as to the actionability of any breaches of the legislation in SVG mean that I could not find that CWWI was liable for any breach of that legislation. Nor could I find that C&W plc was a joint tortfeasor with CWWI in relation to any such breach.

234. This means that it becomes essential, in order for the Claimants to succeed in SVG, that they establish that a breach of the legislation in SLU, or a breach of the

telecommunications licence to CWWI, amounts to "unlawful means" for the tort of conspiracy to injure by unlawful means. The first requirement of the conspiracy claim is that the matters complained of amount to "unlawful means". If the Claimants do not establish that matter, then they have no cause of action in SVG. Although I will, in any event, make findings of fact on the matters of complaint that have been argued in SVG, I have decided that it would be convenient to deal with the issue as to the scope of "unlawful means" before I make my findings of fact in SVG.

ARE BREACHES OF THE LEGISLATION "UNLAWFUL MEANS" FOR THE PURPOSES OF THE TORT OF CONSPIRACY TO INJURE BY UNLAWFUL MEANS?

235. As I explained when I was dealing with SLU, I have set out in a separate annex to this judgment (Annex I) my understanding of the legal principles relating to this question and indeed other relevant legal principles in relation to the tort of conspiracy to injure by unlawful means.

236. My conclusion in relation to the scope of "unlawful means", for the purpose of the tort of conspiracy to injure by unlawful means, is that a breach of a statutory obligation, which is not an actionable breach, and which is not a criminal offence, does not constitute "unlawful means".

CWWI'S LICENCE

237. In SVG, the Claimants rely upon the terms of the licence granted to CWWI in so far as those terms prohibit certain specified anti-competitive behaviour. The Claimants say, first, that CWWI contravened the terms of the licence, secondly, that a breach of the licence is a breach of the statute, thirdly, that this breach of the statute is actionable and fourthly, that a breach of the licence amounts to unlawful means for the tort of conspiracy to injure by unlawful means and this is the position whether a breach of the licence is a breach of the statute or not.

238. The licence to CWWI in SVG is in essentially the same terms as the licence to CWWI in SLU. I have already set out those terms and I need not repeat them here.

239. When I considered the Claimants' case based on CWWI's licence in SLU, I commented on the fact that the Claimants' claim in this respect was unparticularised. The same comment applies to the Claimants' case on CWWI's licence in SVG. The claim is one which the court must deal with, even though it is unparticularised.

240. In all other respects the comments I have made as to the Claimants' case based on CWWI's licence in SLU apply to the Claimants' case based on CWWI's licence in SVG. For the reasons which I gave in relation to SLU, the relevant competition rules on the subject of interconnection between an incumbent operator and a new entrant are those contained in the specific rules contained in the Telecommunications Act 2001 and the regulations in SVG, as to such interconnection, and the general references in the licence to prohibitions on anti-competitive practices do not add anything to those specific rules.

241. In view of my conclusion in the last paragraph to the effect that the terms of CWWI's licence in SVG, dealing with anti-competitive conduct, do not add anything to the specific rules contained in the 2001 Act and regulations as to interconnection between operators, it is not strictly necessary to ask whether a breach by CWWI of its licence is a breach of the 2001 Act or the regulations. However, for the sake of completeness, I will state my conclusion on that subject in SVG.

242. In SVG, the Claimants rely on section 70 of the Telecommunications Act 2001. Section 70 is somewhat challenging to interpret. It is similar to section 72 of the 2000 Act in SLU which I have already considered in detail, when considering the question of whether a breach of the 2000 Act in SLU is actionable. My conclusion in relation to section 72 of the 2000 Act in SLU applies equally to section 70 of the 2001 Act in SVG. I therefore conclude that section 70 does not have the effect of making a breach of the licence by CWWI a breach of the 2001 Act. Further, I have held that a breach of the statute in SVG is not actionable.

243. When considering the Claimants' case on the CWWI licence in SLU, I concluded that a breach by CWWI of its licence did not constitute unlawful means for the tort of conspiracy to injure by unlawful means. The same reasoning and the same result apply in SVG also.

244. The result of the above conclusions is that Digicel SVG does not have a cause of action in SVG even if it establishes that CWWI committed breaches of the legislation or the licence in SVG and that CWWI and C&W plc combined in relation to those breaches with the necessary intention to injure Digicel SVG.

WERE THERE BREACHES OF THE LEGISLATION?

245. Although I have now held that Digicel SVG does not have a cause of action in SVG, I have heard detailed evidence and submissions in relation to the matters of complaint in SVG. I will therefore make findings of fact on those matters.

246. A discussion of the matters of complaint in SVG and my findings of fact in respect of those matters are somewhat lengthy. I have decided that it is convenient to set out that discussion and my findings separately in Annex B dealing with SVG.

247. In reaching my conclusions on the matters of complaint in SVG, I have directed myself in accordance with my earlier rulings on the meaning and effect of the legislation in SVG. In particular, I have held that CWWI was not in breach of that legislation by failing to order interconnection equipment earlier than it actually did. My overall conclusion in relation to the allegations in respect of SVG is that the Claimants have failed to establish that CWWI was in breach of duty in relation to physical interconnection. Further, I have held that while it is possible that CWWI was guilty of dragging its feet in relation to contractual interconnection, any such conduct did not in the end delay the time when the parties ultimately reached agreement on interconnection.

JOINT TORTS AND CONSPIRACY

248. In SVG, the operating company was CWWI. The Claimants' case was that the breaches of the legislation were committed by CWWI and that C&W plc was a joint tortfeasor and/or a conspirator with CWWI. In view of my earlier findings, no question of joint torts or conspiracy to injure by unlawful means arises.

249. When considering the position in SLU, I commented on the role of C&W plc. Those comments also apply in the case of SVG.

250. When considering the position in SLU, I made findings of fact as the belief of Mr Thompson and Mr Batstone as to whether CWWI was obliged to negotiate interconnection with the Digicel SLU before the latter obtained its licence and whether CWWI was obliged to order interconnection equipment before the parties entered into an interconnection agreement. Those findings apply equally to the position in SVG.

DAMAGES

251. There was a lengthy and detailed dispute on the issue of fact whether, if CWWI had been in breach of duty in SVG and that breach of duty had caused delay to interconnection in SVG, any such delay in interconnection had caused delay to Digicel SVG's launch of its telecommunications service in SVG. The Claimants said that Digicel SVG was delayed in relation to its launch for more or less the full period of any delay in relation to interconnection. CWWI said that Digicel SVG had many other matters to deal with, apart from interconnection, before it could be ready to launch and, on the detailed facts, Digicel SVG was not ready to launch before it actually did so. Accordingly, any delay on the part of CWWI in relation to interconnection had not made any difference to the date when Digicel SVG launched in SVG.

252. I have decided that I will not attempt to determine the very many issues which arose in this respect. My reasons for this decision are in substance the same as the reasons I have already set out for reaching a similar decision in relation to SLU (save that there is no separate limitation point in SVG). Accordingly, I conclude that it is not proportionate to go further than I have done and I will not make findings on the allegation that a delay in interconnection did cause delay to Digicel SVG's launch.

253. In these circumstances, it is not appropriate to discuss the law or the facts as to whether the present is a case of exemplary damages or what have been called restitutionary damages.

THE RESULT IN ST VINCENT AND THE GRENADINES

254. The result which emerges from the above conclusions is that the claim by Digicel SVG against CWWI and C&W plc fails on the facts and on the law. The claim will therefore be dismissed.

PART 4: GRENADA

INTRODUCTION

255. In Grenada, the incumbent telecommunications operator was C&W Grenada. The licensed new entrant was Digicel Grenada. The claim in relation to Grenada is brought by Digicel Grenada against C&W Grenada, CWWI and C&W plc. The Claimants allege that C&W Grenada was in breach of the primary legislation in Grenada. The Claimants do not make any claim on the basis of the regulations in Grenada because the implementation of the regulations was stayed from 28th February 2003 until 1st December 2003, as a result of an order made in proceedings brought by C&W Grenada for judicial review of the regulations. The Claimants say that such breaches were actionable as the tort of breach of statutory duty, that C&W Grenada, CWWI and C&W plc were joint tortfeasors and/or that they combined together so that they are liable for the tort of conspiracy to injure by unlawful means.

256. C&W Grenada, CWWI and C&W plc deny that there were any breaches of the legislation. In any event, they say that any such breaches were not actionable. They also say that on the facts and as a matter of law, they are not liable in the tort of conspiracy. They further say that any breaches caused no loss. There is no limitation issue in Grenada.

257. The parties disagree as to the meaning and effect of the legislation in Grenada. Accordingly, I will begin by considering that legislation. As I will be examining the scope of the duties imposed by that legislation, it is convenient for me next to consider whether any breach of such duties would be actionable as the tort of breach of statutory duty, before I consider the facts. If I find that any breach of the legislation would not be actionable, then I will consider whether any breach of the legislation would be "unlawful means" for the purpose of the tort of conspiracy to injure by unlawful means, again before I consider the detailed facts.

258. Whatever I decide about the actionability of any breaches and whether any breaches could be unlawful means, I will make findings of fact on the matters of complaint which the Claimants say were breaches of the primary legislation.

THE LEGISLATION

259. The legislation and the regulations in Grenada are based on the legislation and regulations in SLU. The relevant parts of the legislation in Grenada are set out in Annex C to this judgment. Even though the Claimants do not make any claim based upon an allegation of a breach of the Telecommunications (Interconnection) Regulations 2003 in Grenada, I have included some of the regulations for the sake of completeness. The Claimants rely on section 45(1) of the Telecommunications Act 2000. Section 45 of the Grenada Act is equivalent to section 46 of the SLU Act.

260. My conclusions as to the scope of the duties imposed on CWWI in SLU apply in all respects to the scope of the duties imposed on C&W Grenada in Grenada.

ARE BREACHES OF THE LEGISLATION ACTIONABLE?

261. The Claimants contend that a breach of section 45(1) of the Telecommunications Act 2000 in Grenada is actionable. The terms of the 2000 Act are essentially the same as

the terms of the Telecommunications Act 2000 in SLU save that section 71 of the 2000 Act in Grenada does not repeat the obvious printing errors contained in section 72 of the Act in SLU. For the reasons given in detail in relation to SLU, my conclusion is that a breach of section 45(1) of the 2000 Act in Grenada is not actionable.

262. My conclusions as to the actionability of any breaches of the legislation in Grenada means that I could not find that C&W Grenada was liable for any breach of that legislation. Nor could I find that CWWI or C&W plc was a joint tortfeasor with C&W Grenada in relation to any such breach.

263. This means that it becomes essential, in order for the Claimants to succeed in Grenada, that they establish that a breach of the legislation in Grenada, or a breach of the telecommunications licence granted to C&W Grenada, amounts to "unlawful means" for the tort of conspiracy to injure by unlawful means. The first requirement of the conspiracy claim is that the matters complained of amount to "unlawful means". If the Claimants do not establish that matter, then they have no cause of action in Grenada. Although I will, in any event, make findings of fact on the matters of complaint that have been argued in Grenada, I have decided that it would be convenient to deal with the issue as to the scope of "unlawful means" before I make my findings of fact in Grenada.

ARE BREACHES OF THE LEGISLATION "UNLAWFUL MEANS" FOR THE TORT OF CONSPIRACY TO INJURE BY UNLAWFUL MEANS?

264. As I explained when I was dealing with SLU, I have set out in a separate annex to this judgment (Annex I) my understanding of the legal principles relating to this question and indeed other relevant legal principles in relation to the tort of conspiracy to injure by unlawful means.

265. My conclusion in relation to the scope of "unlawful means", for the purpose of the tort of conspiracy to injure by unlawful means, is that a breach of a statutory obligation, which is not an actionable breach, and which is not a criminal offence, does not constitute "unlawful means".

C&W GRENADA'S LICENCE

266. In Grenada, the Claimants rely upon the terms of the licence granted to C&W Grenada in so far as those terms prohibit certain specified anti-competitive behaviour. The Claimants say, first, that C&W Grenada contravened the terms of the licence, secondly, that a breach of the licence is a breach of the statute, thirdly that this breach of the statute is actionable and fourthly, that a breach of the licence amounts to unlawful means for the tort of conspiracy to injure by unlawful means and this is the position whether a breach of the licence is a breach of the statute or not.

267. The licence to C&W Grenada in Grenada is in essentially the same terms as the licence to CWWI in SLU. I have already set out those terms and I need not repeat them here.

268. When I considered the Claimants' case based on CWWI's licence in SLU, I commented on the fact that the Claimants' claim in this respect was unparticularised. The same comment applies to the Claimants' case on C&W Grenada's licence in Grenada. The claim is one which the court must deal with, even though it is unparticularised.

269. In all other respects the comments I have made as to the Claimants' case based on CWWI's licence in SLU apply to the Claimants' case based on C&W Grenada's licence in Grenada. For the reasons which I gave in relation to SLU, the relevant competition rules on the subject of interconnection between an incumbent operator and a new entrant are those contained in the specific rules contained in the Telecommunications Act 2000 and the regulations in Grenada, as to such interconnection, and the general references in the licence to prohibitions on anti-competitive practices do not add anything to those specific rules.

270. In view of my conclusion in the last paragraph to the effect that the terms of C&W Grenada's licence in Grenada, dealing with anti-competitive conduct, do not add anything to the specific rules contained in the 2000 Act and regulations as to interconnection between operators, it is not strictly necessary to ask whether a breach by C&W Grenada of its licence is a breach of the 2000 Act or the regulations. However, for the sake of completeness, I will state my conclusion on that subject in Grenada.

271. In Grenada, the Claimants rely on section 71 of the Telecommunications Act 2000. Section 71 is somewhat challenging to interpret. My conclusion in relation to section 71 of the 2000 Act in Grenada is the same as my conclusion in relation to section 72 of the 2000 Act in SLU, which I discussed in detail earlier in this judgment. I therefore conclude that section 71 does not have the effect of making a breach of the licence by C&W Grenada a breach of the 2000 Act. Further, I have held that a breach of the statute is not actionable.

272. When considering the Claimants' case on the CWWI licence in SLU, I concluded that a breach by CWWI of its licence did not constitute unlawful means for the tort of conspiracy to injure by unlawful means. The same reasoning and the same result apply in Grenada also.

273. The result of the above conclusions is that the Digicel Grenada does not have a cause of action in Grenada even if it establishes that C&W Grenada committed breaches of the legislation or the licence in Grenada and that C&W Grenada, CWWI and C&W plc combined in relation to those breaches with the necessary intention to injure Digicel Grenada.

WERE THERE BREACHES OF THE LEGISLATION?

274. Although I have now held that Digicel Grenada does not have a cause of action in Grenada, I have heard detailed evidence and submissions in relation to the matters of complaint in Grenada. I will therefore make findings of fact on those matters.

275. A discussion of the matters of complaint in Grenada and my findings of fact in respect of those matters are somewhat lengthy. I have decided that it is convenient to set out that discussion and my findings separately in Annex C dealing with Grenada.

276. In reaching my conclusions on the matters of complaint in Grenada, I have directed myself in accordance with my earlier rulings as to the meaning and effect of the legislation in Grenada. The result I have reached is that it is arguable that C&W Grenada was at fault but in one respect only, that is, in relation to the non-provision of a draft interconnection agreement prior to 30th June 2003. I have held that if the draft interconnection agreement had been provided earlier, this would not have changed the date when the interconnection agreement in Grenada was ultimately finalised. Accordingly, any arguable fault in this respect did not cause any delay to the completion of interconnection, was therefore not a breach of the duty not to delay interconnection and did not cause any loss to Digicel Grenada.

JOINT TORTS AND CONSPIRACY

277. In Grenada, the operating company was C&W Grenada. The Claimants' case was that the breaches of the legislation were committed by C&W Grenada and that CWWI and C&W plc were joint tortfeasors and/or conspirators with C&W Grenada. In view of my earlier findings, no question of joint torts or conspiracy to injure by unlawful means arises.

278. When considering the position in SLU, I commented on the role of C&W plc. Those comments also apply in the case of Grenada.

279. The position of CWWI in Grenada was different from the position of C&W plc. CWWI provided the carrier services team to assist C&W Grenada. Those two companies were therefore working together to some extent in connection with interconnection in Grenada. The Defendants initially contended that there were Chinese Walls between the carrier services team of CWWI and the business unit of C&W Grenada. However, by the end of the trial it was clear that any suggested restrictions on the passage of information between the carrier services team and the business unit were not fully effective. If I had held that C&W Grenada had committed breaches of the legislation in Grenada, it would then have been necessary to consider whether CWWI had combined with C&W Grenada in a relevant way so that CWWI would also be liable for such breaches. In view of my finding that there were no breaches which caused any delay to the completion of interconnection, it does not seem to me to be helpful to discuss any further the application of the legal principles (which were not seriously in dispute) to possible findings of fact which I have not made.

280. When considering the position in SLU, I made findings of fact as to the belief of Mr Thompson and Mr Batstone as to whether CWWI was obliged to negotiate interconnection with the Digicel SLU before the latter obtained its licence and whether CWWI was obliged to order interconnection equipment before the parties entered into an interconnection agreement. I know of no reason why those findings should not apply

equally to the position in Grenada, although in their closing submissions, the Defendants appear only to refer specifically to the position of Mr Batstone in this regard.

DAMAGES

281. There was a lengthy and detailed dispute on the issue of fact whether, if C&W Grenada had been in breach of duty in Grenada and that breach of duty had caused delay to interconnection in Grenada, any such delay in interconnection had caused delay to Digicel Grenada's launch of its telecommunications service in Grenada. The Claimants said that the Digicel Grenada was delayed in relation to its launch for more or less the full period of any delay in relation to interconnection. C&W Grenada said that Digicel Grenada had many other matters to deal with, apart from interconnection, before it could be ready to launch and, on the detailed facts, Digicel Grenada was not ready to launch before it actually did so. Accordingly, any delay on the part of C&W Grenada in relation to interconnection had not made any difference to the date when Digicel Grenada launched in Grenada.

282. I have decided that I will not attempt to determine the very many issues which arose in this respect. My reasons for this decision are in substance the same as the reasons I have already set out for reaching a similar decision in relation to SLU (save that there is no separate limitation point in Grenada). Accordingly, I conclude that it is not proportionate to go further than I have done and I will not make findings on the allegation that a delay in interconnection did cause delay to Digicel Grenada's launch.

283. In these circumstances, it is not appropriate to discuss the law or the facts as to whether the present is a case of exemplary damages or what have been called restitutionary damages.

THE RESULT IN GRENADA

284. The result which emerges from the above conclusions is that the claim by Digicel Grenada against C&W Grenada, CWWI and C&W plc fails on the facts and on the law. The claim will therefore be dismissed.

PART 5: BARBADOS

INTRODUCTION

285. In Barbados, the incumbent telecommunications operator was C&W Barbados. The licensed new entrant was Digicel Barbados. The claim in relation to Barbados is brought by Digicel Barbados against C&W Barbados, CWWI and C&W plc. The Claimants allege that C&W Barbados was in breach of the primary legislation in Barbados. There are two statutes, namely, the Telecommunicaitons Act 2001 and the Fair Competition Act 2002. The Claimants do not make any claim on the basis of the regulations in Barbados. The Claimants say that the primary legislation in Barbados expressly provides that a person injured by a breach of the legislation has a claim in damages against a licensee, such as C&W Barbados, if that person contravenes the legislation. The Claimants claim against CWWI and C&W plc as joint tortfeasors with

C&W Barbados or as persons who conspired with C&W Barbados to injure Digicel Barbados by unlawful means. Further, the legislation in Barbados provides for persons acting jointly with the licensee, who contravenes the legislation, or who is conspiring with that licensee to contravene the legislation to be liable to pay damages, in the same way as C&W Barbados would be liable.

286. C&W Barbados, CWWI and C&W plc deny that there were any breaches of the legislation. They further say that any breaches caused no loss. They also say that a claim in respect of a contravention of the Fair Competition Act 2002, or of a conspiry to contravene that Act, is statute barred.

287. The parties disagree as to the meaning and effect of the legislation in Barbados. Accordingly, I will begin by considering that legislation in detail.

THE LEGISLATION

288. In Barbados, the Claimants rely upon the Telecommunications Act 2001 and the Fair Competition Act 2002. They do not assert any breach of the Telecommunications (Interconnection) Regulations 2003. I have set out the relevant parts of this legislation in Annex D to this judgment.

289. The Claimants rely, in particular, on sections 25 and 28 of the Telecommunications Act 2001. There does not appear to be any dispute between the parties as to the meaning and effect of section 25 of that Act. There is a major dispute between the parties as to the meaning and effect of section 28. In these circumstances, I will, first, briefly describe the position under section 25 of the 2001 Act and then deal with the dispute as to section 28.

290. Section 25(1) of the Telecommunications Act 2001 provides as follows:

"A carrier shall provide, on request from any other carrier, interconnection services to its public telecommunications network for the purpose of supplying telecommunication services in accordance with the provisions of sub section (2)."

291. Section 25(2) of the 2001 Act states that interconnection services are to be offered or made available on certain terms or in certain respects. In particular, section 25(2)(d) provides that interconnection services are to be made available "in a timely fashion".

292. By section 25(3)(a), a carrier is obliged to provide interconnection to its network on such reasonable terms and conditions as the interconnecting parties agree through commercial negotiations.

293. To complete one's understanding of the operation of section 25 of the 2001 Act, it is necessary to refer to some of the definitions in section 2 of the 2001 Act. "Carrier" is defined to mean "a person who has been granted a licence by the Minister pursuant to this Act to own and operate a public telecommunications network". "Interconnection" is

defined to mean "the linking of public telecommunications networks to allow users of one licensed carrier to communicate with users of another licensed carrier". "Interconnection service" means "a service provided as part of the obligation to provide interconnection under part VI". Sections 25 and 28 of the 2001 Act are in part VI of the Act. "Licence" is defined to mean "a licence referred to in this Act". "Licensee" is defined to mean "a person who is a holder of a valid licence granted under this Act".

294. Reading section 25 of the 2001 Act with the benefit of the definitions referred to above, the following conclusions can be drawn. Section 25 requires a carrier to provide interconnection services to another carrier. Interconnection service is a service provided pursuant to an obligation to provide interconnection. Interconnection is the linking of networks to allow users of one carrier to communicate with users of another carrier. The definition of "interconnection" starts by referring to the physical link but continues by referring to the physical link "to allow" the specified use of the link. In my judgment, this definition of interconnection is not restricted to physical interconnection but is apt to refer to both physical and contractual interconnection. I understand that the parties are agreed that this is indeed the meaning of "interconnection" in the 2001 Act.

295. At all material times C&W Barbados was "a carrier" which owed the obligation imposed by section 25(1) of the Act. Digicel Barbados only became a carrier within the meaning of the 2001 Act when Digicel Barbados was granted a licence under the Act. This licence was granted on the 8th August 2003. Before the 8th August 2003, C&W Barbados did not owe a duty to Digicel Barbados pursuant to section 25 of the 2001 Act.

296. Section 25 of the 2001 Act contemplates that interconnection services would be provided on certain terms and conditions and that those terms and conditions would be contained in an agreement arrived at as the result of commercial negotiations. I will discuss, later in this judgment, the implications of section 25, and of other provisions of the 2001 Act, for the arguments between the parties as to whether the incumbent operator was obliged to order equipment for its side of the interconnection, and/or install and test that equipment and/or carry out civil works to connect the switch sites of the incumbent operator and of the proposed new entrant at any time before the parties had agreed the terms of an interconnection agreement, the terms of which should make provision for those various matters.

297. I now turn to the dispute between the parties as to the meaning and effect of section 28 of the 2001 Act. The Claimants draw attention to the fact that section 28(1) and (3) referred to "a person" and that section 28(2) and section 28(5) referred to "the person". The Claimants emphasised that section 28 does not use the words "a carrier". "A carrier" is defined for the purpose of the 2001 Act as a person who has a licence under the Act. Therefore, the Claimants argue that the obligation created by section 28 is owed to a person, whether that person is a carrier or not and whether that person has a licence or not. Accordingly, the Claimants argue, the obligation created by section 28 was owed to Digicel Barbados prior to 8th August 2003 when that company was granted a licence under the Act. The Defendants say that if one reads section 28 in the context of the statute as a whole, it was not envisaged that "a person" would mean any person, whether

licensed under the Act or not and, in effect, the only person relevant for the purposes of section 28 is a carrier, that is, a person licensed under the Act.

298. For the purposes of considering the rival positions of the parties, it is necessary to refer to further provisions of the 2001 Act. Section 2 of the Act defines "a person" to "include an individual, a partnership, an unincorporated organisation, a Government or Government agency". Part IV of the Act deals with licensing requirements in respect of public telecommunications. By section 10(1), no person may own or operate a telecommunications network without a carrier licence under the Act. Section 11 deals with the procedure to be followed when applying for a licence. By section 11(2), an applicant for a licence is required to satisfy the Minister on a number of specified matters. These include a requirement that the applicant will comply with all interconnection obligations and licence limitations, that the licensee possesses the technical qualifications necessary to perform the obligations attached to the licence and that the applicant satisfies certain financial requirements. Section 12 deals with the grant of a licence under part IV of the Act. The Minister is required to consider, amongst other things, whether an applicant is a person of fit and proper character and whether the applicant has had a licence revoked or is affiliated with a person who has had a licence revoked. By section 19 of the Act, the Minister may suspend or revoke a licence granted under part IV of the Act where the licensee has contravened the Act or a term in the licence or on other specified grounds.

299. Turning then to Part VI of the Act, I have already referred to section 25 (in Part VI). As explained, section 25 only places an obligation on "a carrier" and the obligation is owed only to carriers. Section 25(1) states that the obligation arises "on request". Section 25 does not itself spell out what must be contained in any such request, nor the immediate consequences of a request being made.

300. Sections 26 and 27 deal with the subject of a Reference Interconnection Offer, referred to as a "RIO". By section 26(1), a dominant carrier is required to file a RIO with the regulator. A RIO is described as an offer which sets out the terms and conditions "upon which other licensed carriers will be permitted to interconnect". Accordingly, a RIO is a document to be entered into between a dominant carrier and another licensed carrier. By section 27(1), a RIO does not take effect unless it is approved in writing by the regulator.

301. The side note to section 28 is: "Requests for interconnection". Section 28 provides for the form of a request for interconnection and the immediate consequences of the making of such a request. It will be remembered that section 25(1) referred to "any other carrier" making "a request" but did not, in section 25 itself, identify a form of the request nor the immediate consequences of it.

302. It is helpful to set out the full terms of section 28 which are as follows:

"28(1) A person who wishes to interconnect with the telecommunications network of a telecommunications provider shall so request that provider in writing giving sufficient

information as is reasonably required by a provider to allow for a response to the requests.

(2) Where an RIO is in effect with respect to an interconnection provider, and the person seeking interconnection accepts the terms and conditions set out in the RIO, the parties shall sign an agreement in accordance with those terms and conditions of the RIO within 90 days of the receipt of the request.

(3) Where a person requests an interconnection pursuant to subsection (1) on terms other than those of the RIO that is in effect in relation to the interconnection provider, the parties shall negotiate in good faith to reach an agreement on the terms and conditions of the interconnection; and the negotiations shall commence within 30 days of the receipt of the written request.

(4) A request for interconnection to a public telecommunications network may be refused by an interconnection provider for the following reasons:

(a) for the protection of the

(i) safety of a person;

(ii) security of the network;

(iii) integrity of the network; or

(b) the difficult technical and engineering nature of the interconnection.

(5) Where there is a refusal by the provider under sub section (4), the person seeking interconnection may refer that refusal to the Commission for review."

303. Section 29 deals with interconnection agreements. Section 29(1) refers to "a person" who requests interconnection and an interconnection provider agreeing on the terms and conditions of interconnection; this is described as being "pursuant to subsection (3) of section 28". In that event, the parties are to file the interconnection agreement with the regulator for its approval. The regulator may then approve the agreement or require the parties to vary it. By section 29(5) an interconnection provider may limit or terminate its agreement to offer interconnection services or may cease to offer those services on various grounds, including where the other party to the agreement fails to comply with the terms of the agreement. Where an interconnection provider takes action pursuant to section 29(5), the other party to the agreement may refer the matter to the regulator for review and section 29(7) allows the party who makes the reference to the regulator to seek compensation for financial loss.

304. By section 31(1) a dispute which arises between the parties in respect of the negotiation of an interconnection agreement may be referred to the regulator for resolution.

305. Part XIII of the 2001 Act deals with compliance matters. Under section 72, the Minister may apply to the court for an injunction or the imposition of a pecuniary penalty, where a person has contravened an obligation under the Act. By section 73, a person who suffers financial loss or damage to property as a result of another's person contravention of the Act may claim a reasonable amount determined by a court of competent jurisdiction.

306. Part XIV of the Act deals with offences and penalties. By section 78(1) a person who contravenes the Act commits an offence and is liable on conviction on indictment to a fine or a period of imprisonment.

307. The Claimants submit that Digicel Barbados was "a person" as defined in the 2001 Act at all material times and even before it acquired its licence on the 8th August 2003. Accordingly, it is said, C&W Barbados owed to Digicel Barbados the duties defined in section 28 of the Act. The Claimants say that there is a deliberate change in the language from section 25 which refers to "a carrier" to section 28 which refers to "a person". If the Court were to read section 28 so that it only applied to a carrier, that would involve a re-writing of the Act which the Court could not and should not do. The Claimants say that there is nothing unworkable or even surprising in their interpretation. If a person came forward, seeking to rely on section 28, in circumstances where that person had no prospect whatever of later acquiring a licence under the Act then the content of the obligation under section 28(3) would be easily satisfied by the incumbent carrier. Both parties are obliged by section 28(3) to negotiate in good faith and it would soon become apparent in the case of a person who had no prospect of a licence that that person was not negotiating in good faith. The Claimants also distinguished between sections 25 and 28 in that section 25 deals with interconnection services whereas section 28 refers to interconnection. It is said that the phrase "interconnection services" refers to the time when interconnection is in use whereas "interconnection" can occur even before the person who requests interconnection is able to operate a network. The Claimants also submit that there is very good sense in their reading of section 28 because it allows an intending new entrant like Digicel Barbados to make progress with negotiations on an interconnection agreement even before the grant of its licence.

308. This approach is rejected by the Defendants. They submit that section 28 is not concerned with the class of persons who are entitled to request interconnection. That question is determined by section 25. What section 28 is dealing with are the statutory requirements as to the making of a "request". If the Claimants were right, the obligation under section 28 would be owed to the world at large, subject only to the making of a request. Such an obligation would be impossibly wide-ranging, burdensome and would serve no useful purpose. The Claimants' suggested solution, which uses the obligation in section 28(3) to negotiate in good faith, to limit the class of persons who could rely on section 28, is not in fact a solution. Even with a person who requests interconnection under section 28 and who has only a limited prospect of later obtaining a licence, it would not be possible, alternatively it would not be easy, to say that such a person was not negotiating in good faith. The Defendants also point to section 28(2) which contemplates that a "person" might enter into a RIO so that there would be a contractually binding agreement between the incumbent operator and a person who does

not have a licence under the Act. The Defendants point out that a RIO is defined in section 26 as an agreement made between carriers. The suggested distinction between section 25 dealing with interconnection services and section 28 dealing with interconnection is not a real distinction.

309. The parties also referred in this context to regulations 4 and 7 of the Telecommunications (Interconnection) Regulations 2003. Under regulation 4, no person is to be "granted" interconnection unless that person holds a relevant valid licence. There is room for argument as to when a person is "granted" interconnection; it may be that a person is only granted interconnection when the interconnection service is provided. Regulation 7 provides that an interconnection seeker must produce a valid carrier licence as proof of being the holder of such a licence as of the date "the interconnection commences". Again, it is open to argument when interconnection "commences"; it may be that interconnection commences when the interconnection service begins to be used. In my judgment, it is not necessary to determine whether these Regulations can be relied upon as an aid to the interpretation of the Telecommunications 2001 as I do not find that any clear indication either way is to be found in the terms of the Regulations.

310. Finally, the Defendants rely upon the provisions of the 2001 Act which deal with compliance and the creation of a criminal offence. It is suggested that it would be surprising if these provisions would apply in a case where an incumbent operator had refused to discuss interconnection with a person who was not a licensee and, even more so, someone who had no real prospect of becoming a licensee.

311. I prefer the submissions for the Defendants. Section 25 is quite clearly restricted so that the duty it imposes is only owed to a carrier licensed under the Act. Section 25 requires such a carrier to make a request for interconnection services. Section 25 does not itself identify the form of, or the immediate consequences of, such a request. That topic is dealt with by section 28 which deals with requests for interconnection. The purpose of section 28 is to provide that a request for interconnection must be in writing and must be supported by information. Where there is a request for interconnection the parties can either agree to enter into a RIO or negotiate an agreement on terms different from those of the RIO. In my judgment, it is implicit in the language of section 28 that the only request which is relevant for the purposes of section 28 is a request which conforms to section 25, that is, a request from a licensed carrier.

312. The Defendants' interpretation of section 28 is a more sensible interpretation of the section and provides a better fit for a number of the detailed provisions, as compared with the Claimants' interpretation. Section 26(1) defines a RIO as an agreement to be entered into between licensed carriers. Section 28(2) contemplates the parties entering into a RIO. The Claimants' interpretation of section 28 could produce the result that a RIO was entered into and was binding upon a dominant carrier on the one hand and someone who is not licensed under the Act on the other hand. Such an agreement would not satisfy the definition of RIO in section 26.

313. Section 28(3) imposes on the incumbent carrier an obligation to negotiate in good faith to reach agreement on the terms and conditions of the interconnection. It may turn

out to be a waste of time for the dominant carrier to discuss interconnection with someone who is not a licensee and who does not subsequently obtain a licence. I do not agree with the Claimants' contention that it will always be apparent at an early stage whether a non-licensed person is, or is not, negotiating in good faith.

314. Section 28(4) allows an incumbent carrier to refuse a request for interconnection on certain grounds. The incumbent carrier is not entitled to refuse the request on the grounds that the person requesting interconnection does not have a licence and has no prospect of getting one. That means that, if the Claimants are right, the incumbent carrier must negotiate the terms of an agreement with someone who has no licence and has no prospect of getting one.

315. If a person, who does not have a licence, has a statutory entitlement under section 28 to request interconnection and engage in negotiations on the terms of an interconnection agreement then, in some cases at least, those negotiations will result in an agreement. Such an agreement would have to be submitted to the regulator for approval and the incumbent carrier would be obliged to perform the terms of the agreement. The Claimants submit that the incumbent carrier could easily terminate the agreement because the other party would not be able to perform its side of the agreement. That would depend on the terms of the agreement but, in any event, it seems a strange result to place the incumbent carrier under a statutory obligation to negotiate and, if necessary, agree the terms of an interconnection agreement with a view to the incumbent carrier immediately terminating that agreement. Further, disputes between the parties to the negotiation could lead to a referral to the regulator under section 31.

316. I also bear in mind the point that the compliance provisions of the 2001 Act, and even more so, the criminal penalty provisions of the Act are likely to be wholly inappropriate in a case where the person requesting interconnection does not have a licence and does not have a prospect of obtaining one. I do not regard the arguments as to section 28 as being evenly balanced but if I did I would incline to read section 28 narrowly, rather than widely, given that a contravention of section 28 is a criminal offence under section 78.

317. My conclusion on the dispute as to the meaning of section 28 of the 2001 Act is that section 28 when it refers to "a person" or "the person" is referring to a person who is entitled to make a request under section 25 of the Act, that is a carrier with a licence under the Act. It follows that the duty created by section 28 was not owed to Digicel Barbados prior to it obtaining its licence on the 8th August 2003.

318. The Claimants also rely upon section 16 of the Fair Competition Act 2002. In summary, section 16 prohibits the abuse by an enterprise of a dominant position which that enterprise holds.

319. The Fair Competition Act 2002 is a general statute dealing with the subject of competition. The long title to the Act states that the Act was passed to promote and maintain and encourage competition, to prohibit the prevention, restriction or distortion of competition and the abuse of dominant positions and to ensure that all enterprises have

the opportunity to participate equitably in the marketplace. The Fair Competition Act 2002 does not deal specifically with the telecommunications market. The Fair Competition Act 2002 was passed in November 2002 and came into force on the 3rd January 2003. The relevant telecommunications statute in Barbados was the Telecommunications Act 2001, to which I have already referred in detail. The Telecommunications Act 2001 came into force on 30th September 2002. The Fair Competition Act 2002 does not refer to the Telecommunications Act 2001 and is not expressed as involving any amendment of the Telecommunications Act 2001. The regulator under the Telecommunications Act 2001 was the Fair Trading Commission which was established under the Fair Trading Commission Act. Under the Fair Competition Act 2002, it is also the Fair Trading Commission which is responsible for the administration of that Act: see section 4 thereof.

320. Section 2 of the Fair Competition Act 2002 defines "anti competitive practice" and "market" and explains references to "the lessening of competition". It is not necessary to set out those definitions.

321. Section 16 of the Fair Competition Act 2002 provides as follows:

"***Abuse of dominant position.***

16. (1) Subject to subsection (4), the abuse by an enterprise of a dominant position which the enterprise holds is prohibited.

(2) For the purposes of this Act, an enterprise holds a dominant position in a market if, by itself or together with an affiliated company, it occupies such a position of economic strength as will enable it to operate in the market without effective competition from its competitors or potential competitors.

(3) An enterprise abuses a dominant position if it impedes the maintenance or development of effective competition in a market and in particular, but without prejudice to the generality of the foregoing, if it

(a) restricts the entry of any enterprise into that or any other market that supplies or is likely to supply a substitute for the good or service supplied in that market;
(b) prevents or deters any enterprise from engaging in competitive conduct in that or any other market;
(c) eliminates or removes any enterprise from that or any other market;
(d) directly or indirectly imposes unfair purchase or selling prices that are excessive, unreasonable, discriminatory or predatory;
(e) limits production of goods or services to the prejudice of consumers;
(f) makes the conclusion of agreements subject to acceptance by

other parties of supplementary obligations which by their nature, or according to commercial usage, have no connection with the subject of such agreements;
(g) engages in exclusive dealing, market restriction or tied selling; or
(h) uses any other measure unfairly in its trading operations that allows it to maintain dominance.

(4) An enterprise shall not be treated as abusing a dominant position

(a) if it is shown that its behaviour was exclusively directed to improving the production or distribution of goods or to promoting technical or economic progress and consumers were allowed a fair share of the resulting benefit;
(b) the effect or likely effect of its behaviour in the market is the result of its superior competitive performance; or
(c) by reason only that the enterprise enforces or seeks to enforce any right under or existing by virtue of any copyright, patent, registered design or trademark except where the Commission is satisfied that the exercise of those rights
(i) has the effect of lessening competition substantially in a market; and
(ii) impedes the transfer and dissemination of technology."

322. Section 34 of the Fair Competition Act 2002 states that no person may conspire, combine, agree or arrange with another person to lessen unduly competition in the supply of goods or services or otherwise unduly restrain or injure competition.

323. Section 37 of the Fair Competition Act 2002 confers on the High Court of Barbados power to grant an injunction restraining conduct which is a contravention of sections 16 or 34 of the Act. Contravention of section 16 or section 34 of the Fair Competition Act 2002 is an offence by reason of section 43 of that Act.

324. Section 44 provides that every person who engages in conduct that constitutes a contravention of any of the obligations or prohibitions imposed by, amongst other sections, section 16 or conspires with any other person to contravene section 16 is liable in damages for any loss caused to any other person by such conduct. Section 44(2) provides that an action under sub section (1) may be commenced at any time within 3 years from the time when the cause of action arose.

325. By reason of section 44(2) of the Fair Competition Act 2002, the Claimants accept that any direct claim that they might have had on the basis of sections 16 or 34 of the Act was statute barred at the date of commencement of these proceedings. Further, any claim that the Claimants may have had for damages for conspiracy within section 44(1)(e) is also statute barred. However, the Claimants wish to say that a breach of

section 16 of the Fair Competition Act 2002 amounts to the use of unlawful means for the common law tort of conspiracy to injure by unlawful means. The Claimants also say that a combination to do something which infringes section 16 would be a combination to lessen competition in the supply of services and would unduly restrain or injure competition so as to amount to a breach of section 34 which, the Claimants again say, amounts to unlawful means for the common law of tort. The Claimants then submit that Section 44(2) does not impose a limitation period of 3 years for the common law tort of conspiracy because, they say, section 44(2) only applies to an action under section 44(1) and an action for the common law tort of conspiracy is different from an action arising out of a statutory conspiracy within section 44(1)(e). Accordingly, it is necessary, in the first instance, to consider the scope of the obligations in sections 16 and 34 of the Fair Competition Act 2002.

326. In its Particulars of Claim in relation to Barbados, the Claimants pleaded the relevant sections of the Fair Competition Act 2002 and then set out the relevant events by way of a chronology of those events. In paragraph 4.3(b) of the relevant pleading it was alleged that the relevant Defendant had breached its obligations under the Fair Competition Act 2002 by:

"(i) deliberately and/or unreasonably abusing its dominant position in the telecommunications market in Barbados in breach of section 16(1) of the Fair Competition Act 2002; and/or

(ii) deliberately and/or unreasonably conspiring combining agreeing or arranging with another person to unduly restrict or injure competition in breach of section 34(1) of the Fair Competition Act 2002."

327. The Claimants' pleading of their claim under the Fair Competition Act 2002, which I have set out verbatim above, is extremely brief. The requirements of a pleading which alleges an abuse of a dominant position under article 82 of the EC Treaty (now article 102 of the Treaty on the Functioning of the European Union ("TFEU") are described in Bellamy & Child, European Community Law of Competition, 6th Edition at paragraphs 14.151-14.152. The text book states that as a matter of pleading a party raising an issue under article 82 must expressly state that fact in his pleading and adequately set out full and proper particulars of his case on that issue, including the essential facts. Particular care is expected of a party pleading competition law infringements as they are notoriously burdensome allegations, leading to excessive evidence and lengthy trials. Mere assertion in a pleading will not do. Unparticularised allegations may be struck out. The degree of particularity required will depend upon the nature of the allegation. The text book points out that the court should not make it too easy for a party to raise what turns out to be a baseless allegation of article 82 infringement but on the other hand it would be wrong to make it too difficult for a party with a valid case of article 82 infringement to put its case before the court.

328. The Defendants requested particulars of the Claimants' pleading of a breach of sections 16 and 34 of the 2002 Act. The Claimants were asked to state the respect in

which it was alleged that the relevant Defendant had committed an abuse of a dominant position. The response to the request was in these terms:

"by impeding, obstructing and/or delaying interconnection C&W restricted and prevented Digicel's entry into the telecommunications market in Barbados and limited the telecommunications services available to the public in contravention of inter alia sections 16(1) and 16(3)(a),(b),(e)and (h) of the Fair Competition Act 2002 respectively. Digicel does not yet know exactly how C&W dealt with its own mobile operation and therefore reserves the right to allege other abuses of dominance as may be supported in evidence in these proceedings. Further details in the response relate to evidence."

329. The Defendants did not apply to the Court for further information in relation to the alleged abuse of dominant position and did not apply to strike out the relevant part of the Claimants' pleading. Thus, this allegation has survived in the pleading although it has never been properly particularised.

330. In their opening and closing submissions, the Claimants have repeated their reliance on the provisions of the Fair Competition Act 2002. However, the way in which the Claimants have put their case has been simply to state the provisions of the Act and to refer to the facts which the Claimants rely upon to establish breaches of sections 25 and 28 of the Telecommunications Act 2001.

331. It appeared to me from the Claimants' closing submissions that the Claimants' case on the application of the Fair Competition Act 2002 did not really add anything to the Claimants' reliance on the Telecommunications Act 2001. As I understand it, the only circumstances in which the Claimants might wish to contend that the Fair Competition Act 2002 gave them an additional claim to their claim under the Telecommunications Act 2001 was in relation to the period of time before Digicel Barbados was granted its licence on 8th August 2003 in the event that I held (as I have held) that neither section 25 nor section 28 of the Telecommunications Act 2001 imposed a duty on C&W Barbados prior to this date. When questioned about reliance on the Fair Competition Act 2002 in such circumstances, it seemed to me that the Claimants' Counsel did not press the point. At that stage, I drew attention to the position under article 102 of TFEU (formerly article 82 of the EC Treaty) and the European competition law as to the possibility of an abuse of dominant position where a dominant telecommunications operator refuses to grant access to an essential facility, such as its existing network. Having referred to the principles in that respect, I was then addressed by Counsel for the Defendants as to why the Fair Competition Act 2002 did not impose any obligation upon C&W Barbados in relation to the period before the grant of the licence to Digicel Barbados on 8th August 2003.

332. The position in European competition law as to a refusal to grant access to an essential facility is described in Faull & Nikpay, The EC Law of Competition, 2nd Edition, at paras. 4.193 to 4.202. The text book draws upon the detailed discussion of the topic in the Commission Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector; (1998) OJ C265/02. That notice

identifies the circumstances in which a dominant telecommunications operator may be required to give access to its network to enable a new entrant to the market to launch its telecommunications service. The Commission Notice draws on a number of cases dealing with transport infrastructure and harbour facilities, in particular, Sea Containers v Stena Sealink [1993] OJ 1994 L15/8. These materials show that in some circumstances, it can be considered to be an abuse of a dominant position for a dominant operator to deny a new entrant access to its network.

333. The Defendants pointed out that, apart from the general provisions of article 102 of TFEU, the question of interconnection between telecommunicaitons operators is governed in Europe by Directive 97/33/EC, which has been given effect in the United Kingdom by the Telecommunications (Interconnection) Regulations 1997. The Directive identifies the nature and the scope of the obligation on a dominant operator to allow interconnection to its network. It is clear that the obligation is owed to another operator who has a relevant licence to operate a telecommunications network and is not owed to persons who do not have such licences: see recital (5) and article 4 of the directive. The position is the same in relation to the UK regulations: see regulation 3.

334. The conclusion I draw from this review of the position under European competition law is that the relevant rules in Europe, being the general rules outlawing abuse of a dominant position and the specific rules as to interconnection between telecommunications operators, have the effect that a dominant operator is obliged to provide access to necessary facilities in the form of interconnection to its network but this obligation is owed to another licensed operator and is not owed to persons who are not licensed operators.

335. The question in the present case is not directly as to the position under European competition law but is, instead, a question as to the combined operation of the Telecommunications Act 2001 and the Fair Competition Act 2002 in Barbados. In my judgment, section 16 of the Fair Competition Act 2002 outlaws abuse of a dominant position. A denial of access to essential facilities can in some circumstances be an abuse of a dominant position. However, this case is specifically about interconnection between telecommunications operators. That topic is dealt with by the specific provisions of the Telecommunications Act 2001 and sections 25 and 28 of that Act, as I interpret them, place duties upon the incumbent operator but those duties are owed only to another licensed operator and are not owed to a person in the period before that person becomes a licensed operator. In my judgment, the way in which Barbados has chosen to give effect to the general duty of a dominant operator to provide access to essential facilities to a new entrant is, in the specific case of interconnection to an existing network, dealt with by the specific provisions of the Telecommunications Act 2001 and is not extended by the general provisions of section 16 of the Fair Competition Act 2002. The position is the same in relation to section 34 of the Fair Competition Act 2002.

336. It is of interest to note that a similar question as to the inter-relationship of telecommunications interconnection and anti-trust law has been considered in the Supreme Court of the United States in Verizon Communications Inc v Law Offices of Curtis V Trinko LLP 540 US 398 (2004). The approach of the Supreme Court of the

United States appears to support the approach I have adopted to this legislation in Barbados.

337. In these circumstances, I conclude that the Claimants' reliance upon the Fair Competition Act 2002 does not add anything to their case based on sections 25 and 28 of the Telecommunications Act 2001. If the Claimants fail to establish a breach of sections 25 and 28 of the Telecommunications Act 2001, they will not, in my judgment, be able to establish a breach of the more general provisions about abuse of dominant position contained in the Fair Competition Act 2002.

338. When I considered the legislation in SLU, I considered whether there was an obligation on CWWI: (1) to order the equipment it needed for its side of the interconnection; and (2) to carry out civil works to effect interconnection; before the parties had agreed the terms of an interconnection agreement. I also considered whether it was legitimate for CWWI to refuse to do either of these things, before the parties had agreed the terms of an interconnection agreement, as a means of leverage in the negotiations as to those terms. I need to consider the same questions in relation to C&W Barbados in Barbados.

339. When I considered the position in SLU, I referred to the legislation in SLU and then to more general considerations as to the character of commercial negotiations. In the case of Barbados I similarly need to consider the legislation in Barbados and then reflect again on more general considerations.

340. I have already referred to some of the detailed provisions of the legislation in Barbados. On the present questions, I draw attention to the way in which the legislation provides for the parties to negotiate an interconnection agreement and the expected terms of such an agreement in so far as those terms are relevant to the topic of ordering equipment and carrying out civil works. Sections 25(2)(b) and (e) of the Telecommunications Act 2001 refer to the terms on which interconnection services are to be offered or made available. Section 25(2)(d) of the 2001 Act requires interconnection services to be made available in a timely fashion. Section 25(3) of the 2001 Act refers to the parties agreeing the relevant terms through commercial negotiations. Section 26 of the 2001 Act refers to a dominant carrier filing a RIO which will set out the terms on which interconnection is to be provided. Section 28(1) of the 2001 Act refers to a person requesting interconnection and under section 28(3) the parties are then to negotiate in good faith the terms of an interconnection agreement. I comment that the obligation to act in good faith is in relation to the negotiation of the terms of the agreement. The subsection does not in terms impose an obligation to act in good faith in relation to its handling of the process of interconnection.

341. Section 16 of the Fair Competition Act 2002 prohibits abuse of its position by a dominant operator. I have discussed above the interplay between this provision and the detailed provisions of the Telecommunications Act 2001. In my judgment, section 16 of the 2002 Act does not require any specific behaviour in relation to ordering equipment and carrying out civil works which is not required by the 2001 Act. Further, in my judgment, section 16 of the 2002 Act does not have any implications for the debate as to

whether it is open to a party to commercial negotiations to use the bargaining advantages open to it such as the bargaining advantage, referred to as leverage, which is relevant for present purposes. The same reasoning applies to section 34 of the Fair Competition Act 2002.

342. The Telecommunications (Interconnection) Regulations 2003 which applied in Barbados referred (at regulation 3) to certain published interconnection guidelines. I do not see anything in those guidelines which is material for present purposes in that the guidelines do not add anything relevant to the relevant statutory material. Regulation 5 of the 2003 regulations refers to the permissible content of a draft RIO.

343. I have also reminded myself of the terms of the draft RIO which was submitted to the regulator by C&W Barbados and the terms of the interconnection agreement which was later entered into by the parties in Barbados. It is not necessary to refer to any particular provision of those documents.

344. The arguments of the parties in relation to ordering equipment and civil works in Barbados followed essentially the same lines as the arguments I have set out above in relation to SLU, save that C&W Barbados did not advance any argument that it was prohibited from ordering equipment and/or carrying out civil works before agreeing the terms of an interconnection agreement.

345. My reaction to the detailed provisions of the legislation in Barbados and the arguments of the parties is essentially the same as my reaction to those matters in SLU. I conclude that there is nothing in the legislation which specifically required C&W Barbados to order equipment and carry out civil works before finalising the terms of an interconnection agreement. Similarly, there is nothing in the legislation which prohibited C&W Barbados for doing either or both of these things. The legislation contemplates that the parties will conduct commercial negotiations as to an agreement which will provide for all relevant aspects of interconnection. The negotiations must be conducted in good faith. The use of the leverage in question is, in my judgment, normally a legitimate part of commercial negotiations. I do not see that the use of such leverage is a breach of the obligation to conduct commercial negotiations in good faith.

346. In the event, in Barbados, C&W Barbados did order its side of the necessary equipment and did commence the civil works before finalising the terms of the interconnection agreement. Digicel Barbados contends that C&W Barbados was in breach of duty by not ordering the equipment at an even earlier stage and, similarly, not commencing the civil works at an even earlier stage. For the reasons given above, I do not agree.

347. There is one further point which arises on the legislation in Barbados. The issue is whether it is open to the parties to finalise, as between themselves, the terms of an interconnection agreement and to implement those terms, even before the terms are approved by the regulator. The question of approval by the regulator is dealt with by section 29 of the 2001 Act. By section 29(1), where the parties agree the terms of an interconnection agreement, the agreement must be filed with the regulator within 30 days

of the date of the agreement, for the purpose of seeking the regulator's approval to the agreement. By section 29(2), the regulator may approve the agreement as filed or may require it to be varied. Section 29(4) deals with the consequences of the parties failing to comply with such a requirement by the regulator.

348. In my judgment, these provisions do not prohibit the parties from implementing the interconnection agreement, which they have agreed between themselves, before the agreement is approved by the regulator. However, conversely, these provisions do not prevent the parties making an agreement on terms that it is not to take effect until it receives the approval of the regulator. On this reasoning it is, in principle, open to a party either to agree terms subject to such a suspensive condition, or not so subject. If a party insists in the course of negotiations on such a suspensive condition, which is not acceptable to the other party, then a question could arise whether such insistence is being put forward in good faith, as required by section 28(3) of the 2001 Act or is in bad faith, for the purpose of delaying the time when the agreement may be implemented.

ARE BREACHES OF THE LEGISLATION ACTIONABLE?

349. The position in Barbados is different from the above jurisdictions. The Claimants rely on sections 25 and 28 of the Telecommunications Act 2001. Section 73 of that Act provides that where a person suffers financial loss or damage to property as a result of another person's contravention of any obligation or prohibition imposed by that Act, there is payable to that other person, by the person in default, such reasonable amount as is agreed between the parties or, failing agreement, as is determined by a court of competent jurisdiction.

350. The Defendants appear to accept that the High Court of England and Wales is a court of competent jurisdiction for the purposes of section 73 of the 2001 Act. The Defendants also accept that when the court is asked to determine "such reasonable amount" for the purposes of making an award in favour of a person who has suffered financial loss, the court should apply the ordinary principles as to the assessment of damages in tort. The parties did not make submissions as to whether it was open to the court to award exemplary damages or what have been called restitutionary damages under section 73 of the 2001 Act. Thus, in the way described above, section 73 makes actionable any breach by C&W Barbados of section 25 or 28 of the 2001 Act.

351. Section 73 also provides for a right of action under the statute against anyone, in addition to C&W Barbados, who has aided and abetted, counselled or procured a breach of section 25 or section 28, or induced such a breach, or been a party to such a breach or conspired with C&W Barbados to contravene section 25 or section 28: see sub-sections (b), (c), (d) and (e) of section 73. Section 73 (e) refers to a person "conspiring with any other person to contravene any provision under this Act". Questions might arise as to whether all of the ingredients of the common law tort of conspiracy apply to this statutory tort of conspiracy. In view of the existence of the statutory tort of conspiracy, there seems to me to be little point in the Claimants relying instead on an alleged common law conspiracy to commit a breach of section 25 or 28 of the Telecommunicaitons Act 2001.

352. The Claimants also rely on sections 16 and 34 of the Fair Competition Act 2002. I have earlier held that sections 16 and 34 of the 2002 Act do not add anything to the obligations of C&W Barbados under sections 25 and 28 of the 2001 Act. If the Claimants could establish a breach of sections 16 or 34 of the 2002 Act, then by virtue of section 44 of the 2002 Act, such a breach would have been actionable, but the limitation period for such a claim was 3 years from the time when the cause of action arose and the Claimants accept that any claim under sections 16 or 34 was statute barred when they brought these proceedings. Section 44 also extended the class of persons who might be liable for a breach of section 16 or section 34 of the 2002 Act to persons who aided and abetted or counselled and procured or induced such a breach or were parties to such breach or who conspired to contravene sections 16 or 34 of the 2002 Act. However any claim of this kind under section 44 was also statute barred. The only relevance, therefore, of the 2002 Act would be if a breach of sections 16 or 34 amounted to unlawful means for the purposes of the common law tort of conspiracy to injure by unlawful means. However, I have already held that sections 16 and 34 of the 2002 Act do not add anything to the claims based on sections 25 and 28 of the 2001 Act. The Defendants also submitted that in view of the statutory tort of conspiracy created by section 44(1) of the 2002 Act, there was no room for the common law tort of conspiracy to contravene sections 16 or 34 of the 2002 Act; alternatively, the three year limitation period in section 44(2) of the 2002 Act also applied to any common law tort of conspiracy. In view of my findings as to sections 16 and 34 not adding anything to the claim based on sections 25 and 28 of the Telecommunications Act 2001, it is not necessary to consider those arguments.

ARE BREACHES OF THE LEGISLATION "UNLAWFUL MEANS" FOR THE TORT OF CONSPIRACY TO INJURE BY UNLAWFUL MEANS?

353. The Defendants accept that a breach of sections 25 or 28 of the Telecommunications Act 2001 or a breach of sections 16 or 34 of the Fair Competition Act 2002 would constitue unlawful means for the purpose of the common law tort of conspiracy to injure by unlawful means.

354. When discussing the actionability of a breach of the legislation in Barbados, I referred to the express statutory provisions dealing with conspiracy to contravene the legislation and the questions which might arise as to the interrelationship between the statutory tort of conspiracy and the alleged common law tort of conspiracy to contravene that legislation. For the reasons given earlier, it is not necessary to pursue those matters.

WERE THERE BREACHES OF THE LEGISLATION?

355. Because a breach of sections 25 and 28 of the Telecommunications Act 2001 is expressed to be actionable in the event of such a breach causing damage to Digicel Barbados, it is now necessary to consider whether C&W Barbados acted in breach of the obligations placed on it by sections 25 and 28 of the 2001 Act.

356. I have set out in Annex D to this judgment a discussion of the matters of complaint in relation to Barbados and my findings of fact in relation to them. In making my findings, I have directed myself in accordance with my earlier rulings as to the

content of the obligations imposed by sections 25 and 28 of the Telecommunications Act 2001. My conclusions are that Digicel Barbados has not established that interconnection was delayed by reason of a breach of duty by C&W Barbados. Accordingly, the claim for damages by Digicel Barbados fails.

JOINT TORTS AND CONSPIRACY

357. I have earlier referred to the express statutory provisions in section 73 of the Telecommunications Act 2001 and section 44 of the Fair Competition Act 2002 which deal with secondary parties in relation to a contravention of the legislation and which deal with a conspiracy to contravene the legislation. If I had held that C&W Barbados had acted in contravention of the legislation then various questions would have arisen as to whether CWWI and/or C&W plc were liable under these express statutory provisions. Further questions would arise as to whether CWWI and/or C&W plc were liable for a common law tort of conspiracy to injure by unlawful means. In view of my actual findings that C&W Barbados did not contravene the legislation, I will not discuss these questions in any detail. I will, however, make some brief comments on certain matters of fact in relation to secondary liability and conspiracy which were argued in relation to the claim in Barbados.

358. The Claimants alleged that C&W plc combined with C&W Barbados (and/or with CWWI) to contravene the legislation in Barbados. When I considered the claim in relation to SLU, I made my findings as to the involvement of C&W plc in relation to the various jurisdictions with which this litigation is concerned. Those comments apply also to the claim in relation to Barbados.

359. In relation to the allegation of a conspiracy in Barbados, the position of CWWI as an alleged conspirator with C&W Barbados is not the same as the position of C&W plc. After all, CWWI was involved in the detail of the interconnection process in Barbados. However, in my judgment, no purpose is served in discussing in the abstract whether CWWI did or did not combine in any relevant way with C&W Barbados. It would only be relevant and useful to discuss that question if there was some feature of C&W Barbados' conduct which amounted to an unlawful act. As I have held that C&W Barbados did not commit any unlawful act, I see no purpose in discussing whether CWWI did or did not combine with C&W Barbados in relation to matters which were not unlawful.

360. Although the next point does not strictly arise in view of my earlier findings, I heard evidence as to the existence of an honest belief on the part of certain persons acting on behalf of C&W Barbados that certain actions of C&W Barbados were lawful and I will briefly record my findings on that evidence.

361. In their closing submissions, the Defendants invited me to find: (1) that Mr Batstone, Mr Austin and Ms Medford believed at all relevant times in Barbados that C&W Barbados was not under a legal obligation owed to Digicel Barbados to negotiate on the subject of interconnection with Digicel Barbados prior to the latter obtaining a licence in Barbados and (2) that Mr Thompson, Mr Batstone and Mr Austin believed at

all material times in Barbados that C&W Barbados was not under a legal obligation owed to Digicel Barbados to order the equipment needed for C&W Barbados' side of the interconnection before the parties had entered into an interconnection agreement which provided for the ordering of such equipment.

362. As to (1), I find that Mr Batstone, Mr Austin and Ms Medford did have that belief as to the legal position. They all gave evidence to that effect. Mr Batstone and Ms Medford, but not Mr Austin, were cross-examined as to that evidence. I accept their evidence on this point. I also find that Ms Medford, and possibly Mr Batstone and Mr Austin also, thought that the position was not wholly clear because Digicel Barbados had put forward a contrary argument to the effect that section 28 of the Telecommunications Act 2001 could be relied upon by a "person" even when that person was not a licensee. Nonetheless, they all thought that that argument was probably wrong.

363. As to (2), I find that Mr Thompson, Mr Batstone and Mr Austin did have that belief as to the legal position. They all gave evidence to that effect and there was no real challenge to that evidence in cross-examination I accept their evidence on this point.

DAMAGES

364. There was a lengthy and detailed dispute on the issue of fact whether, if C&W Barbados had been in breach of duty in Barbados and that breach of duty had caused delay to interconnection in Barbados, any such delay in interconnection had caused delay to Digicel Barbados' launch of its telecommunications service in Barbados. The Claimants said that the Digicel Barbados was delayed in relation to its launch for more or less the full period of any delay in relation to interconnection. C&W Barbados said that Digicel Barbados had many other matters to deal with, apart from interconnection, before it could be ready to launch and, on the detailed facts, Digicel Barbados was not ready to launch before it actually did so. Accordingly, any delay on the part of C&W Barbados in relation to interconnection had not made any difference to the date when Digicel Barbados launched in Barbados.

365. I have decided that I will not attempt to determine the very many issues which arose in this respect. My reasons for this decision are somewhat similar to the reasons which I have already set out for reaching a similar decision in relation to SLU, although some of the points which led me to my conclusion in SLU do not apply in Barbados. In Barbados my reasons are as follows. First, I have determined that there was no delay to interconnection in breach of any obligation on the part of C&W Barbados, so the question of any delay to Digicel Barbados' launch does not arise. Secondly, if I attempted to deal with the many points of detail as to a possible delay to the launch in Barbados, I would immediately face the difficulty of having to make an assumption of fact, which I have not held to be well founded, as to when interconnection should have been completed and then to ask whether interconnection on such an assumed date would have allowed Digicel Barbados to launch earlier than it actually did. Indeed, I would have to deal with a number of possible assumed dates depending on what conduct on the part of C&W Barbados is to be assumed (contrary to my actual findings) to have been a breach of duty on its part. The assumed dates of interconnection could have a bearing on the effect of the

allegedly delayed interconnection on a planned launch. Thirdly, any attempt to make findings of fact on the question of a possible delayed launch in Barbados would involve a very considerable amount of time and result in delay in concluding my judgment. Fourthly, there were significant arguments as to whether I should permit the Claimants to advance a case that they were delayed from a specified date or alternative specified dates when those dates were not pleaded and the date of commencement of delay, which was pleaded in relation to Barbados, was not contended for by the Claimants in their closing submissions. If I were otherwise minded to make findings of fact as to a possible delay to the launch in Barabdos, it would be necessary to set out in some detail the procedural history in relation to this question and to examine the legal basis for the Defendants' proposition. Fifthly, the Claimants proposed a particularly burdensome course of action which, they suggested, required me to read a substantial quantity of further documents which had not been referred to at any earlier stage of the trial solely for the purpose of answering the question of whether Digicel Barbados would have been able to launch its network earlier in certain hypothetical circumstances. For all these reasons, I conclude that it would be disproportionate to go further into the facts as to any such delay to launch. Accordingly, I will not make findings on a hypothetical basis as to whether a delay in interconnection did cause delay to Digicel Barbados' launch.

366. In these circumstances, it is not appropriate to discuss the law or the facts as to whether the present is a case of exemplary damages or what have been called restitutionary damages or whether the legislation in Barbados, which allows the court to award damages, extends to an award of exemplary or restitutionary damages.

THE RESULT IN BARBADOS

367. The result which emerges from the above conclusions is that the claim by Digicel Barbados against C&W Barbados, CWWI and C&W plc fails and will therefore be dismissed.

PART 6: CAYMAN ISLANDS

INTRODUCTION

368. In Cayman, the incumbent telecommunications operator was C&W Cayman. The licensed new entrant was Digicel Cayman. The claim in relation to Cayman is brought by Digicel Cayman against C&W Cayman, CWWI and C&W plc. The Claimants allege that C&W Cayman was in breach of the primary and secondary legislation in Cayman. The regulations in Cayman only came into effect on 1st December 2003 so that the claim in relation to the regulations relates only to the period beginning on 1st December 2003. The Claimants say that such breaches were actionable as the tort of breach of statutory duty, that C&W Cayman, CWWI and C&W plc were joint tortfeasors and/or that they combined together such that they are liable for the tort of conspiracy to injure by unlawful means.

369. C&W Cayman, CWWI and C&W plc deny that there were any breaches of the primary or secondary legislation. In any event, they say that any such breaches were not actionable. They also say that on the facts and as a matter of law, they are not liable in the tort of conspiracy. They further say that any breaches caused no loss. There is no limitation issue in Cayman.

370. The parties disagree as to the meaning and effect of the primary and secondary legislation in Cayman. Accordingly, I will begin by considering that legislation in detail. As I will be examining the scope of the duties imposed by that legislation, it is convenient for me next to consider whether any breach of such duties would be actionable as the tort of breach of statutory duty, before I consider the facts. If I find that any breach of the legislation would not be actionable, then I will consider whether any breach of the legislation would be "unlawful means" for the purpose of the tort of conspiracy to injure by unlawful means, again before I consider the detailed facts.

371. Whatever I decide about the actionability of any breaches and whether any breaches could be unlawful means, I will make findings of fact on the matters of complaint which the Claimants say were breaches of the primary or secondary legislation.

THE LEGISLATION

372. I set out the relevant parts of the primary and secondary legislation in Cayman in Annex F. The Claimants rely upon section 44 of the Information and Communications Technology Authority Law 2002 and upon various regulations in the Information and Communications Technology Authority (Interconnection and Infrastructure Sharing) Regulations 2003. The 2003 Regulations came into effect on 1st December 2003. The process of arranging interconnection in Cayman had begun before that date so that the 2003 regulations only applied to the later part of that process.

373. Some of the wording in section 44 of the 2002 Law resembles some of the wording in section 46 of the Telecommunications Act 2000 in SLU. The parties appeared to proceed on the basis that much of the argument and discussion in relation to the SLU Act would also apply in the case of the 2002 Law. Whilst it is true that there are similarities between some of the wording in the SLU Act and some of the wording in the 2002 Law, it seems to me to be desirable to analyse and discuss the 2002 Law afresh, and without any preconceptions arising from the earlier discussion of the SLU Act. There are obvious differences between the wording of the 2002 Law and that of the SLU Act, and those differences may well mean that similar wording in the 2002 Law should not automatically be given the same meaning as that wording in the SLU Act.

374. The definition of "interconnection" in the 2002 Law is different from the definition of "interconnection" in the SLU Act. In the 2002 Law "interconnection" is defined to mean "the physical or logical connection of public ICT networks of different ICT network providers". This definition refers to physical interconnection, and I do not read it as referring to both physical and contractual interconnection. There is no definition

in the 2002 Law of "interconnection service", although that phrase is used in a number of places in the 2002 Law.

375. Section 44 (1) states that a licensee which operates a public ICT network shall not refuse, obstruct, or in any way impede another licensee in the making of any interconnection with its ICT network and should, in accordance with the provisions of section 44, ensure that the interconnection provided is made at technically feasible physical points. This subsection makes clear that the duty imposed on an incumbent licensee is owed to another licensee. "Licensee" is defined by the 2002 Law to mean a person to whom a licence is granted by ICTA under the 2002 Law. In this case, Digicel Cayman was granted such a licence, and so became a licensee as defined, on the 17th October 2003. Prior to that date, Digicel Cayman was not such a licensee. It is clear, therefore that the duty imposed on C&W Cayman by section 44 (1) of the 2002 Law did not apply in relation to the period prior to 17th October 2003.

376. Section 44 (1) of the 2002 Law stated that the incumbent licensee was not, amongst other things, to obstruct or in any way impede a new entrant licensee in the making of any interconnection. Because “interconnection” is defined by the 2002 Law to mean physical interconnection, section 44 (1) refers to obstructing and impeding physical interconnection, rather than obstructing and impeding contractual interconnection. However, it is clear from the provisions of the 2002 Law taken as a whole, that the parties were expected to make an agreement in relation to the use of physical interconnection, that is, the use of the interconnection service. If the incumbent licensee proposed that the parties negotiate and agree an interconnection agreement before taking steps to achieve physical interconnection, that stance on the part of the incumbent licensee would not, in my judgment, necessarily mean that the incumbent licensee was obstructing or impeding the making of a physical interconnection. If agreement as to the terms of interconnection agreement were necessary, or even desirable, for the purposes of achieving physical interconnection, a proposal to agree such terms could be seen as making progress towards physical interconnection rather than obstructing or impeding it.

377. When discussing section 46 (1) of the SLU Act earlier in this judgment, I recorded my difficulty in interpreting an obligation expressed in the negative so as to create a positive obligation to take action. I then referred to the possibility that section 46 (1) of the SLU Act might be given effect as a true negative obligation on the basis that the new entrant licensee would enjoy, pursuant to the provisions of the Act, a right of access to the incumbent's switch site. The new entrant licensee could rely on that right of access to install interconnection equipment on the incumbent’s switch site and it was that process which the incumbent was not to obstruct or impede. The position in Cayman is different for a number of reasons so that this possible interpretation does not arise. The first is that there is no provision comparable to section 50 of the SLU Act which provides for the new entrant licensee to have access to a site owned by the incumbent. The second difference is that it is, in any event, not necessary to interpret section 44 (1) of the 2002 Law as imposing any kind of positive obligation to take action. That is because other provisions in the 2002 Law do impose a positive obligation to take action. In those circumstances, I incline to the view that section 44 (1) does operate in accordance with its

express terms as a negative prohibition on obstruction of, and impeding, the making of physical interconnection.

378. Section 44 (3) obliges the incumbent licensee, subject to subsection (5), to "provide the interconnection service in a reasonable time". "Interconnection service" is not defined but, in my judgment, interconnection service is a reference to the use of the physical interconnection. Other provisions of the 2002 Law make it clear that the parties are expected to agree terms on which the interconnection service may be used. In this way, section 44 (3) places an obligation on the incumbent licensee to provide interconnection service and, for that purpose, to take the steps that are necessary to enter into an interconnection agreement and to complete the work needed to achieve physical interconnection. Accordingly, section 44 (3) does clearly impose on the incumbent licensee a positive obligation in relation to both physical and contractual interconnection. Section 44 (5) refers to "interconnection" as being provided at reasonable rates and on certain terms and conditions. Section 44 (5) goes on to provide in various ways for controls on the parties' freedom of action in relation to rates, terms and conditions. On the basis that "interconnection", as defined in the 2002 Law, is a reference to physical interconnection, section 44 (5) should be understood as requiring that physical interconnection is to be provided on certain contractual terms, in accordance with the detailed provisions of the 2002 Law.

379. Section 45 deals with the form of interconnection agreements and certain allied matters. It is clear that the parties can bind themselves to the terms of an interconnection agreement and give effect to those terms, without seeking prior approval from ICTA. However, the concluded agreement must be submitted to ICTA.

380. Section 46 of the 2002 Law refers to "negotiations for the provision of interconnection". This phrase contemplates that the parties will negotiate the terms on which physical interconnection is to be provided.

381. When discussing sections 44, 45 and 46 of the 2002 Law, I have referred to the various ways in which those sections refer to physical interconnection and to the terms of an agreement on which physical interconnection is to be provided. Those provisions suggests to me that the draughtsman of the 2002 Law contemplated that the ordinary way in which the parties would go about providing physical interconnection and agreeing the terms on which physical interconnection could be used was that the parties would agree the terms of an interconnection agreement and then implement that interconnection agreement by providing physical interconnection. When the physical interconnection was in place, it could be used by the parties on the terms of the interconnection agreement. I do not see anything in these provisions which places an express obligation upon an incumbent licensee to order the necessary equipment for its side of the interconnection and/or to install and test that equipment prior to the parties agreeing the terms of an interconnection agreement. Similarly, there is no provision which obliges the incumbent licensee to carry out civil works to connect the two switch sites (of the incumbent and the new entrant respectively) prior to the parties agreeing the terms of an interconnection agreement. Conversely, there is no express provision in these sections, which prohibits the parties, if they both so wish, from ordering and/or installing and/or testing the

equipment to be used on the incumbent licensee's side of the interconnection, or the carrying out of the civil works prior to the making of an interconnection agreement.

382. When I considered the position in SLU, I discussed the question whether it was permissible for the incumbent licensee to withhold its agreement to ordering necessary equipment and/or installing and/or testing that equipment, and to decline to carry out civil works, prior to the parties entering into an interconnection agreement, with a view to obtaining leverage over the new entrant licensee in relation to the negotiations as to the terms of the interconnection agreement. It was seen that such leverage might arise for the benefit of the incumbent licensee, because the new entrant licensee would generally be in a hurry to achieve physical and contractual interconnection in order to be able to launch its telecommunications service. In relation to SLU, I commented on what was generally involved in the conduct of commercial negotiations. I concluded that the use of that kind of leverage could be seen as part of ordinary commercial negotiations. I also concluded that the use of that kind of leverage was not contrary to the express provisions of the SLU Act. I reach the same conclusions in those respects in relation to the 2002 Law.

383. I now turn to consider the 2003 Regulations in Cayman. These regulations came into force on 1st December 2003. The interconnection process had already begun by that date and the regulations only apply to the later part of that process. Regulation 2 defines "interconnection" in the same way as that word is defined in the 2002 Law. Accordingly, in my judgment, "interconnection" in the 2003 Regulations refers to physical interconnection.

384. Regulation 3 in the 2003 Regulations defines "licensee" in a way which shows that Digicel Cayman was not a "licensee" for the purposes of the Regulations until 17th October 2003.

385. Regulation 4 (1) provides that a licensee must not refuse, obstruct or in any way impede another licensee in the making of any interconnection or infrastructure sharing arrangement. The obligation imposed by regulation 4(1) is said to be "in accordance with the provisions of section 44 of the Law". There is, however, a difference between the obligation imposed by section 44 and that imposed by regulation 4 (1). Both provisions use the verbs "refuse, obstruct or impede". However, in the case of section 44 (1) of the Law, the thing which is not to be obstructed or impeded is "the making of any interconnection". In the case of regulation 4 (1), the thing which is not to be obstructed or impeded is "the making of any interconnection ... arrangement". I acknowledge that this is not the only possible reading of regulation 4 (1). Another reading would be that regulation 4 (1) prevents the obstruction or impeding of "the making of any interconnection". That reading of regulation 4 (1) would simply repeat the obligation in section 44 (1) and would not add anything. I prefer the reading of regulation 4 (1) which describes the thing which is not to be instructed or impeded as "the making of any interconnection ... arrangement". That way of reading the phrase "the making of any interconnection or infrastructure sharing arrangement" appears to be more consistent with the later provisions in regulation 4 and the terms of regulation 5. Further, that reading of regulation 4 (1) does not mean that regulation 4 (1) is not "in accordance with the provisions of section 44 of the Law "; it will be remembered that section 44 (3) of the

Law required the parties to provide the interconnection service in a reasonable time, and in accordance with that requirement, as I see it, regulation 4 (1) will oblige a licensee not to obstruct or impede the making of an interconnection arrangement. On that reading of regulation 4 (1), an interconnection arrangement would mean an arrangement which provided for the achievement of both physical and contractual interconnection.

386. Regulation 5 provides that "interconnection and infrastructure sharing arrangements shall be concluded as quickly as possible, and in any event, no later than the time limits set out in these regulations, unless otherwise agreed between the parties." In my judgment, this regulation means what it says and does not pose any real difficulties of interpretation. The arrangements for interconnection are to be concluded as quickly as possible. The arrangements which are referred to involve both the making of an interconnection agreement and achieving physical interconnection. Regulation 5 does not dictate whether the parties should go about the performance of this obligation by making, in the first instance, an interconnection agreement followed by the implementation of the agreement or, conversely, taking steps to achieve physical interconnection prior to the conclusion of an interconnection agreement. The Claimants have sought to rely upon regulation 5 in their closing submissions and they allege that C&W Cayman acted in breach of regulation 5. However, the Claimants do not plead any breach of regulation 5 in their pleaded case. As the Claimants were permitted on three occasions to amend their pleaded claim in relation to Cayman and as they did not on any of those occasions put forward a claim that C&W Cayman had acted in breach of regulation 5, I will not consider in this judgment any allegation by the Claimants of a breach of regulation 5.

387. Regulation 6 spells out a number of detailed matters as to the principles and guidelines to be applied by the parties to the provision of interconnection services. Regulation 6 (a) imposes on each licensee an obligation to negotiate interconnection agreements and to provide interconnection services "in good faith". It is not necessary at this point in the judgment to discuss the precise meaning of the phrase "in good faith". Regulation 6 (b) refers to the parties “in the first instance” attempting to reach agreement on interconnection by negotiation. The phrase “in the first instance” is used primarily to distinguish the negotiations stage from a possible later dispute resolution stage. However, in my judgment, regulation 6 (b) also suggests that in the ordinary way the parties will go about arranging interconnection by negotiating the terms of an interconnection agreement, which will then be implemented so as to provide physical interconnection and which will identify the terms on which the physical interconnection may be used. The same indication can be found in regulation 6 (e), which refers to interconnection being provided on certain terms and conditions. Regulation 6 (g) refers to the party who is to bear the cost of providing interconnection; the sub-paragraph provides that the costs are to be borne in accordance with the interconnection agreement. Again, in my judgment, this suggests that what was expected in the ordinary way was that the parties would make an interconnection agreement and then implement it so that costs would be incurred and borne in accordance with the terms of the agreement. The same point can be made in relation to regulation 6 (k).

388. Regulation 8 (1) provides that licensees are obliged to negotiate interconnection in order to ensure the provision and interoperability of services throughout the Cayman

Islands. The remainder of regulation 8 specifies a detailed timetable, which proceeds by the following stages: a request from the new entrant to the incumbent for a quotation pursuant to which the incumbent will provide interconnection; an acknowledgment by the incumbent of the request; a statement by the incumbent that the request is complete and accurate or that there is a need for further information; the provision by the incumbent of a quotation as to the rates terms and conditions for obtaining the requested service of interconnection; following the provision of the quotation, the parties are to undertake good faith negotiations for the purpose of producing an interconnection agreement. Regulation 8 (11) identifies five matters, which will be regarded as violating the obligation to act in good faith. It is not necessary to discuss the meaning of regulation 8 (11) at this point in the judgment as its provisions are clear. My reaction to the wording of the timetable in regulation 8 is that it was expected that the parties would conclude an interconnection agreement and then implement that interconnection agreement by, for example, ordering and installing and testing the equipment which was needed on the incumbent's side of the interconnection and carrying out any necessary civil works.

389. Regulations 9, 10 and 11 contained detailed provisions as to the rates which might be charged for interconnection services. It is not necessary to refer to those provisions at this point in the judgment.

390. Regulation 19 deals with the form and the content of an interconnection agreement. It identifies, at a minimum, a number of matters which are required to be specified in an interconnection agreement. Amongst those matters are: the capacity and service levels agreed between the parties; "forecasting, ordering, provisioning and testing procedures"; geographical and technical characteristics and location of each point of interconnection; measures anticipated for avoiding interference with damage to the networks of the parties involved or those of third parties; methods for measuring service quality; provision of network information; technical specifications and standards; the procedures to detect and repair faults; the scope and description of the services to be provided; the technical characteristics of all the main and auxiliary signals to be transmitted by the system; the obligations and responsibilities of both parties in the event that inadequate or defective equipment is connected to their respective networks, and any other relevant issue. The details contained in regulation 19 and, in particular, the reference to the interconnection agreement dealing with matters such as forecasting, ordering, provisioning and testing procedures suggests that it was expected that, in the ordinary case, the parties would make an interconnection agreement, and then implement that agreement in relation to those ordering, installation and testing procedures and the carrying out of any civil works.

391. Regulation 24 provides that the incumbent licensee should promptly provide services in accordance with the final interconnection agreement. Again, this suggests to me that it was expected that, in the ordinary case, the parties would proceed to conclude an interconnection agreement, and then implement that agreement by providing services, including the service of arranging physical interconnection.

ARE BREACHES OF THE LEGISLATION ACTIONABLE?

392. The Claimants contend that breaches of section 44 of the Information and Communications Technology Authority Law 2002 are actionable. As before, I will consider the matters which assist in determining the answer to this question.

393. In my judgment, the 2002 Law in Cayman was passed primarily to benefit the public interest. Similarly, section 44 of the 2002 Law was enacted primarily to benefit the public interest. The intention to benefit the public interest can be seen from the nature of the many provisions in the 2002 Law, from the long title which states that the object of the Law is to establish the Information and Communications Technology Authority and for incidental and connected purposes, from section 9(3) which refers to the principal functions of ICTA and from section 26(2) which identifies the matters to be taken into account by ICTA before granting or renewing a licence under the law.

394. The terms in which section 44 is expressed do not make the duty unsuitable to be an actionable duty. The class of persons who might suffer harm as a result of a breach of duty are, first, the public and, secondly, the licensee requesting interconnection. The expected harm to the licensee requesting interconnection is economic loss rather than damage to the person or damage to property. The duty imposed by section 44 is imposed on a private entity.

395. The 2002 Law does not make a breach of section 44 a criminal offence although sections 70(1) and (2) of the 2002 Law provide that regulations could be made so as to make contravention of any provision in the regulations an offence. Thus, section 44 could have been repeated in the regulations and breach of such provision could have been made an offence. The 2002 Law does contain a sanction for breach of section 44, in that, under sections 32 and 33 of the 2002 law, ICTA may suspend or revoke a licence held by the licensee who is acting in breach of section 44. Thus, sections 32 and 33 provide a sanction for contravention of section 44. Further, sections 32 and 33 have a remedial function in that section 32(4) and section 33(4) permit ICTA to give the defaulting licensee an opportunity to remedy the breach within a reasonable time before the sanction is imposed.

396. The 2002 Law contains various provisions dealing with the enforcement of the duty under section 44. ICTA may issue a cease and desist order under section 35 of the Law. ICTA can apply to the court for the court to exercise any of its powers under section 37: see section 36 of the Law. Under section 37, the court may impose a substantial pecuniary penalty, or grant an injunction restraining the offending licensee from engaging in a contravention of section 44 or may make such other order as the court thinks fit.

397. The 2002 Law also contains dispute resolution provisions. Section 46 of the Law provides for the determination of a "pre-contract dispute". This term applies to a dispute as to the terms and conditions for the provision of interconnection. In my judgment a pre-contract dispute is not restricted to a dispute as to the terms and conditions of a proposed interconnection agreement. Section 46 is supplemented by sections 55 and 56 dealing with a review of a decision by ICTA and an appeal to the court. Section 56 also allows an appeal to the court against a cease and desist order under section 35.

398. Section 69 is not directly relevant in that it only applies where a person is convicted of an offence under the 2002 Law. In such a case, the court may make an order for the payment of compensation to any person for any damage caused by the offence. By section 69(2), the making of an order for compensation does not prejudice any right to a civil remedy for the recovery of damages beyond the amount of compensation paid under the order. It is not necessary to refer to the detailed provisions as to offences under the 2002 Law. However, it can readily be seen that the facts which give rise to such offences could give rise to civil liability under the general law, for example, for assault or for trespass. Section 69 is relevant to the extent that it shows that the legislature considered the circumstances in which a court should be empowered to order payment of compensation and the 2002 Law did not expressly provide for a general right to damages for breach of any provision of the Law.

399. On the question whether the 2002 Law provides for disputes to be determined by reference to matters of discretion or matters of policy, which might not be the same as the basis on which a court would decide liability for an actionable breach of statutory duty, it is relevant to refer to section 11 which enables the Minister to give to ICTA directions as to policy in the exercise and performance of ICTA's functions and, by section 9(3)(g), one of ICTA's functions was to resolve disputes concerning interconnection.

400. Having reviewed the matters relevant for the purpose of considering whether a breach of section 44 of the 2002 law is actionable, I find that the factors in favour of non-actionability are very much stronger than the factors in favour of actionability. I conclude that a breach of section 44 of the law is not actionable.

401. The Claimants contend that a breach of regulations 4, 5, 6 and 8 of the Information and Communications Technology Authority (Interconnection and Infrastructure Sharing) Regulations 2003 are actionable. For the purpose of answering this question I will address the matters that require to be considered.

402. In my judgment, the regulations, like the 2002 Law itself, were passed to benefit the public interest. This conclusion applies, in particular, to regulations 4, 5, 6 and 8. The regulations were made pursuant to section 70 of the 2002 Law which gave a power to the Governor in Council to make regulations essentially for the purpose of carrying the 2002 Law into effect.

403. Many of the duties imposed by regulations 4, 5, 6 and 8 are in terms which do not make them unsuitable to be actionable. However, in relation to the obligation to act in good faith, if that matter had stood alone, I would have been more hesitant about holding that it was expressed in terms which made it suitable to be an actionable duty. In Walford v Miles [1992] 2 AC 128, Lord Ackner at 138E – G stated that the concept of a duty to carry on negotiations in good faith was inherently repugnant to the adversarial position of the parties when involved in negotiations. As against that, it was stated in Petromec Inc v Petroleo Brasileiro [2006] 1 Lloyds LR 121 that an express contractual obligation to negotiate in good faith was enforceable: see per Longmore LJ at [115] to [121]. The content of an obligation to negotiate in good faith has received considerably more attention in Australia than it has in England and Wales: see Strickland v Minister for

Land [1998] AILR 41; (1998) 3 AILR 532 (concerning a statutory obligation to negotiate in good faith) and United Group Rail Services Limited v Rail Corporation New South Wales [2009] NSWCA 177 (concerning a contractual obligation to negotiate in good faith). In England and Wales, a contractual duty of utmost good faith has been held to be enforceable: see Berkeley Community Villages Limited v Pullen [2007] 3 EGLR 101.

404. The class of persons who might suffer harm as a result of a breach of the duty created by regulations 4, 5, 6 and 8 will be first, the public and, secondly, the licensee requesting interconnection. The loss suffered by the licensee requesting interconnection will be economic loss. The duty imposed by the relevant regulations is a duty imposed upon a private entity.

405. The regulations and the 2002 Law impose sanctions for a breach of a duty in the regulations. Regulation 30 provides that the contravention of any provision of the regulations constitutes an offence. Sections 32 and 33 of the Law allow ICTA to suspend or revoke a licence where there is a breach of the regulations in the same way it can suspend or revoke a licence for a contravention of the Law. Section 32(4) and section 33(4) also permit ICTA to give a licensee an opportunity to remedy the breach before suspending or revoking the licence.

406. The regulations and the 2002 Law provide for methods of enforcing the duties under the regulations. ICTA can issue a cease and desist order under section 35 for a breach of the regulations. The court can act on the application of ICTA for a breach of the regulations: see section 36(c). The court's powers on an application under section 36 are provided for in section 37. A decision of ICTA to make a cease and desist order can be appealed to the court under section 56. Regulation 26 also allows disputes as to interconnection to be submitted to ICTA for resolution in accordance with the Information and Communications Technology Authority (Dispute Resolution) Regulations 2003.

407. Taking all these matters together, in my judgment, the factors in favour of non-actionability are considerably stronger than the factors in favour of actionability. I conclude that breaches of the regulations relied upon by the Claimants are not actionable.

ARE BREACHES OF THE LEGISLATION "UNLAWFUL MEANS" FOR THE TORT OF CONSPIRACY TO INJURE BY UNLAWFUL MEANS?

408. This question arises not only in Cayman but also in some of the other jurisdictions with which this litigation is concerned. I have therefore set out in a separate annex to this judgment (Annex I) my understanding of the legal principles relating to this question and indeed other relevant legal principles in relation to the tort of conspiracy to injure by unlawful means.

409. My conclusion in relation to the scope of "unlawful means", for the purpose of the tort of conspiracy to injure by unlawful means, is that a breach of a statutory

obligation which is not an actionable breach and which is not a criminal offence does not constitute "unlawful means".

410. The above conclusion disposes of the claim in so far as it is founded upon an allegation that a breach of the 2002 Law constituted unlawful means for the tort of conspiracy to injure by unlawful means. However, there is a point which arises in Cayman, in relation to this tort, which does not arise in relation to the other jurisdictions. Regulation 30 of the regulations in Cayman provides that a contravention of any provision of the regulations constitutes an offence. In Annex I to this judgment, I discuss the authorities on the question as to whether all crimes are unlawful means for the purposes of the tort of conspiracy to injure by unlawful means. I there explain that I incline to the view that all crimes are unlawful means for this purpose. On that basis, the commission of an offence pursuant to regulation 30 would constitute unlawful means for the purposes of the tort. As explained in Annex I, I did not in the end feel that it was necessary to decide this point in view of the fact that I hold on the facts that C&W Cayman did not commit an offence contrary to regulaton 30. In the remainder of this main judgment, dealing with Cayman, I will assume in favour of the Claimants that the commission of an offence contrary to regulation 30 would constitute unlawful means for the purposes of the tort.

C&W CAYMAN'S LICENCE

411. In Cayman, the Claimants rely upon the terms of the licence granted to C&W Cayman in so far as those terms prohibit certain specified anti-competitive behaviour. The Claimants say, first, that C&W Cayman contravened the terms of the licence, secondly, that a breach of the licence is a breach of statutory duty having regard to the terms of the legislation in Cayman and thirdly, a breach of the licence amounts to unlawful means for the tort of conspiracy to injure by unlawful means and this is the position whether a breach of the licence is a breach of statutory duty or not.

412. In the licence granted to C&W Cayman, the relevant clauses are clauses 14 and 15. Clause 14 has the heading "Anti-competitive practices: agreements". Clause 14 is a detailed provision which applies to certain agreements which have as their object or effect the prevention, restriction or distortion of competition within the Cayman Islands. Clause 15 has the heading "Anti-competitive practices: conduct". Clause 15.1 provides:

"Any conduct on the part of one or more licensees which amounts to the abuse of a dominant position in a market for ICT networks or ICT services is prohibited if it may affect trade within the Cayman Islands".

413. Although the Claimants rely upon the provisions in the licence to C&W Cayman, the allegations of breach in the Claimants' pleading are unparticularised and the Claimants did not give further particulars when asked for further information. The position in this respect is similar to the position of the pleadings in Barbados as to abuse of dominant position pursuant to section 16 of the Fair Competition Act 2002.

Nonetheless, the Defendants did not press for an order for further particulars to be given and did not apply to strike out the allegations. For the reasons which I have spelt out when dealing with the unparticularised claim based on section 16 of the 2002 Act in Barbados, the claim is one which the court must deal with even though it is not particularised.

414. When I considered the allegation of abuse of dominant position pursuant to section 16 of the Fair Competition Act in Barbados, I discussed the extent to which general provisions preventing anti-competitive conduct such as section 16 of the Fair Competition Act and such as these provisions in the licence to C&W Cayman added anything to the specific provisions in the telecommunications legislation and regulations in the relevant jurisdiction, which specifically deal with the question of competition between an incumbent and a new entrant by making detailed provisions as to interconnection between those persons.

415. For the reasons which I gave in relation to section 16 of the Fair Competition Act 2002 in Barbados, I conclude that the relevant competition rules on the subject of interconnection between an incumbent operator and a new entrant are those contained in the specific rules as to such interconnection and the general references to prohibitions on anti-competitive practices do not add anything to the specific rules.

416. In view of my conclusion in the last paragraph to the effect that the terms of the licence to C&W Cayman, dealing generally with anti-competitive conduct, do not add anything to the specific rules contained in the statutes and regulations in Cayman, as to interconnection between operators, it may not be strictly necessary to ask whether C&W Cayman's breach of its licence is a breach of a statute or a regulations in Cayman. However, for the sake of completeness, I will state my conclusion on that subject.

417. In Cayman, the Claimants rely on section 9(2)(d), section 36 and section 37 of the 2002 Law for their submission that a breach by C&W Cayman of its licence is a breach of the 2002 Law. Those sections are clear as to their meaning and, in my judgment, they do not produce the result contended for by the Claimants. In my judgment, any breach of the licence is not a breach of the 2002 Law.

418. In view of my earlier conclusion that the general prohibitions on anti-competitive conduct do not add anything to the specific obligations as to interconnection imposed by the 2002 Law and by the regulations, it is not strictly necessary to consider whether a breach by C&W Cayman of its licence amounts to unlawful means for the tort of conspiracy to injure by unlawful means. As I have already explained, I am not prepared to extend the scope of "unlawful means" in this context so that it covers a breach of a statute or a regulation, when such breach is not actionable and not a criminal offence. It seems to me that it is consistent with that approach to hold that a breach of a public licence, such as the telecommunications licence in this case, similarly does not constitute unlawful means for the purposes of the tort of conspiracy.

419. The result of the above conclusions is that (on the assumption that all crimes are unlawful means for the tort of conspiracy) Digicel Cayman has a cause of action in the

event that there was a combination to commit a breach of the regulations, and therefore to commit a criminal offence under regulation 30, and if the other ingredients of the tort of conspiracy to injure by unlawful means were to be established, but Digicel Cayman does not otherwise have a cause of action. Such a cause of action would be against those persons who were a party to such a combination.

WERE THERE BREACHES OF THE LEGISLATION?

420. I have set out a discussion of the matters of complaint in relation to Cayman and my findings of fact in relation to them. Although Digicel Cayman's only cause of action was in relation to a conspiracy involving a breach of the regulations, which would constitute a criminal offence under regulation 30 (on the assumption that such an offence constitutes unlawful means for the tort of conspiracy), I have made findings of fact in relation to all the matters of complaint which were relied upon by Digicel Cayman in its closing submissions.

421. In summary, I find that Digicel Cayman has not established that C&W Cayman delayed interconnection in breach of any duty imposed upon it.

JOINT TORTS AND CONSPIRACY

422. In Cayman, the operating company was C&W Cayman. The Claimants' case was that the breaches of the legislation were committed by C&W Cayman and that CWWI and C&W plc were joint tortfeasors and/or conspirators with C&W Cayman. In view of my earlier findings, no question of joint torts or conspiracy to injure by unlawful means arises.

423. When considering the position in SLU, I commented on the role of C&W plc. Those comments also apply in the case of Cayman.

424. The position of CWWI in Cayman was different from the position of C&W plc. CWWI provided the carrier services team to assist C&W Cayman. Those two companies were therefore working together to some extent in connection with interconnection in Cayman. If I had held that C&W Cayman had committed breaches of the legislation in Cayman, it would then have been necessary to consider whether CWWI had combined with C&W Cayman in a relevant way so that CWWI would also be liable for such breaches. In view of my finding that there were no such breaches, it does not seem to me to be helpful to discuss any further the application of the legal principles (which were not seriously in dispute) to possible findings of fact which I have not made.

425. In their closing submissions, the Defendants did not ask me to make any findings in relation to Cayman on the subject of the existence of an honest belief so as to negative an intention to injure. Accordingly, I will not consider that question in relation to Cayman.

DAMAGES

426. There was a lengthy and detailed dispute on the issue of fact whether, if C&W Cayman had been in breach of duty in Cayman and that breach of duty had caused delay to interconnection in Cayman, any such delay in interconnection had caused delay to Digicel Cayman's launch of its telecommunications service in Cayman. The Claimants said that the Digicel Cayman was delayed in relation to its launch for more or less the full period of any delay in relation to interconnection. C&W Cayman said that Digicel Cayman had many other matters to deal with, apart from interconnection, before it could be ready to launch and, on the detailed facts, Digicel Cayman was not ready to launch before it actually did so. Accordingly, any delay on the part of C&W Cayman in relation to interconnection had not made any difference to the date when Digicel Cayman launched in Cayman.

427. I have decided that I will not attempt to determine the very many issues which arose in this respect. My reasons for this decision are somewhat similar to the reasons which I have already set out for reaching a similar decision in relation to SLU, although some of the points which led me to my conclusion in SLU do not apply in Cayman. In Cayman my reasons are as follows. First, I have determined that there was no delay to interconnection in breach of any obligation on the part of C&W Cayman, so the question of any delay to Digicel Cayman's launch does not arise. Secondly, I have held that Digicel Cayman did not have a cause of action in relation to all its matters of complaint but only in relation to matters which involved an allegation that C&W Cayman had conspired with others to commit a breach of the regulations, which would have been a criminal offence and therefore unlawful means for the tort of conspiracy to injure by unlawful means. Thirdly, if I attempted to deal with the many points of detail as to a possible delay to the launch in Cayman, I would immediately face the difficulty of having to make an assumption of fact, which I have not held to be well founded, as to when interconnection should have been completed and then to ask whether interconnection on such an assumed date would have allowed Digicel Cayman to launch earlier than it actually did. Indeed, I would have to deal with a number of possible assumed dates depending on what conduct on the part of C&W Cayman is to be assumed (contrary to my actual findings) to have been a breach of duty on its part. The assumed dates of interconnection could have a bearing on the effect of the allegedly delayed interconnection on a planned launch. Fourthly, any attempt to make findings of fact on the question of a possible delayed launch in Cayman would involve a very considerable amount of time and result in delay in concluding my judgment. Fifthly, there were significant arguments as to whether I should permit the Claimants to advance a case that they were delayed from a specified date or alternative specified dates when those dates were not pleaded and the date of commencement of delay, which was pleaded in relation to Cayman, was not contended for by the Claimants in their closing submissions. If I were otherwise minded to make findings of fact as to a possible delay to the launch in Cayman, it would be necessary to set out in some detail the procedural history in relation to this question and to examine the legal basis for the Defendants' proposition. Sixthly, the Claimants proposed a particularly burdensome course of action which, they suggested, required me to read a substantial quantity of further documents which had not been referred to at any earlier stage of the trial solely for the purpose of answering the question of whether Digicel Cayman would have been able to launch its network earlier in certain hypothetical circumstances. For all these reasons, I conclude that it would be

disproportionate to go further into the facts as to any such delay to launch. Accordingly, I will not make findings on a hypothetical basis as to whether a delay in interconnection did cause delay to Digicel Cayman's launch.

428. In these circumstances, it is not appropriate to discuss the law or the facts as to whether the present is a case of exemplary damages or what have been called restitutionary damages.

THE RESULT IN THE CAYMAN ISLANDS

429. The result which emerges from the above conclusions is that the claim by Digicel Cayman against C&W Cayman, CWWI and C&W plc fails on the facts and on the law. The claim will therefore be dismissed.

PART 7: TRINIDAD AND TOBAGO

INTRODUCTION

430. In Trinidad and Tobago ("T&T") the incumbent telecommunications operator was TSTT. The new entrant who obtained a "concession" (the term in T&T which is used for a telecommunications licence) was Digicel T&T. In T&T, Digicel T&T's claim is against TSTT alone. The claim is not based on the provisions of the Telecommunications Act in T&T nor on the terms of the concession granted to TSTT. The claim is that TSTT acted "contrary to honest practices" and is liable under section 4 of the Protection Against Unfair Competition Act 1996 ("PAUCA") to pay damages for the resulting loss to Digicel T&T. Digicel T&T originally claimed, in addition, against CWWI and C&W plc on the basis of an allegation of conspiracy between TSTT, CWWI and C&W plc. Digicel T&T maintained that claim until it was abandoned in its written closing submissions. Up to that point, the allegation of conspiracy had been investigated in detail at the trial and, to some extent, the allegation of conspiracy in T&T involved different issues from those arising in the other jurisdictions. One reason for that was that TSTT was not a subsidiary of CWWI or C&W plc; CWWI had a 49% stake in TSTT.

431. The Claimants' pleaded case in T&T was significantly amended, with permission, on a number of occasions during the trial. Indeed, Digicel T&T applied to amend its claim against TSTT in other respects for which I did not give permission. This was because I took the view that an allegation of conduct contrary to honest practices is a serious allegation and the matters which were pleaded as proposed amendments were not always sufficient to disclose a prima face case of such conduct and/or because it was clear to me that Digicel T&T did not have material which would be available to it to support the allegation. In the case of some amendments which I permitted Digicel T&T to make, the allegations were later abandoned and removed in later amendments.

THE LEGISLATION

432. The legislation which applies in T&T is quite different from the legislation so far considered. I have set out the relevant provisions in Annex F to this judgment.

433. The relevant telecommunications legislation is the Telecommunications Act 2001. Unlike the legislation which applies in the other countries and which has been considered above, this Act does not directly impose duties on a telecommunications provider in relation to interconnection with a new entrant into the market. The Act requires the operator of a public telecommunications network to have a "concession" as it is called (rather than a "licence"): section 21. The Act then provides that the concession must contain terms and conditions dealing with certain matters: see sections 22 and 24. Interconnection is dealt with in section 25. By section 25(1), a concession must include conditions obliging the concessionaire to provide for interconnection. In respect of that obligation, the regulatory authority, the Telecommunications Authority of Trinidad and Tobago ("TATT") (set up by section 4 of the 2001 Act as amended by the Telecommunications (Amendment) Act 2004, section 5) shall require the concessionaire to comply with a large number of specific guidelines, standards and other matters. Thus the direct source of any obligation in relation to interconnection will not be the 2001 Act but will be the terms of the concession or (following the grant of the concession) the guidelines of TATT or specific requirements of TATT. Accordingly, there can be no claim that the 2001 Act directly imposes duties on TSTT, giving rise to a cause of action against TSTT if the duties are broken. Finally, in relation to the 2001 Act, section 65 (as amended by the Telecommunications (Amendment) Act 2004) makes it an offence for a person to commit a material breach of a condition contained in a concession.

434. The relevant regulations in T&T were the Telecommunications Regulations 2006. They were published on 9th May 2006 and came into force at the end of August 2006. They were therefore not in force at the time of the events which are the subject of the claim in relation to T&T.

435. The Claimants do not rely upon the Telecommunications Act 2001 nor the Telecommunications Regulations 2006 nor the terms of the concession granted to TSTT. Instead the Claimants rely only on alleged breaches by TSTT of PAUCA. The full text of PAUCA is set out in Annex F to this judgment.

436. The only cause of action on which Digicel relies in T&T is based on section 4 of PAUCA, as amended by section 4 of the Intellectual Property (Miscellaneous Amendments) Act 2000. Section 4 of PAUCA, as amended, provides, so far as relevant:

"(1) In addition to the acts and practices referred to in sections 5 to 9, any act or practice, in the course of industrial or commercial activities, that is contrary to honest practices shall constitute an act of unfair competition.

(2) Any person damaged or likely to be damaged by an act of unfair competition shall be entitled to the remedies obtainable under the civil law of Trinidad and Tobago".

(3) This section and sections 5 to 9 shall apply independently of, and in addition to, any legislative provisions protecting inventions, industrial designs, trademarks, literary and artistic works and other intellectual property subject matter."

437. Section 3 of PAUCA defines "industrial or commercial activities" so as to include the activities of professionals and other such persons and defines "practice" so as to include "an omission to act".

438. On the facts of this case, there is no relevant dispute between the parties as to the meaning of the phrase "any act or practice" or the phrase "in the course of industrial or commercial activities". It is accepted that the matters which are alleged against TSTT, if they were proven on the facts, would be "any act or practice, in the course of industrial or commercial activities". The dispute between the parties as to the meaning and effect of section 4(1) of PAUCA concerned the meaning of the phrase "that is contrary to honest practices".

439. The Defendants' interpretation of that phrase can be simply stated. The Defendants contend that the only thing which is contrary to honest practices is an act or practice which is dishonest.

440. The Claimants' interpretation of the phrase "contrary to honest practices" is more complicated. The Claimants submit that the test as to whether something is contrary to honest practices is an objective test. That formulation, by itself, is not particularly helpful as it leads only to the real question as to what precisely the test is. The Claimants then submit that the test is not one of dishonesty, even objectively considered. To assist with the interpretation of section 4 of PAUCA, the Claimants rely upon the treaty obligations of the Government of T&T and a large number of decisions dealing with intellectual property matters, in particular trademarks. The Claimants ultimately submitted that the duty imposed by section 4(1) of PAUCA was a duty to act fairly in relation to the legitimate interests involved.

441. Although there is an immense gulf between a duty to avoid acting dishonestly and a duty to act fairly, the Claimants submitted that when one examined the facts of the allegations against TSTT, it might transpire that nothing really turned on this difference between the parties. Whilst that might turn out to be the case, it seems to me that I ought to consider the different ways in which the parties put their cases on section 4 of PAUCA and come to my own conclusion as to the duty imposed by that section.

442. For the purpose of considering the meaning and effect of section 4 of PAUCA, I will first consider section 4 itself and then consider the other provisions of PAUCA. I will then consider what is generally meant by "dishonesty" in a civil context. I will then consider the Claimants' argument based upon the treaty obligations of the Government of T&T and the various authorities cited in relation to intellectual property matters. I will then consider the debate in the Trinidadian Senate on the Bill which became PAUCA and a judgment of the High Court of Trinidad & Tobago which considered section 4 of PAUCA. At the end of that process I will express my conclusions.

443. Section 4(1) begins by referring to "any act or practice". "Practice" is defined by section 3 of PAUCA to include an omission to act. Accordingly, "any act or practice" is

any act or omission. It can be seen therefore that this part of the section is in very wide terms.

444. Section 4(1) refers to "in the course of industrial or commercial activities". This phrase is defined in section 3 to include "the activities of professionals and other such persons". The meaning of "commercial activities" is reasonably clear and certainly creates no difficulty in the present case. There may be more room for doubt as to the meaning of "industrial". I imagine that most, if not all, industrial activities would also be commercial activities. Given that PAUCA is, in other sections, concerned with intellectual property it might have been thought that the word "industrial" is being used in the sense it has in the phrase "industrial property", which was an earlier term for intellectual property. The present case does not involve intellectual property. The Defendants certainly do not submit that industrial activities are confined to intellectual property matters. Such a submission would not have taken the Defendants very far in view of the fact that section 4 is not confined to industrial property or industrial activities but extends to any act or omission in the course of commercial activities. Not only is the phrase "any act or practice" a wide one, so too is the reference to "commercial activities".

445. The phrase "that is contrary to honest practices" is a key phrase in section 4(1). In view of the width of the phrase "any act or practice in the course of industrial or commercial activities", it is essential to focus on the phrase "that is contrary to honest practices" in order to find what is permitted and what is prohibited by section 4(1). The reference to honest practices is thus the essential definition as to what is within section 4(1).

446. Section 4(1) states that the act or practice which infringes section 4(1) constitutes an act of unfair competition. It is important to notice that section 4(1) does not use the concept of "unfair competition" to define what is permitted and what is prohibited by section 4(1). The reference to unfair competition is for the purpose of describing the consequence of behaviour which infringes section 4(1). Once one has determined that an act or omission infringes section 4(1), one then calls that act or omission "an act of unfair competition" and that gives rise to a right to claim under section 4(2); under that sub-section a claim may only be brought in relation to damage from "an act of unfair competition".

447. Section 4(1) refers to matters which are "contrary to honest practices". I have considered what, if anything, is added by the reference to "practices" in this phrase. In some contexts, a reference to a "practice" might refer to something which is continuous or which occurs regularly. It seems unlikely that this is the meaning intended in the present case because section 4(1) refers to "any act or practice" which effectively means any act or omission. Accordingly, infringing behaviour can consist of a single act which does not continue and which is not repeated. The Claimants say that the word "practices" suggests an objective standard which pays little or no attention to the particular circumstances of the person who carries on the act or practice in question. The difficulty about that submission is that section 4(1) does not refer to practices in general but refers to honest practices. In my judgment, in order to assess whether a practice is honest or not, one needs to look at all the circumstances and that would ordinarily extend to the state of

mind of the person responsible for the act or omission in question. In my judgment, the ordinary meaning of the phrase "contrary to honest practices" requires there to be dishonesty involved in the act or omission in question. The thing which is contrary to honesty is dishonesty and in this context the act or omission which is contrary to honest practices is equally an act or omission involving dishonesty.

448. It is, of course, essential to consider the meaning of section 4 of PAUCA in the context of the act as a whole. The short title to the act refers to "Protection Against Unfair Competition". This concept is repeated in the long title which stated that the Act was "to provide for protection against unfair competition". Section 4 is headed "General Principles" and states that section 4(1) prohibits certain acts or practices "in addition to the acts and practices referred to in sections 5 to 9". Section 4(1) appears to prohibit an act or practice "contrary to honest practices" which is expressed in general terms whereas the prohibitions in sections 5 to 9 relate to more specific matters. Section 5 deals with causing confusion with respect to another's enterprise or its activities. Section 6 deals with damaging another's goodwill or reputation. Section 7 concerns an act or practice which misleads the public. Section 8 deals with discrediting another's enterprise or its activities. Section 9 is concerned with unfair competition in respect of trade secrets.

449. Part of the drafting style used in section 4 of PAUCA is repeated in the other sections. The phrase "any act or practice in the course of industrial or commercial activities" is used in sections 4, 5, 6, 7 and 9 whereas section 8 refers to "any false or unjustifiable allegation, in the course of industrial or commercial activities". In all of the sections, 4 to 9 inclusive, the prohibited conduct is said to "constitute an act of unfair competition". This particular point emphasises that the act which is prohibited by section 4(1) is not "an act of unfair competition" but is an act or practice "contrary to honest practices". The reference to "an act of unfair competition" in section 4, as in the other sections, is the stated consequence of the prohibited conduct and not the definition of the prohibited conduct.

450. The phrase "contrary to honest practices" is used only once in PAUCA although section 9(1) refers to "contrary to honest commercial practices"; it may be that there is no difference between these two phrases, given that both sections 4 and 9 refer to acts or practices in the course of industrial or commercial activities. In any case, I do not find the use of a similar phrase in section 9(1) throws any particular light on the meaning of "contrary to honest practices" in section 4(1). Section 9(2)(e) refers to a third party acquiring a trade secret in circumstances where the third party knew or was grossly negligent in failing to know that a certain act was involved. Whilst that refers to knowledge or the means of knowledge I do not get any very clear guidance from it as to the intended meaning of honest practices in section 4(1). Section 9(4)(a) refers to "an unfair commercial use". This is a specific example of the prohibited conduct being expressed in terms of its unfairness. Again, I do not get any assistance from section 9(4)(a) for the purpose of construing section 4(1).

451. In the civil, as distinct from the criminal, context, the concept of dishonesty is relatively clear. The matter was described by Lord Nicholls delivering the judgment of the Privy Council in Royal Brunei Airlines v Tan [1995] 2 AC 378 at 389B-G. That case

was concerned with an allegation of dishonest assistance in a breach of trust. Lord Nicholls said:

"Whatever may be the position in some criminal or other contexts (see, for instance, Reg. v Ghosh [1982] QB 1053), in the context of the accessory liability principle acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances. This is an objective standard. At first sight this may seem surprising. Honesty has a connotation of subjectivity, as distinct from the objectivity of negligence. Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. Further, honesty and its counterpart dishonesty are mostly concerned with advertent conduct not inadvertent conduct. Carelessness is not dishonesty. Thus for the most part dishonesty is to be equated with conscious impropriety. However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual. If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour. In most situations there is little difficulty in identifying how an honest person would behave. Honest people do not intentionally deceive others to their detriment. Honest people do not knowingly take others' property. Unless there is a very good and compelling reason, an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries. Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless."

452. The question of dishonesty was considered by the House of Lords in Twinsectra Limited v Yardley [2002] 2 AC 64. Difficulties later arose with some of the dicta in the Twinsectra case and the position was clarified by the decision of the Privy Council in Barlow Clowes Limited v Eurotrust International Limited [2006] 1 WLR 1476. At [10], Lord Hoffmann giving the judgment of the Privy Council said:

"The Judge stated the law in terms largely derived from the advice of the board given by Lord Nicholls of Birkenhead in Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 AC 378. In summary, she said that liability for dishonest assistance requires a dishonest state of mind on the part of the person who assists in a breach of trust. Such a state of mind may consist in knowledge that the transaction is one in which he cannot honestly participate (for example, a misappropriation of other people's money), or it may consist in suspicion combined with a conscious decision not to make enquiries which might result in knowledge: see Manifest Shipping Co Limited v Uni-Polaris Insurance Co Limited [2003] 1 AC 469. Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary

standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards. The Court of Appeal held this to be a correct state of the law and their Lordships agree."

453. The better view is that the law in this area as to the meaning of dishonesty is to be found in the above three cases and that the statements in Twinsectra are to be interpreted in accordance with the explanation given by the Privy Council in the Barlow Clowes case: see Lewin on Trusts, 18th ed., at para. 40.25.

454. Having considered the words in which section 4 of PAUCA is expressed and the remainder of the statute, my very clear provisional view is that the only behaviour which is contrary to section 4(1) is dishonest behaviour and for this purpose dishonesty is to be understood in the way described by Lord Nicholls in Royal Brunei Airlines v Tan.

455. The Claimants submitted that an analysis along the above lines is inadequate for the purpose of interpreting section 4(1). The Claimants draw attention to the terms of the Paris Convention, to which Trinidad and Tobago was a signatory. The Claimants also say that when the Bill which became PAUCA was debated in the Trinidadian Senate, it was expressly stated that PAUCA was to be enacted to give effect to the Government's obligations under the Paris Convention. The Claimants also say that the Paris Convention has given rise to a Directive and to Regulations in Europe and legislation in the United Kingdom, all of which uses the phrase "contrary to honest practices" and that phrase has been authoritatively considered by the courts in Europe and in England and Wales so that the phrase encompasses many things beyond cases of dishonesty.

456. The Paris Convention for the Protection of Industrial Property in 1883 was revised in Stockholm in 1967. Article 1(2) of the Convention stated that the protection of industrial property had as its object patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations or origin, and the repression of unfair competition. Whilst this list of objects includes many examples of intellectual property, the list ends with a reference to unfair competition. Many of the articles of the Paris Convention deal with intellectual property but the article which is of relevance for present purposes is article 10 bis which is headed "Unfair Competition". Article 10 bis provides as follows:

"(1) The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition.

(2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.

(3) The following in particular shall be prohibited:

1. all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor.

2. false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;

3. indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods."

457. The First Council Directive of 21st December 1988 to Approximate the Laws of the Member States relating to Trade Marks (89/104/EEC) includes, at article 6, certain limitations as to the effects of a trademark. In particular, article 6(1)(a) provides that a trademark does not entitle the proprietor to prohibit a third party from using, in the course of trade, his own name or business "provided he uses them in accordance with honest practices in industrial or commercial matters". A similar provision appears in Council Regulation (EC) 40/94, dealing with the Community Trade Mark, at article 12(a).

458. Section 10(6) of the Trade Marks Act 1994 provides:

"Nothing in the preceding provisions of this section shall be construed as preventing the use of a registered trade mark by any person for the purpose of identifying goods or services as those of the proprietor or a licensee. But any such use otherwise than in accordance with honest practices in industrial or commercial matters shall be treated as infringing the registered trade mark if the use without due cause takes unfair advantage of, or is detrimental to, the distinctive character or repute of the trademark."

459. Section 11(2)(a) sets out certain limitations on the effect of a registered trademark and repeats the "own name defence" in the European Directive and Regulations provided that the use of the mark is in accordance with honest practices in industrial or commercial matters.

460. The European and United Kingdom legislation in relation to trademarks has been the subject of a considerable body of authority, to much of which I was taken in the course of argument. I will attempt to refer to some of that authority, as economically as possible.

461. Barclays Bank Plc v RBS Advanta [1996] RPC 307 concerned a case of comparative advertising and section 10(6) of the Trade Marks Act 1994. Laddie J considered the meaning of section 10(6) and the proviso referring to honest practices, at page 315. He said that if the use of the trade mark was considered honest by members of a reasonable audience, the use did not infringe. Conversely, if a reasonable trader was likely to say, on being given the full facts, that the use of the mark in an advertisement was not honest, for example because it was significantly misleading, then the proviso was not satisfied.

462. In Cable & Wireless Plc v British Telecommunications Plc [1998] FSR 383, Jacob J referred to this case and others. At page 391, he referred to article 10 bis of the Paris Convention. He referred in particular to the examples given in article 10 bis (3) and stated that none of those specific examples seemed to involve any investigation of the state of mind of the advertiser. He suggested that the test for the proviso as to honest practices was objective in the sense that one should ask whether a reasonable trader could honestly have made the statements he made based upon the information that he had. In this way, the information which the trader had was material. The question was whether others would regard what he was doing as honest and his personal state of mind was irrelevant. It did not matter whether the advertiser believed the statements were true; the question was whether an honest man, given the information the advertiser had, would have been prepared to make those statements.

463. In Reed Executive Plc v Reed Business Information Limited [2004] RPC 40, the Court of Appeal considered the own name defence and section 11(2) of the Trade Marks Act 1994. The principal judgment was given by Jacob LJ. At [126], having referred to the decision of the European Court of Justice in Gerolsteiner Brunnen v Putsch [2004] RPC 39, Jacob LJ said:

> "The court also gave guidance on the meaning of "honest practices etc". It did not go down the route suggested to us by [counsel]. On the contrary it said that "the condition of honest practices constitutes in substance the expression of a duty to act fairly in relation to legitimate interests of the trademark owner" (para.[23]). The test is for the national court to carry out an overall assessment of all the circumstances – and in particular to assess whether the defendant "might be regarded as unfairly competing with the proprietor of the trade mark"(para. [26])."

464. Jacob LJ at [131] stated that the ECJ had not by that time ruled "on more subtle questions" concerning "honest practices". He then identified three possible states of mind on the part of the user of the trade mark. He was inclined to favour the first of these rather than the second (which was the meaning he had put forward in Cable & Wireless Plc v British Telecommunications Plc). The first state of mind was described in these terms:

> "… the test is objective and one of simple causation – if the defendant in fact caused significant deception, albeit innocently, there is no defence. He must pay for the damage he unwittingly caused. The position for the past is the same as for the future."

465. The defence of honest practices in the context of a trade mark infringement was considered again by the Court of Appeal in L'Oreal v Bellure [2007] EWCA Civ 968. The principal judgment was given by Jacob LJ. At [51] he said:

> "So the real question is, whether the use in the comparative lists is "in accordance with honest practices in industrial or commercial matters". Quite obviously if people are or are likely to be deceived by the use then the use would not be honest. And that must be so even if there is a real likelihood that the use actually made, although it would not deceive the defendants' actual customers (e.g.

market traders), would lead to deception of significant numbers of ultimate consumers. If what you do, to your actual or constructive knowledge, will lead or is likely to lead to deception of someone down the chain, you yourself will not be acting in accordance with an honest practice".

466. Jacob LJ also considered a submission that the common law should be developed by the creation of a tort of "unfair competition". He rejected that submission for various reasons, in the course of which he referred to article 10 bis of the Paris Convention. He rejected the submission that the United Kingdom was in breach of the Convention by not having a tort of unfair competition. He also stated at [147] that article 10 bis did not spell out what was to be regarded as "unfair" and that the article did not clearly identify what was meant in the Convention by an act "contrary to honest practices".

467. The own name defence in a case of a trade mark infringement was considered by Arnold J in Hotel Cipriani v Cipriani (Grosvenor Street) Limited [2008] EWHC 3032 (Ch). At [143], the judge stated that the ECJ had repeatedly held that the requirement to act in accordance with honest practices in industrial or commercial matters "constitutes in substance the expression of a duty to act fairly in relation to the legitimate interest of the trademark proprietor" and he referred to a number of cases including Gerolsteiner Brunnen. At [144] the judge stated that the ECJ had held that the court should "carry out an overall assessment of all the relevant circumstances" and in particular should assess whether the defendant "can be regarded as unfairly competing with the proprietor of the trade mark" and he again referred to a number of cases including Gerolsteiner Brunnen. The judge added:

"This makes sense, since the wording of the proviso to article 12 appears to reflect article 10 bis (2) of the Paris Convention for the Protection of Industrial Property, which provides "any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition."

468. Arnold J then dealt with the state of the defendant's information, for the purposes of considering the defence of honest practices. At [149], he stated that the question whether the defendant ought to have been aware of the existence of deception was a relevant factor. The defendant's knowledge of the trade mark was one of the relevant circumstances to be assessed: see at [151]. At [152], the judge stated that the test was an objective one.

469. The decision of Arnold J in the Hotel Cipriani case has recently been upheld by the Court of Appeal: see [2010] EWCA Civ 110.

470. The Bill which became PAUCA was passed in the House of Representatives of T&T on 9th July 1996. The Bill was then passed in the Senate on 30th July 1996 and the Senate amendments were agreed to by the House of Representatives on 7th August 1996. I was shown the debates on the Bill in the Senate on 25th July and 30th July 1996. I was shown these debates for the purpose of informing me that T&T was a signatory to the

Paris Convention and that the Bill was brought forward for reasons which included a wish to give effect to T&T's international obligations under that Convention. If the Claimants wish to rely upon the debates in the Senate for wider purposes, then I am far from clear that they are able to do so. I did not receive any submissions as to whether the decision in Pepper v Hart [1993] AC 593 applies to legislation in Trinidad & Tobago. Assuming that the rules laid down in that case do apply in Trinidad & Tobago, then parliamentary material may be introduced as an aid to statutory construction where (a) the legislation was ambiguous or obscure or led to absurdity; (b) the material relied upon consisted of one or more statements by a minister or other promoter of the bill together if necessary with such other parliamentary material as was necessary to understand such statements and their effect and (c) the statements relied upon were clear. I doubt if these requirements are met in relation to the debates in the Senate in T&T. In particular, if the Claimants had wished to rely upon those debates for the purpose of showing the court that the Senate intended that the conduct prohibited by section 4(1) of PAUCA would extend beyond dishonest behaviour to any behaviour which was unfair competition or unfair behaviour in relation to the legitimate interests involved, I do not find the statements in the Senate to be clearly to that effect. Indeed, during the debate on 30th July 1996, there appears to have been concern expressed as to the possible width of clause 4 of the Bill. The draughtsman of the Bill had departed from article 10 bis (2) of the Paris Convention by changing "any act of competition" to "any act or practice". Clause 4 was amended but the amendment did not alter clause 4(1); instead, it sought to limit the persons who could claim under clause 4(2). As regards the Paris Convention being the source of the Bill, it was stated at page 19 of the official report of the debate on 30th July 1996 that there was no single model for the Bill in that it had been drawn from the unfair competition law of several jurisdictions and put together. At pages 16 to 17 of the report of that day's debate, when referring to honest practices, it was said that the notion of honest practices would have to be interpreted by the judicial authorities in Trinidad and Tobago and the judiciary could be assisted by the case law of other nations with similarly worded legislation.

471. I have been referred to the decision of Bereaux J, given on 15th February 2007 in the High Court of Trinidad and Tobago, in a case brought by Digicel T&T against TSTT. The claim was for interim relief in the form of various injunctions against TSTT. The claim was put on various bases and it is not necessary to refer to all of the claims which were made. In particular, the claimant relied on section 4 of PAUCA. There was also reliance on section 6 of PAUCA which provides that any act or practice, in the course of commercial activities, that damages or is likely to damage the goodwill or reputation of another's enterprise constitutes an act of unfair competition. At paragraph 26 of his judgment, the learned judge stated that he did not propose to embark on any great exposition of the law, although that comment may have been principally directed at the law relating to the grant of interlocutory injunctions. He dealt with the claims under PAUCA at paragraphs 32 to 36 of his judgment. At paragraph 33, he stated that claims under PAUCA were "very much uncharted territory in Trinidad and Tobago" and that there was no direct authority on such claims. At paragraph 33, he stated that the phrase "act or practice" was to be interpreted broadly. At paragraph 34, he stated that in connection with the provision of interconnection, TSTT was required by PAUCA "to treat fairly with Digicel and to engage fair practices in the course of competing with

Digicel." He added: "[t]his would include affording to Digicel the same treatment it affords its own mobile network in relation to its landlines and vice versa." At paragraph 36, he held that the claimant in the proceedings before him had an arguable case that it was subjected to "acts of unfair competition". The learned judge did not at any stage discuss the meaning of the phrase "contrary to honest practices". It is not clear whether the judge had in mind the provisions of section 6 of PAUCA, rather than section 4, when he made the remarks I have quoted. I acknowledge that in paragraph 40 of his judgment he stated: "Given the breadth of section 4 of [PAUCA], it is more than arguable that such a practice is unfair". Taking that sentence in isolation, it suggests that he was approaching section 4 on the basis that it prohibited anything which the court considered was an unfair practice.

472. The parties accept that I am not bound by the remarks of Bereaux J in the case before him. In view of the fact that the learned judge did not discuss the phrase "contrary to honest practices" at all and he appears to have regarded the words "unfair competition" as the essential definition of what was prohibited by section 4, I do not in the end derive much assistance from this judgment as to the correct interpretation of "contrary to honest practices" in section 4 of PAUCA.

473. Having considered the language in which section 4 of, and the remainder of, PAUCA is expressed and considering all the material put before me by the Claimants, I can now state my conclusions. Section 4(1) of PAUCA is clear in its expression. The phrase "any act or practice" is very wide indeed. The phrase "in the course of industrial or commercial activities" provides some limitation on the earlier phrase but does extend to all commercial activities of whatever kind. Section 4(1) is not confined to acts of competition. Section 4(1) is not confined to intellectual property. This means that section 4(1), until one comes to the phrase "contrary to honest practices", is potentially very wide in its reach. The phrase "contrary to honest practices" is therefore a key phrase in order to define the scope of section 4(1) and to divide permitted activities from prohibited activities. As a matter of language, contrary to honest practices is referring to acts or omissions which involve dishonesty. The Claimants' approach to the phrase "contrary to honest practices" gives that phrase a very wide ambit. If I held that the phrase prohibited any act or omission which was unfair having regard to the legitimate interests involved in the commercial activities in question, that would prohibit a vast range of behaviour. It would not be confined to unfair use of a trade mark, or unfair use of intellectual property or even unfair acts of competition. If I held that section 4(1) imposed a liability for honest behaviour which was careless (as the Claimants submit that I should) then, again, the scope of section 4(1) would be excessively wide.

474. I have considered with care the background to PAUCA as represented by the Paris Convention and I have also considered the body of case law on the meaning of "contrary to honest practices" in the specific case of trade marks. If that body of law was lifted out of its context and grafted onto the different context of section 4 of PAUCA then, as explained above, the width of the prohibition which resulted would be unacceptable, at least to my mind. I am not prepared to foist onto Trinidad and Tobago an interpretation of that width particularly when the language used in the provision is clear and is much narrower. The ordinary meaning of the words used in section 4 is limited to

acts of omissions involving dishonesty. Accordingly, I hold that section 4(1) of PAUCA refers to any act or practice in the course of industrial or commercial activities which involves dishonesty, in accordance with the meaning of that word given in Royal Brunei Airlines v Tan.

ARE BREACHES OF THE LEGISLATION ACTIONABLE?

475. The position as to actionability in T & T is different from the position in the above jurisdictions. In T&T, the only claim made by the Claimants is based on Section 4 of PAUCA. If the Claimants establish that there is conduct which infringes section 4(1) of PAUCA, then that conduct constitutes "an act of unfair competition". Section 4(2) of PAUCA provides that any person damaged by such an act is entitled to "the remedies obtainable under the civil law of Trinidad and Tobago". There is no dispute that such remedies include the remedy of damages as claimed by Digicel T&T. The parties did not make submissions to me as to the availability of exemplary or restitutionary damages under the civil law of T&T.

WERE THERE BREACHES OF THE LEGISLATION?

476. Because a breach of section 4 of PAUCA is actionable if it caused loss to Digicel T&T, the result of the claim in relation to T&T vitally depends on whether TSTT acted in breach of section 4 of PAUCA.

477. I have set out in Annex F to this judgment a discussion of the matters of complaint which are pleaded in relation to T&T and my findings of fact in relation to them.

478. In summary, I hold for the reasons given in Annex F that TSTT acted contrary to honest practices and therefore in breach of section 4 of PAUCA in two respects. First, TSTT acted contrary to honest practices when Mr Espinal telephoned Ms Bejar of Nortel in late September 2005 and instructed her not to complete the process of interconnection between TSTT and the new entrants in T&T, including Digicel T&T, before 31st March 2006. Secondly, TSTT's involvement in the composition of Mr Davy's letter of 3rd October 2005 and TSTT's later use of that letter was contrary to honest practices.

DAMAGES

479. I have set out in Annex F to this judgment a detailed consideration of whether TSTT's conduct, which was contrary to honest practices and in breach of section 4 of PAUCA, resulted in any loss and damage to Digicel T&T. My conclusion in relation to the first breach of section 4 of PAUCA described above is that Digicel T&T has failed to establish that it suffered loss and damage as a result of the conversation referred to in that Digicel T&T has failed to show that it had a real or substantial chance of having been

better off if that conversation had not taken place and in particular has failed to show that it had a real or substantial chance that interconnection would have been completed before 31st March 2006. My conclusion in relation to TSTT's conduct in respect of the composition of and the use of Mr Davy's letter of 3rd October 2005 is that Digicel T&T has not shown that such breach caused delay in achieving interconnection between the parties in T&T.

480. There was a lengthy and detailed dispute on the issue of whether, if TSTT's breach of section 4 of PAUCA had caused delay to interconnection in T&T, any such delay in interconnection had caused delay to Digicel T&T's launch of its telecommunications service in T&T. The Claimants said that Digicel T&T was delayed in relation to its launch for the period of any delay in relation to interconnection. TSTT said that Digicel T&T had many other matters to deal with, apart from interconnection, before it could be ready to launch and, on the detailed facts, Digicel T&T was not ready to launch before it actually did so. Accordingly, any delay on the part of TSTT in relation to interconnection had not made any difference to the date when Digicel T&T launched in T&T.

481. I have decided that I will not attempt to determine the very many issues which arose in this respect. My reasons for this decision are somewhat similar to the reasons which I have already set out for reaching a similar decision in relation to Barbados. In T&T my reasons are as follows. First, I have determined that there was no delay to interconnection even though TSTT was in breach of section 4 of PAUCA. Secondly, if I attempted to deal with the many points of detail as to a possible delay to the launch in T&T, I would immediately face the difficulty of having to make an assumption of fact, which I have not held to be well founded, as to when interconnection should have been completed and then to ask whether interconnection on such an assumed date would have allowed Digicel T&T to launch earlier than it actually did. Indeed, I may have to deal with a number of possible assumed dates depending on what Digicel T&T says is the date on which interconnection should have been completed (contrary to my actual findings). The assumed dates of interconnection could have a bearing on the effect of the allegedly delayed interconnection on a planned launch. Thirdly, any attempt to make findings of fact on the question of a possible delayed launch in T&T would involve a very considerable amount of time and result in delay in concluding my judgment. Fourthly, there were significant arguments as to whether I should permit the Claimants to advance a case that they were delayed from a specified date or alternative specified dates when those dates were not pleaded and the date of commencement of delay, which was pleaded in relation to T&T, was not contended for by the Claimants in their closing submissions. If I were otherwise minded to make findings of fact as to a possible delay to the launch in T&T, it would be necessary to set out in some detail the procedural history in relation to this question and to examine the legal basis for the Defendants' proposition. Fifthly, the

Claimants proposed a particularly burdensome course of action which, they suggested, required me to read a substantial quantity of further documents, which had not been referred to at any earlier stage of the trial, solely for the purpose of answering the question of whether Digicel T&T would have been able to launch its network earlier in certain hypothetical circumstances. For all these reasons, I conclude that it would be disproportionate to go further into the facts as to any such delay to launch. Accordingly, I will not make findings on a hypothetical basis as to whether a delay in interconnection did cause delay to Digicel T&T's launch.

482. In these circumstances, it is not appropriate to discuss the law or the facts as to whether the present might have been a case for exemplary damages or what have been called restitutionary damages or whether the legislation in T&T, which allows the court to award the remedies obtainable under the civil law of T&T, extends to an award of exemplary or restitutionary damages.

THE RESULT IN TRINIDAD AND TOBAGO

483. The result in T&T is that although TSTT acted contrary to honest practices in various respects, Digicel T&T has not shown that it suffered loss and damage as a result.

484. Digicel T&T's claim to damages against TSTT will be dismissed.

PART 8: THE TURKS AND CAICOS ISLANDS

INTRODUCTION

485. In TCI the incumbent telecommunications operator was CWWI. The licensed new entrant was Digicel TCI. The claim in relation to TCI is brought by Digicel TCI against CWWI and C&W plc. The Claimants allege that CWWI was in breach of the primary and secondary legislation in TCI, that such breaches were actionable as the tort of breach of statutory duty, that CWWI and C&W plc were joint tortfeasors and/or that they combined together such that they are liable for the tort of conspiracy to injure by unlawful means.

486. By an amendment, with permission, during the course of the trial, the Claimants alleged that CWWI had committed a breach of contract, namely a Memorandum of Understanding entered into at the end of February 2006, and that Digicel TCI had suffered loss and damage as a result. The Claimants also alleged that a breach of contract by CWWI constituted unlawful means for the tort of conspiracy and that CWWI and C&W plc had conspired to commit the breach of contract. Somewhat oddly, the Claimants never asserted that C&W plc was liable in the different tort of procuring or inducing a breach of contract.

487. CWWI and C&W plc deny that there were any breaches of the primary or secondary legislation. In any event, they say that any such breaches were not actionable. They also deny the alleged breach of contract. They also say that on the facts and as a matter of law, they are not liable in the tort of conspiracy. They further say that any breaches caused no loss.

488. The parties disagree as to the meaning and effect of the primary and secondary legislation in TCI. Accordingly, I will begin by considering that legislation in detail. As I will be examining the scope of the duties imposed by that legislation, it is convenient for me next to consider whether any breach of such duties would be actionable as the tort of breach of statutory duty, before I consider the facts. If I find that any breach of the legislation would not be actionable, then I will consider whether any breach of the legislation would be "unlawful means" for the purpose of the tort of conspiracy to injure by unlawful means, again before I consider the detailed facts.

489. Whatever I decide about the actionability of any breaches and whether any breaches could be unlawful means, I will make findings of fact on the matters of complaint which the Claimants say were breaches of the primary or secondary legislation.

490. As regards the breach of contract claim, I will make findings of fact in relation to that claim and also consider whether a breach of contract constitutes "unlawful means" for the tort of conspiracy to injure by unlawful means.

THE LEGISLATION

491. In TCI, the Claimants relied upon the provisions of the Telecommunications Ordinance 2004 and the Interconnection and Access to Telecommunications Facilities Regulations 2005.

492. Section 2 of the 2004 Ordinance defines "interconnection" to mean "the physical linking of public telecommunications networks to allow users of one licensed carrier to communicate with users of another licensed carrier". This definition refers, first, to the physical link involved in interconnection, but the definition goes on to refer to that physical link "allowing" the two licensed carriers to communicate. In my judgment, this definition of "interconnection" is not restricted to physical interconnection but is apt to refer to both physical and contractual interconnection. Both parties appeared to agree with this interpretation of the definition.

493. Section 13 of the 2004 Ordinance deals with the grant of a licence under the Ordinance. Section 13 (5) states that the licensee must comply with the terms and conditions of the licence. This means that compliance with the terms and conditions of the licence is required, first, by the licence and, secondly, by the Ordinance. In view of the fact that the terms of the licence are made matters of statutory obligation, I will, at this point, refer briefly, to some of the relevant terms in the licence granted to CWWI on 25th January 2006.

494. Clause 15.1 of the licence referred to the licensed services and licensed networks which were the subject matter of the licence. Those services and networks were the relevant services and networks provided at the relevant times by CWWI. Clause 15.1 went on to require CWWI to provide interconnection to another licensee in accordance with section 22 of the Ordinance. I will refer to section 22 later in this judgment. Clause 15.2 of the licence stated that the regulator might issue instructions to CWWI, in

accordance with section 23 of the Ordinance. Accordingly, it can be seen, that clauses 15.1 and 15.2 of the licence cross referred to the statutory provisions. They did not extend the obligations beyond the obligations contained in those statutory provisions.

495. Clause 15.3 does not in terms refer to the statutory provisions, but instead requires CWWI to make available to other carriers or service providers such technical information as the regulator might determine on a timely basis, as the regulator may prescribe.

496. Clause 13 of the licence has the heading: "Non-discrimination and Fair Trading". Clause 13 contains a number of more general provisions in relation to non-discrimination by CWWI in the provision of the licensed services and the operation of the licensed networks. In particular, by clause 13.4, it was provided that CWWI should not engage in practices or activities, whether by act or omission, which have or are intended to or likely to have the effect of unfairly preventing, restricting or distorting competition in any market for the licensed services. Clause 13.4 refers to such practices or activities "as may be further specified in regulations". Accordingly, the expectation is that further specification of the practices or activities in question will be the subject matter of regulations pursuant to the 2004 Ordinance.

497. Clause 13.5 is expressed in terms which are not to limit the generality of clause 13.4. By clause 13.5, any act or omission, which leads, or is likely to lead to a substantial lessening of competition in the market for any telecommunications network or telecommunications service is prohibited. Clause 13.5 states that the regulator will issue guidelines describing what is to constitute a substantial lessening of competition and the procedures for assessing it.

498. Thus, it can be seen that the licence contains, in clause 15, provisions dealing specifically with interconnection, essentially by cross-referring to the provisions of the Ordinance, and the licence also contains at clause 13 general provisions as to non-discrimination which contemplate further detailed provision being made in regulations or in guidelines issued by the regulator.

499. Section 16 of the 2004 Ordinance states that the regulator is able to make a determination that a particular licensee is dominant in relation to a particular telecommunications network or service. By clause 9 of the licence granted to CWWI on 25th January 2006, CWWI was declared dominant in relation to the relevant services and networks.

500. The 2004 Ordinance deals with interconnection in sections 22 to 25A. Section 22 (1) deals with a case where a licensee has been determined to be dominant, as was the case with CWWI by reason of clause 9 of its licence of 25th January 2006. In such a case, pursuant to section 22 (1), the licensee is obliged to "provide an interconnection timeously to another licensee who requires the interconnection". “Timeously” means “in good time”.

501. Section 23 permits the regulator to issue instructions to a dominant licensee or, indeed, any licensee, in relation to the provision of interconnection. Section 23 refers to a

number of topics, and, in particular, refers to the terms and conditions on which interconnection is to be provided. As will be seen, the Regulations in TCI contain detailed provisions as to interconnection agreements and these are stated to be an instruction pursuant to section 23 of the Ordinance.

502. It is clear that the obligation on CWWI to provide interconnection only applies in the case of other licensees. Accordingly, CWWI did not owe any obligation, under section 22 of the 2004 Ordinance to Digicel TCI until the latter was granted its licence on 31st March 2006. The 2004 Ordinance says comparatively little about the negotiation of, and the terms and conditions of, an interconnection agreement. However, section 23 recognises that interconnection will be provided upon a set of terms and conditions. Under section 64(2) of the 2004 Ordinance there is a power to make regulations in relation to a number of matters including the procedures to be followed under the Ordinance and as to interconnection agreements. As will be seen, the Regulations in TCI contain very detailed provisions in relation to interconnection agreements.

503. I now turn to the detailed provisions of the 2005 Regulations in TCI. Regulation 2 of the Regulations defines an "interconnection agreement" as an agreement setting forth the rights and obligations of the parties with respect to providing interconnection between their networks and services. By regulation 3 (1), carriers and service providers are required to co-operate with each other, in accordance with the regulations, in order to enable carriers and service providers to provide integrated public telecommunications services through TCI. By regulation 3 (2), interconnection is to be established and provided in accordance with interconnection agreements negotiated and agreed between the parties and submitted to the regulator, pursuant to the Ordinance and the Regulations.

504. Regulation 5 (1) imposes on every carrier and service provider "a duty to interconnect" with other carriers and service providers. This imposed on CWWI a positive duty to interconnect with Digicel TCI, following the grant of a licence to the latter on 31st March 2006. By regulation 5 (3), it was provided that the duty to interconnect specified in regulation 5 (1) obliged CWWI to refrain from refusing, obstructing or in any way impeding the interconnection of another carrier or service provider, entitled to obtain such interconnection. Whereas the duty in regulation 5 (1) is expressed as a positive duty on CWWI, the obligation on CWWI imposed by regulation 5 (3) is expressed in what are clearly negative terms. In my judgment, it is neither necessary, nor appropriate, to read regulation 5 (3) as imposing a positive duty on CWWI to provide interconnection. Regulation 5 (6) requires any agreement governing interconnection between licensees to be embodied in a written interconnection agreement.

505. Regulation 6 deals with the subject of non-discrimination. By regulation 6 (1), every carrier and service provider must offer to provide, and in fact provide, interconnection to other carriers and service providers on the basis of terms and conditions that are non-discriminatory. This obligation is owed to carriers and service providers and was therefore owed to Digicel TCI from the date the latter obtained its licence, but not before.

506. By regulation 6 (3), it is provided that every carrier and service provider must offer to provide and provide interconnection "on a timely basis, not to exceed 90 days, subject to section 8 ...". Regulation 6 (3) refers to interconnection being provided on the basis of certain terms and conditions. Regulation 8 imposes on a carrier or service provider, upon request, an obligation to make available a standard, or a reference, interconnection offer.

507. Part 4 of the Regulations (regulations 9 to 13) makes further provision for interconnection agreements. The duty owed by CWWI under regulation 9 plainly only applied to a request for interconnection from a licensed operator. Under regulation 9 (5), it was provided that the parties were to negotiate in good faith with the objective of concluding an interconnection agreement. Regulation 9 (6) stated that good faith negotiations required, at a minimum, adherence by the parties to a detailed timetable. This timetable identified a period for acknowledgment of a request for interconnection and a further period for the provision of a complete response to a request for interconnection.

508. Regulation 10 dealt with the contents of interconnection agreements. Regulation 10 was stated to be "pursuant to section 23 of the Ordinance". It will be remembered that section 23 of the Ordinance referred to the regulator issuing instructions in respect of interconnection. Accordingly, regulation 10 is such an instruction in relation to the contents of interconnection agreements. By regulation 10, an interconnection agreement was to address a large number of matters, including the technical characteristics of interconnection, capacity levels, service levels, forecasting, "ordering and provisioning", provision of information, fault detection and repair and provision for breaches of the agreement.

509. It is clear that the specific duties as regards interconnection imposed by the Ordinance and the Regulations were owed by CWWI to Digicel TCI only from the date that the latter obtained its licence, i.e. 31st March 2006. I will deal later with the argument that the general obligations as to competition contained in clauses 13.4 and 13.5 of the licence applied to a period before the 31st March 2006.

510. The Regulations contain detailed provisions as to interconnection agreements. It seems to have been contemplated that the parties would negotiate and agree the terms of an interconnection agreement and then implement that agreement in order to provide interconnection. There is no express obligation upon CWWI, whether pursuant to the Ordinance or the Regulations, to order and/or install and/or test the specialist equipment needed for its side of the interconnection, or to carry out civil works, before concluding an interconnection agreement. Conversely, there was no prohibition upon the parties, if both so wished it, making an *ad hoc* agreement which dealt with ordering or installation or testing equipment, or the carrying out of civil works, before they concluded a comprehensive interconnection agreement.

511. When considering the obligations on CWWI in SLU, I discussed what was involved in the course of ordinary commercial negotiations. I reached the following conclusion, as to the usual position of parties to negotiations where one party is under

time pressure and wishes some step to be taken prior to the conclusion of those negotiations and the other party is not under time pressure and does not have any reason of his own to see that step taken prior to the conclusion of negotiations. In such negotiations, the second party has a bargaining advantage which it is ordinarily legitimate for that party to use to encourage the first party to agree terms more favourable to the second party, so that the agreed terms can then be implemented and the step which the first party wants to see taken can then be taken in accordance with the agreed terms. I also considered that it was not contrary to the legislation in SLU for the second party to use that advantage to negotiate more favourable terms by declining to order and/or to install and test interconnection equipment and/or to carry out civil works before the parties had entered into an interconnection agreement which provided for all those steps to be taken. Having considered the Ordinance and the regulations in TCI, I consider that the conclusions I reached in SLU are also appropriate in TCI. However, as will be seen in TCI, the question of ordering and installing and testing equipment and carrying out civil works did not rest on the terms of the Ordinance and the regulations but was made the subject to an express contract entered into by CWWI and Digicel TCI.

ARE BREACHES OF THE LEGISLATION ACTIONABLE?

512. The Claimants contend that a breach of section 22 of the Telecommunications Ordinance 2004 is actionable. I will now consider the various matters which are relevant for the purpose of determining this question.

513. In my judgment, the 2004 Ordinance and, in particular section 22, were passed primarily for the purpose of benefiting the public interest. The long title to the Ordinance states that it was passed to provide for the establishment of a telecommunications commission, to provide for the functions of the commission and for connected purposes. The functions of the commission are set out in section 4.

514. On the question whether section 22 is expressed in terms which make it suitable for actionability, there is nothing in section 22 which is unsuitable for an actionable duty. The persons who will suffer harm as a result of a breach of duty are, first, the public and, secondly, the licensee requesting interconnection. The loss to the licensee requesting interconnection as a result of a breach of the duty is economic loss. The person on whom the section 22 duty is imposed is a private entity.

515. The 2004 Ordinance does impose sanctions for a breach of the section 22 duty. By section 51(1) where the regulator is satisfied that the licensee has not complied with section 22 then the regulator may issue to the licensee a direction to bring the contravention to an end or to ensure that the contravention is not repeated. By section 51(2) a licensee is obliged to comply with such a direction. If a licensee fails to comply with such a direction then under section 51(5), the regulator may censure the licensee publicly and impose a financial penalty and enforce a remedy available to the regulator under the licensee's licence, including a suspension or revocation of that licence. By section 51(6), where the regulator imposes a penalty under section 51(5), the penalty is recoverable in the same manner as a fine imposed by the magistrates' court. Section 52 deals with revocation and suspension. By section 52(1) the regulator may give to the

licensee a notice requiring the licensee to take remedial action. Thereafter, the regulator may suspend or revoke the licence.

516. The 2004 Ordinance provides means of enforcement of the section 22 duty. Under section 23 the regulator may issue instructions to a licensee as to how to implement section 22. Under section 51(1) and (2) the regulator may give directions to bring a contravention of section 22 to an end or to ensure that such contravention is not repeated and the licensee must comply with such a direction. Under section 24, a dispute as to interconnection may be referred to the regulator and the regulator is able to take such measures as it deems fit to resolve a dispute. By section 64(2)(f) of the 2004 Ordinance, the Governor is given power to make regulations providing for a dispute resolution process in relation to interconnection.

517. Having considered these various matters, in my judgment, the factors in favour of non-actionability are considerably stronger than the factors in favour of actionability. I conclude that a breach of section 22 of the 2004 Ordinance is not actionable.

518. The Claimants contend that various regulations in the Interconnection and access to Telecommunications Facilities Regulations 2005, and in particular, regulations, 3, 5, 6 and 9 are actionable. The Defendants contend that these duties are not actionable. To answer this question it is necessary to consider the matters I have identified above.

519. In my judgment, the regulations and, in particular, those regulations relied upon by the Claimants were passed to benefit the public interest. The regulations were made to give effect to the 2004 Ordinance: see section 64(1) thereof. Further, the functions of the regulator identified in regulation 4 show that the purpose of the regulations is primarily to benefit the public interest.

520. The various duties are expressed in terms which are not unsuitable for actionable duties. As before, I have some reservations about an obligation to act in good faith although in the case of these regulations, regulation 9(6) gives some specific directions as to what is required by good faith negotiations.

521. The class of persons who might suffer harm as a result of a breach of a duty in the regulations are, first, the public and, secondly, the licensee requesting interconnection. The harm which may be suffered by a licensee requesting interconnection as a result of a breach of duty is economic loss. The duties in question are imposed upon a private entity. The 2004 Ordinance imposes sanctions for a breach of a duty in the regulations. Section 51(1) of the Ordinance refers to non-compliance with a provision of the subordinate legislation and this extends to the regulations. Thus a breach of the regulations entitles the regulator to give a direction under section 51(1) requiring compliance with the regulations and under section 51(2) a licensee is obliged to comply with that direction. If the licensee does not comply with a direction which requires compliance with the regulations, then the regulator can act under section 51(5) and (6) of the Ordinance. Further, in a case where the regulator has acted under section 51(1) to require compliance with the regulations and the regulator's directions have not been

complied with then the regulator may require remedial action under section 52(1) and, in case of default, suspend or revoke the licence.

522. In addition to the various sanctions and other methods or enforcing the requirements of the regulations, regulation 11 provides for dispute resolution in respect of disputes as to interconnection.

523. Having considered the various matters which require attention, in my judgment, the factors in favour of non-actionability are stronger than the factors in favour of actionability. I conclude that a breach of the various duties in the regulations, which are relied upon by the Claimants are not actionable.

ARE BREACHES OF THE LEGISLATION "UNLAWFUL MEANS" FOR THE TORT OF CONSPIRACY TO INJURE BY UNLAWFUL MEANS?

524. As the question has arisen not only in TCI but also in some of the other jurisdictions with which this litigation is concerned, I have set out in a separate annex to this judgment (Annex I) my understanding of the legal principles relating to this question and indeed other relevant legal principles in relation to the tort of conspiracy to injure by unlawful means.

525. My conclusion in relation to the scope of "unlawful means", for the purpose of the tort of conspiracy to injure by unlawful means, is that a breach of a statutory obligation which is not an actionable breach and which is not a criminal offence does not constitute "unlawful means".

CWWI'S LICENCE

526. In TCI, the Claimants rely upon the terms of the licence granted to CWWI in so far as those terms prohibit certain specified anti-competitive behaviour. The Claimants say, first, that CWWI contravened the terms of the licence, secondly, that a breach of the licence is a breach of statutory duty having regard to the terms of the legislation in TCI and thirdly, a breach of the licence amounts to unlawful means for the tort of conspiracy to injure by unlawful means.

527. The licence granted to CWWI in TCI contains clauses 13.4 and 13.5 which are similar to clauses 6.4 and 6.5 of the licence granted to CWWI in SLU. In particular, the relevant part of clause 13.4 in the TCI licence is essentially the same as clause 6.4 of the SLU licence. Clause 13.5 of the TCI licence provides:

"Without limiting the generality of clause 13.4 above, any act or omission which leads, or is likely to lead, to a substantial lessening of competition in the market for any telecommunications network or telecommunications service is prohibited. The Commission will issue Guidelines describing, or may otherwise determine, what constitutes a substantial lessening of competition and the procedures for assessing it."

528. Although the Claimants rely upon the provisions in the licence referred to above, the allegations of breach in the Claimants' pleading are unparticularised and the Claimants did not give further particulars when asked for further information. The position in this respect is similar to the position of the pleadings in Barbados as to abuse of dominant position pursuant to section 16 of the Fair Competition Act 2002. Nonetheless, the Defendants did not press for an order for further particulars to be given and did not apply to strike out the allegations. For the reasons which I spelt out in more detail when dealing with the unparticularised claim based on section 16 of the Fair Competition Act 2002 in Barbados, the claim is one which the court must deal with, even though it is not particularised.

529. When I considered the allegation of abuse of dominant position pursuant to section 16 of the Fair Competition Act 2002 in Barbados, I discussed the extent to which general provisions preventing anti-competitive conduct such as section 16 of the Fair Competition Act and such as the provisions in the licence to CWWI added anything to the specific provisions in the telecommunications legislation and regulations in the relevant jurisdiction which specifically deal with the question of competition between an incumbent and a new entrant by making detailed provisions as to interconnection between those persons.

530. For the reasons which I gave in relation to section 16 of the Fair Competition Act 2002 in Barbados, I conclude that the relevant competition rules on the subject of interconnection between an incumbent operator and a new entrant are to be found in the specific rules as to interconnection and the general references to prohibitions on anti-competitive practices do not add anything to the specific rules.

531. In view of my conclusion in the last paragraph to the effect that the terms of a telecommunications licence dealing with anti-competitive conduct do not add anything to the specific rules contained in the statutes and regulations as to interconnection between operators, it may not be strictly necessary to ask whether a breach by CWWI of its licence is a breach of a statute or a regulation in TCI. However, for the sake of completeness, I will state my conclusion on that subject.

532. The position in TCI on the question whether a breach of the licence is a breach of the statute is different from the position in the other four jurisdictions where the point has been raised. Section 13(5) of the 2004 Ordinance provides that a licensee shall comply with the terms and conditions of its licence. Thus if the licensee breaks its licence it also fails to comply with, and therefore breaks, section 13(5) of the TCI Ordinance. Therefore, a breach of the licence is a breach of the statute in TCI.

533. I have already considered the question whether a breach of the legislation in TCI is actionable. I have held that a breach of the legislation is not actionable. I have further held that a non-actionable breach of the legislation does not constitute unlawful means for the tort of conspiracy. For completeness, I also hold that a breach of the licence is not separately to be considered (leaving aside section 13(5) of the Ordinance) to be unlawful means. As I am not prepared to extend the scope of unlawful means so as to embrace a non-actionable, non-criminal breach of the legislation, I am similarly not prepared to

extend the scope of unlawful means to embrace a breach of a public licence such as the telecommunications licence to CWWI in TCI.

534. The result of the above conclusions is that the Digicel TCI does not have a cause of action in TCI arising out of any breach of the legislation or licence in TCI, even if it establishes that CWWI committed breaches of the legislation or licence in TCI and that CWWI and C&W plc combined in relation to those breaches with the necessary intention to injure Digicel TCI. I will separately consider Digicel TCI's case that CWWI committed a breach of contract causing loss and damage to Digicel TCI.

THE MEMORANDUM OF UNDERSTANDING

535. In late February 2006, Digicel TCI and CWWI entered into an agreement recorded in letter form. This agreement has been referred to at the trial as the memorandum of understanding or MOU. The MOU is agreed to have contractual effect. The MOU deals with the subject of CWWI ordering interconnection equipment, carrying out civil works and installing, commissioning and testing the interconnection equipment and the links between the two switch sites and keeping Digicel TCI generally informed of progress in relation to these matters. The parties disagree as to the meaning and effect of this MOU. In those circumstances, I need to set out the full terms of this agreement.

536. The agreement is recorded in the form of a letter dated 23rd February 2006 from CWWI to Digicel TCI. The letter provides as follows:

"Cable and Wireless (West Indies) Ltd ("C&W") and Digicel (Turks and Caicos) Ltd, ("Digicel") ("C&W" and "Digicel" are each hereinafter also referred to as the "Party" and collectively, as the "Parties") agreed to commence and complete the physical and technical interconnection necessary to interconnect their respective networks in the Turks and Caicos Islands immediately and ahead of signing of an interconnect agreement. This work includes but is not limited to:

(a) ordering the required interconnect equipment and fiber and C&W notifying, within one week of its having ordered the interconnection equipment, Digicel of the type of such equipment;
(b) undertaking, at the same time as ordering the interconnection equipment, all civil works associated with, installation of and testing of fiber link(s) and C&W informing, on at least a weekly basis, Digicel of the current location of the interconnection equipment and its date of delivery to C&W in TCI;
(c) commence installing the interconnection equipment within one week of the date of delivery to C&W, and commence commissioning and testing the interconnection equipment and the links within one week of completion of installation.

Digicel agrees to pay C&W the sum of US $90,000 as a deposit, to cover fifty to sixty percent (50-60%) of C&W's estimated costs associated with the civil works and equipment required to achieve physical and technical interconnection. This deposit shall be applied by C&W (once the Interconnect Agreement is executed) to the once-off charges set out in the Tariff Schedule of the Interconnect Agreement, and owed by Digicel to C&W for the civil works and equipment. Any surplus difference between the deposit and the once-off charges will be refunded. Any short fall will be invoiced to, and paid by, Digicel in accordance with the terms of the Interconnect Agreement.

In accordance with sub-section 25(1) of the Telecommunications Ordinance and paragraph 15(2)(a) of the Interconnection Regulations, Digicel shall be responsible for paying to C&W the full costs of the civil works and equipment, including but not limited to the items listed in (a) through (c) above, necessary to complete the physical and technical interconnection of C&W and Digicel networks. While the Parties agree to be bound by the terms of this Agreement, this Agreement is subject to any decision or instruction of the Turks and Caicos Islands Telecommunication Commission concerning in particular section 25.1 of the Telecommunications Ordinance 2004 and/or section 15.2 of the Interconnection Access to Telecommunication and Facilities Regulations.

Digicel agrees not to use the interconnection equipment and links for the exchange of traffic between the Digicel and C&W networks prior to the execution of the Interconnect Agreement, except for the purpose of testing the equipment and the links.

If you are in agreement with these terms, please sign below and return this letter along with the above mentioned payment to the above address as soon as possible in order for the parties to proceed with physical and technical interconnection. In signing this letter agreement, you acknowledge the receipt and sufficiency of the consideration given, and agree to be bound by the terms herein stated."

537. On 25th February 2006, Digicel TCI emailed to CWWI a copy of this letter signed on behalf of Digicel TCI. On 27th February 2006, Digicel TCI gave to CWWI a cheque for the deposit of US $90,000, as referred to in the agreement.

538. In the absence of this MOU, on the true construction of the 2004 Ordinance and the 2005 regulations and, so far as it matters, the licence granted to CWWI in TCI, CWWI was not under an obligation to negotiate interconnection with Digicel TCI until it received its licence on 31st March 2006. Further, CWWI was not under an obligation in advance of the parties entering into an interconnection agreement, to order the interconnection equipment required for the CWWI side of the interconnection or to install and test such equipment or to carry out civil works to join the two switch sites. It is clear that the MOU placed contractual obligations on CWWI in relation to ordering, installing and testing interconnection equipment and carrying out civil works, even at a time when

Digicel TCI did not have a licence in TCI and the parties had not entered into an interconnection agreement.

539. The parties differed as to what was required of CWWI by the MOU in relation to the timetable for taking the various steps referred to in the MOU. They differed, in particular, as to the timetable which was to be complied with by CWWI in relation to ordering interconnection equipment. CWWI accepted in its submissions to me that the MOU placed on it a contractual obligation of some kind in relation to ordering interconnection equipment. It seemed to be accepted that CWWI was to commence the process of ordering the equipment but, it was submitted, the letter said nothing as to any timetable for the placing of the order for the equipment or for later stages of the process. The Claimants submitted that CWWI was contractually obliged to order the interconnection equipment "immediately". In the course of their submissions, the Claimants said that "immediately" meant either "as soon as possible" or "as soon as reasonably practicable".

540. I am not able to accept CWWI's submission that the memorandum of understanding does not lay down a timetable for the various matters which are the subject of the MOU. Starting with the question of ordering interconnection equipment, the MOU makes clear that the task of ordering the interconnection equipment is included within "this work" and the phrase "this work" refers to "the physical and technical interconnection necessary to interconnect their respective networks". On that basis, the task of ordering the interconnection equipment is to be commenced and completed "immediately". The ordinary meaning of "immediately" can be expressed in different ways. It can mean "without delay" or "at once". The word "immediately" has to be read in context. Part of the context is that the parties to the MOU appreciated that for CWWI to order interconnection equipment, it would be necessary for certain preliminary stages to be gone through. The Claimants do not appear to challenge the need for CWWI to communicate with an equipment supplier to obtain a proposal or a quotation from the supplier, for that quotation or proposal to be placed before CWWI for approval of the expenditure and, following that approval, for the order to be placed with the supplier. The Claimants submitted that CWWI had to go through those stages as soon as possible but the Claimants were prepared to accept that the obligation might mean that CWWI should go through those stages "as soon as reasonably practicable". In my judgment, the obligation is to go through the various stages with a view to placing the order for the interconnection equipment as soon as reasonably practicable.

541. The MOU then provides that CWWI is obliged to commence installing the interconnection equipment within one week of the date of delivery of that equipment to CWWI. CWWI is also to commence commissioning and testing the interconnection equipment within one week of completion of installation. It must have been envisaged that CWWI would be obliged to do more than simply commence the installation of the equipment; it must have been envisaged that it would complete that installation. Indeed, in my judgment, the MOU expressly says so when it directs that CWWI is to complete the physical and technical interconnection, necessary to interconnect the respective networks, "immediately". Accordingly, CWWI must complete the installation of the

interconnection equipment as soon as reasonably practicable after it has commenced the installation. CWWI then has one further week from completion of installation to commence commissioning and testing the interconnection equipment and then must complete commissioning and testing as soon as reasonably practicable.

542. As regards the civil works, CWWI is to "undertake" the civil work at the same time as ordering the interconnection equipment. Again, CWWI is to undertake the civil works as soon as reasonably practicable. The requirement "to undertake" the civil works requires CWWI to begin the civil works and carry them to completion as soon as reasonably practicable.

543. The parties disagree as to what is meant by the phrase "the required interconnect equipment". There seem to be two points in play. The first is whether this phrase refers to the MUX and associated cables (this is sometimes called the optical equipment or the transmission equipment) or whether the phrase extends to other work, by way of an upgrade of the switch and signalling equipment at the CWWI switch site. The second point appears to be, once one has identified the interconnection equipment which is needed to interconnect the two networks, whether CWWI has to order all of that equipment or whether it must order only such of it as is immediately needed having regard to spare equipment which might be available to CWWI.

544. As to the meaning of "the required interconnection equipment", the parties agree that this, at least, includes the MUX and cables and any ancillary equipment needed to connect the MUX and make it work. In my judgment, the phrase may go further than those items. The interconnection equipment which is "required" is the interconnection equipment which is required to "complete the physical and technical interconnection necessary to interconnect their respective networks". Therefore, one asks: what is the equipment which needs to be installed so that, following installation, one could properly say that the two networks have been interconnected and the interconnection will work? If that process requires the addition of equipment to the switch or signalling equipment then the equipment which needs to be added is part of the required interconnection equipment. Conversely, if CWWI had a wish to carry out an upgrade to its network and, in particular, the switch and signalling equipment and even if it made sense to carry out that upgrade at the same time as it installed the equipment needed to effect the interconnection, the equipment needed for the upgrade is not part of the required interconnection equipment.

545. The second point concerns whether CWWI must draw on its stock of spares so that it must not order an item which it already has in stock or, at any rate, must not order such an item if placing that order would delay the process of obtaining and installing the other parts of the required interconnection equipment. It is clear that CWWI would be entitled to draw on its stock of spares if it wished to do so. If the item taken from stock was part of the equipment needed to interconnect the networks then CWWI would be entitled to charge for the item which it supplied to itself from its stock. The question is: if CWWI decides not to supply itself with an item from stock and if the ordering of that item afresh in some way delayed the ordering or delivery of other

equipment, has CWWI broken the MOU because it has not ordered the "required" equipment as soon as reasonably practicable?

546. In my judgment, the word "required" refers to the equipment required to effect the interconnection of the networks. If an item is required in this sense and if CWWI orders such an item, even though it could have supplied itself from stock, CWWI is complying with its obligations and is therefore not in breach of its obligations; in particular, it is not obliged to supply itself from its own stock.

WERE THERE BREACHES OF THE LEGISLATION?

547. Although I have now held that Digicel TCI does not have a cause of action in TCI arising out of any breach of the legislation, I have heard detailed evidence and submissions in relation to the matters of complaint in TCI. I will therefore make findings of fact on the matters of complaint put forward by Digicel TCI.

548. As a discussion of the matters of complaint in TCI and my findings of fact in respect of those matters are somewhat lengthy, it is convenient to set out that discussion and my findings separately in Annex G dealing with TCI.

549. In reaching my conclusions on the matters of complaint in TCI, I have directed myself in accordance with my earlier rulings on the meaning and effect of the legislation in TCI. My overall conclusion in relation to the allegations in respect of TCI is that the Claimants have failed to establish that CWWI was in breach of duty under the legislation in relation to interconnection.

WERE THERE BREACHES OF THE MEMORANDUM OF UNDERSTANDING?

550. In Annex G to this judgment, I have discussed in detail the claims made by Digicel TCI that CWWI committed breaches of contract, namely, the memorandum of understanding ("MOU") dated 23rd February 2006. I have concluded for the reasons set out in Annex G that CWWI did commit breaches of the MOU in that it delayed in ordering interconnection equipment until 6th April 2006 when it should have ordered all such equipment by 24th March 2006. CWWI committed a futher breach of the MOU by failing to keep Digicel TCI informed of the progress in relation to the ordering and delivery of the interconnection equipment.

551. I have also concluded for the reasons given in Annex G that these breaches of contract did not cause delay to the completion of interconnection in TCI and did not otherwise cause loss to Digicel TCI.

JOINT TORTS AND CONSPIRACY

552. In TCI, the Claimants' case was that the breaches of the legislation were committed by CWWI and that C&W plc was a joint tortfeasor and/or a conspirator with CWWI. In view of my earlier findings, no question of joint torts arises.

553. As regards the allegation of conspiracy to injure by unlawful means, I have held that any breach of the legislation or the licence did not constitute unlawful means and, in any event, there was no such breach.

554. Digicel TCI also alleges that CWWI and C&W plc conspired together to commit a breach of contract, i.e. a breach of the MOU. It is said that a breach of contract constitutes unlawful means for the tort of conspiracy. I have held that CWWI committed a breach of the MOU but I have also held that the breach did not cause damage to Digicel TCI. As there was no resulting damage, there cannot have been an actionable conspiracy on that ground alone. I note that the Claimants do not allege that C&W plc induced CWWI to commit the breach of contract in TCI. To my mind, if the Claimants were going to allege that C&W plc had participated in some way in the breach of contract by CWWI, I would have expected the Claimants to put their case on the basis that C&W plc induced a breach of contract. That way of putting the case would, at least have allowed the Claimants to rest their case on a recognised tort rather than take on the burden of showing that a breach of contract constitutes unlawful means for the tort of conspiracy to injure by unlawful means.

555. In Annex I to this judgment, I discuss the matters which would need to be addressed before a court would recognise a tort of conspiracy to commit a breach of contract alongside the established tort of inducing a breach of contract. For the reasons given in Annex I, I have decided not to attempt to answer the general question of law as to whether a breach of contract constitutes unlawful means for the tort of conspiracy to injure by unlawful means.

556. For the sake of completeness, I will make my findings of fact as to whether C&W plc did combine with CWWI to commit a breach of the MOU.

557. There is absolutely no material on which I could find that C&W plc did combine with CWWI to commit the breach of the MOU. The breach of contract came about as a result of the actions or omissions of the employees of the business unit in TCI, in particular, Mr Gibbs. The carrier services team within CWWI did not induce that breach or combine with Mr Gibbs, or anyone else in the business unit in TCI, to commit that breach. C&W plc was wholly remote from any of the matters which led to the breach of contract in TCI.

558. More generally, as regards the role of C&W plc in TCI, the comments I made when discussing the allegation that C&W plc was involved in a conspiracy in SLU apply also to the position in TCI.

559. In their closing submissions, the Defendants did not ask me to make any findings in relation to TCI on the subject of the existence of an honest belief so as to negative an intention to injure. Accordingly, I will not consider that question in relation to TCI.

DAMAGES

560. I have held, as explained in Annex G to this judgment, that CWWI committed breaches of the MOU but those breaches did not cause loss to Digicel TCI. Digicel TCI is therefore entitled to receive only nominal damages for breach of contract.

561. There was a lengthy and detailed dispute on the issue of fact whether, if CWWI's breach of the MOU or any breach of duty under the legislation in TCI had caused delay to interconnection in TCI, any such delay in interconnection had caused delay to Digicel TCI's launch of its telecommunications service in TCI. The Claimants said that the Digicel TCI was delayed in relation to its launch for more or less the full period of any delay in relation to interconnection. CWWI said that Digicel TCI had many other matters to deal with, apart from interconnection, before it could be ready to launch and, on the detailed facts, Digicel TCI was not ready to launch before it actually did so. Accordingly, any delay on the part of CWWI in relation to interconnection had not made any difference to the date when Digicel TCI launched in TCI.

562. I have decided that I will not attempt to determine the very many issues which arose in this respect. First of all, I have determined that there was no delay to interconnection by reason of any breach of any obligation placed on CWWI. Secondly, I have held on the facts that there was no conspiracy between CWWI and C&W plc in relation to TCI. Thirdly, I have held that even if there had been a conspiracy to act in breach of the legislation in TCI, it would not have been actionable. Fourthly, if I attempted to deal with the many points of detail as to a possible delay to the launch in TCI, I would immediately face the difficulty of having to make an assumption of fact, which I have not held to be well founded, as to when interconnection should have been completed and then to ask whether interconnection on such an assumed date would have allowed Digicel TCI to launch earlier than it actually did. Indeed, I think that I would have to deal with a number of possible assumed dates depending on what conduct on the part of CWWI is to be assumed (contrary to my actual findings) to have been a breach of its obligations. The assumed dates of interconnection could have a bearing on the effect of the allegedly delayed interconnection on a planned launch. Fifthly, any attempt to make findings of fact on the question of a possible delayed launch in TCI would involve a very considerable amount of time and delay in concluding my judgment. Sixthly, there were significant arguments as to whether I should permit the Claimants to advance a case that they were delayed from a specified date or alternative specified dates when those dates were not pleaded and the date of commencement of delay, which was pleaded in relation to TCI, was not contended for by the Claimants in their closing submissions. If I were otherwise minded to make findings of fact as to a possible delay to the launch in TCI, it would be necessary to set out in some detail the procedural history in relation to this question and to examine the legal basis for the Defendants' proposition. This is an additional reason why it is disproportionate to go further into the facts as to any such delay to launch. Finally, in relation to any assessment of when Digicel TCI would have been able to launch, the Claimants invited me to take the burdensome course of reading additional documents which they supplied as part of their closing submissions and which had not been examined at any earlier stage of the trial and had not been put to any witness.

563. In these circumstances, I conclude that it is not proportionate to go further than I have done and I will not make findings on the allegation that a delay in interconnection, in alleged breach of the legislation in TCI, did cause delay to Digicel TCI's launch. Further, it is not appropriate to discuss the law or the facts as to whether the present is a case of exemplary damages or what have been called restitutionary damages.

THE RESULT IN TURKS AND CAICOS ISLANDS

564. My conclusion is that Digicel TCI is entitled to an award of nominal damages against CWWI for breach of the MOU.

565. All other claims by Digicel TCI against CWWI and all of its claims against C&W plc will be dismissed.

PART 9: THE OVERALL RESULT

566. The result in SLU is that all claims by Digicel SLU against CWWI and C&W plc will be dismissed.

567. The result in SVG is that all claims by Digicel SVG against CWWI and C&W plc will be dismissed. Further the claim by Digicel Ltd in relation to SVG will be dismissed.

568. The result in Grenada is that all claims by Digicel Grenada against C&W Grenada, CWWI and C&W plc will be dismissed.

569. The result in Barbados is that all claims by Digicel Barbados against C&W Barbados, CWWI and C&W plc will be dismissed.

570. The result in Cayman is that all claims by Digicel Cayman against C&W Cayman, CWWI and C&W plc will be dismissed

571. The result in T&T is that the surviving claim which is a claim by Digicel T&T against TSTT will be dismissed. All other claims by Digicel T&T against TSTT and all claims against CWWI and C&W plc have been abandoned and will be dismissed.

572. The result in TCI is that Digicel TCI is entitled to an award of nominal damages for breach of contract against CWWI. All other claims by Digicel TCI against CWWI and all claims against C&W plc will be dismissed.

ANNEX A – ST LUCIA

THE ECTEL TREATY	1
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THE ECTEL TREATY

1. St Lucia was a signatory to the Treaty ("the Treaty") establishing the Eastern Caribbean Telecommunications Authority ("ECTEL").

2. The Preamble to the Treaty is in the following terms:

> *The Governments of the Contracting States,*
> *DESIROUS of creating a competitive environment for telecommunications in the Contracting States:*
> *CONSCIOUS that the benefits of universal telecommunications services should be realised by the people of the Contracting States:*
> *DETERMINED to provide affordable, modern, efficient, competitive, and universally available telecommunications services to the people of the Contracting States:*
> *CONVINCED that a liberalised and competitive telecommunications sector is essential for the future economic and social development of the Contracting States:*
>
> *RECOGNISING that a harmonised and co-ordinated approach by the Contracting States is required to achieve a liberalised and competitive telecommunications sector:*
>
> *HAVE AGREED AS FOLLOWS:*

3. Article 1 of the Treaty contains definitions which include the following defined terms:

> *For the purposes of this Treaty,*
>
> …

"Contracting States" means the Commonwealth of Dominica, Grenada, Saint Christopher and Nevis, Saint Lucia, Saint Vincent and The Grenadines, and any State which becomes a party to this Treaty by virtue of Article 22;

…

"ECTEL" means the Eastern Caribbean Telecommunications Authority established by this Treaty;

…

"frequency authorisation" means an authorisation granted by the Minister to use radio frequencies in connection with the operation of a network or the provision of services under an individual license or class license or otherwise;

"individual licence" means a telecommunications licence issued to a particular person on terms specific to that person;

…

"telecommunications" means any form of transmission emission, or reception of signs, signals, text images and sounds, or other intelligence of any nature by wire, radio, optical or other electromagnetic system;

"telecommunications licence" means a licence issued to a telecommunications provider for the operation of a telecommunications network or the provision of telecommunications services;

"telecommunications provider" means a person who is licensed to operate a telecommunications network or to provide telecommunications services;

"telecommunications services" means services provided by a telecommunications provider;

…

"universal service" includes:
(a) public voice telephony to the population of a Contracting State;
(b) Internet access to the population of a Contracting State;

(c) telecommunications services to schools, hospitals and similar institutions and to the disabled and physically challenged;
(d) the promotion of telecommunications services so as to ensure that as wide a range of people as possible share in the freedom to communicate by having access to efficient and modern telecommunications at an affordable cost;

…

4. The following Articles of the Treaty are material:

ARTICLE 2
Establishment of the Eastern Caribbean Telecommunications Authority
By this Treaty the Contracting States establish for and among themselves the Eastern Caribbean Telecommunications Authority (hereinafter called ECTEL).

ARTICLE 3
General Obligations
1. The Contracting States undertake to put in place all appropriate measures, including the enactment of an appropriate legal and regulatory framework to promote the purposes of this Treaty, the performance of their obligations under this Treaty, the implementation of the decisions of the Council and other matters for the efficient and effective operations of ECTEL.
2. The Contracting States undertake to put in place in their respective jurisdictions a
Telecommunications regulatory body to be known as the National Telecommunications Regulatory Commission which shall co-ordinate and liaise with ECTEL.

ARTICLE 4
Purposes of ECTEL
*1. The major purposes of ECTEL shall be to promote-**:***
(a) open entry, market liberalisation and competition in telecommunications of the Contracting States;
(b) harmonised policies on a regional level for telecommunications of the Contracting States;
(c) a universal service, so as to ensure the widest possible access to telecommunications at an affordable rate by the people of the Contracting States and to enable the people of the Contracting States to share in the freedom to communicate over an efficient and modern telecommunications network;
(d) an objective and harmonised regulatory regime in telecommunications of the Contracting States;
(e) fair pricing and the use of cost-based pricing methods by

telecommunications providers in the Contracting States;
(f) fair competition practices by discouraging anti-competitive practices by telecommunications providers in the Contracting States;
(g) the introduction of advanced telecommunications technologies and an increased range of services in the Contracting States;
(h) increased penetration of telecommunications in the Contracting States;
(i) the overall development of telecommunications in the Contracting States;
(j) national consultations in the development of telecommunications.
2. To advance the purposes of ECTEL the Contracting States undertake to -:
(a) collaborate and co-ordinate with each other and with ECTEL;
(b) take all appropriate measures for ensuring implementation of the policy and recommendations of ECTEL;
(c) meet the financial and other commitments under this Treaty to ensure the efficient operations of ECTEL.

ARTICLE 11
Licences and Frequency Authorisations
1. The Contracting States agree that -:
(a) each application made in a Contracting State for an individual licence shall be submitted to ECTEL for its review and recommendation in order to ensure compliance with ECTEL's technical and financial requirements and this Treaty;
(b) an application for a class licence in a Contracting State shall be submitted to the relevant licensing authority in the Contracting State;
(c) an application for a licence solely for the purposes of telecommunications services in a Contracting State shall be submitted to the relevant licensing authority in the Contracting State;
(d) an application for a frequency authorisation in a Contracting State shall be submitted to ECTEL;
(e) ECTEL shall manage the spectrum on behalf of the Contracting States.
2. The Contracting States undertake to ensure that the following matters are taken into account in the granting of a licence:
(a) the promotion of the objective of universal service so that the largest possible number of persons may share in the freedom to communicate over an efficient and modern telecommunications network at affordable prices;
(b) the protection of the interests of subscribers, purchasers and other users of telecommunications services, particularly with respect to privacy;
(c) the promotion of competition among providers of telecommunications services;
(d) the promotion of research, development and introduction of new telecommunications services and telecommunications technology;
(e) the encouragement of local investment in telecommunications;
(f) the safeguarding of the public interest and national security;
(g) the development of human resources through training and transfer of technology.

ARTICLE 13
Settlement of Disputes between Licencees
1. In the event of a dispute between licencees, a Contracting State may-
(a) refer the matter to ECTEL for an opinion; or
(b) with the consent of the licencees, refer the matter to ECTEL for mediation.
2. Upon receipt of a reference for an opinion from a Contracting State, ECTEL shall
review the facts and the questions of law presented and, within thirty days of receipt of the reference, provide an opinion and a recommendation for the resolution of the dispute.
3. Where further information is required to provide an opinion or recommendation ECTEL shall within ten days of the receipt of the reference, request the Contracting State to supply the further information required by a date specified by ECTEL.
4. ECTEL shall, within thirty days of receiving the further information or documentation required, provide the opinion and recommendation accordingly to the Contracting State or where the information is not provided ECTEL shall provide the opinion within thirty days of the specified date.
5. Upon request of a reference for mediation ECTEL shall, in consultation with the licencees, ensure early commencement of the mediation and on conclusion provide the Contracting State and licencees with a report.

THE TELECOMMUNICATIONS ACT 2000

5. The Telecommunications Act 2000 was in force at all material times.

6. The objects of the Telecommunications Act 2000 were set out in section 3 of the Act as follows:

***3.**— (1) The principal object of this Act is to give effect to the purposes of the Treaty and to regulate the telecommunications sector in Saint Lucia.*
(2) Without limiting the generality of subsection (1) the objects of this Act are to ensure —
(a) open entry, market liberalisation, and competition in telecommunications;
(b) policies and practices in relation to the management of telecommunications are in harmony with those of ECTEL;
(c) the operation of a universal service regime so as to ensure the widest possible access to telecommunications at an affordable rate by the people of Saint Lucia in order to enable them to share in the freedom to communicate over an efficient and modern telecommunications network;
(d) fair pricing and the use of cost-based pricing methods by telecommunications providers in Saint Lucia;
(e) fair competition practices by telecommunications providers;
(f) the introduction of advanced telecommunications technologies

and an increased range of services;
(g) the public interest and national security are preserved;
(h) the application of appropriate standards in the operation of telecommunications;
(i) the overall development of telecommunications in the interest of the sustainable development of Saint Lucia.

7. Section 4(1) of the Telecommunications Act 2000 contained a number of defined terms, including the following:

"interconnection" means the connection of two or more separate telecommunication systems, networks, links, nodes, equipment, circuits and devices involving a physical link or interface.

…

"telecommunications" means any form of transmission, emission, or reception of signs, text, images and sounds or other intelligence of any nature by wire, radio, optical or other electromagnetic means;

"telecommunications facilities" means any facility, apparatus or other thing that is used or capable of being used for telecommunications or for any operation directly connected with telecommunications, and includes a transmission facility;

"telecommunications network" means any wire, radio, optical, or other electromagnetic system used to route, switch, or transmit telecommunications;

"telecommunications provider" means a person who is licensed under this Act to operate a telecommunications network or to provide telecommunications services;

"telecommunications services" means services provided by means of telecommunications facilities and includes the provision in whole or in part of telecommunications facilities and any related equipment, whether by sale, lease or otherwise, or such other services as may be prescribed by the Minister from time to time;

…

8. Section 4(2) of the 2000 Act provided:

(2) Except so far as the contrary intention appears, an expression that is used both in this Act and in the Treaty (whether or not a particular meaning is assigned to it by the Treaty) has in this Act the same meaning as in the Treaty.

9. Section 7 conferred powers on the relevant Minister, as follows:

> ***7.***— *(1) The Minister may grant —*
> *(a) an individual licence;*
> *(b) a class licence;*
> *(c) a frequency authorisation in respect of a licence; or*
> *(d) a special licence.*
> *(2) Where the Minister fails to grant to an applicant a licence or frequency authorisation he or she shall give that applicant his or her reasons for that decision in writing.*
> *(3) The Minister, on receipt of a recommendation from ECTEL shall by notice published in the Gazette, specify the telecommunications networks and services that are subject to an individual licence, a class licence or a frequency authorisation.*
> *(4) In the exercise of his or her powers the Minister shall consult with the Commission.*
> *(5) The Minister shall wherever practicable in the exercise of his or her powers —*
> *(a) adopt the form, document, process and subsidiary legislation as recommended by ECTEL; and*
> *(b) implement policy and recommendations proposed by ECTEL.*

10. Part II of the 2000 Act established the National Telecommunications Regulatory Commission and contained a number of provisions as to its functions and powers. The most relevant provisions are:

> ***Establishment of Commission***
> ***8.***— *(1) There is established a Commission under the general direction and control of the Minister to be known as the National Telecommunications Regulatory Commission.*
> *(2) The Commission shall consist of not less than three and not more than five commissioners, all of whom shall be appointed by the Minister on such terms and conditions as he or she may specify in their instruments of appointment.*
> *(3) The Minister shall appoint one of the commissioners to be the Chairperson.*
>
> *…*
>
> ***Functions of Commission***
> ***12.***— *(1) The functions of the Commission are to —*
> *(a) advise the Minister on the formulation of national policy on telecommunications matters with a view to ensuring the efficient, economic and harmonised development of the telecommunication and broadcasting services and radio communications of Saint Lucia;*
> *(b) ensure compliance with the Government's international obligations on telecommunications;*

(c) be responsible for technical regulation and the setting of technical standards of telecommunications and ensure compatibility with international standards;
(d) plan, supervise, regulate and manage the use of the radio frequency spectrum in conjunction with ECTEL, including the assignment and registration of radio frequencies to be used by all stations operating in Saint Lucia or on any ship, aircraft, vessel, or other floating or airborne contrivance or spacecraft registered in Saint Lucia;
(e) regulate prices for telecommunications services;
(f) advise the Minister in all matters related to tariffs for telecommunications service;
(g) collect all fees prescribed and any other tariffs levied under this Act or Regulations;
(h) receive and review applications for licences and advise the Minister accordingly;
(i) monitor and ensure that licensees comply with the conditions attached to their licences;
(j) review proposed interconnection agreements by telecommunications providers and recommend to the Minister whether or not he should approve such agreements;
(k) investigate and resolve any dispute relating to interconnections or sharing of infrastructure between telecommunications providers;
(l) investigate and resolve complaints related to harmful interference;
(m) monitor anti-competitive practices in the telecommunications sector and advise the national body responsible for the regulation of anti-competitive practices accordingly;
(n) maintain a register of licensees and frequency authorisation holders;
(o) provide the Minister with such information as he may require from time to time;
(p) undertake in conjunction with other institutions and entities where practicable, training, manpower planning, seminars and conferences in areas of national and regional importance in telecommunications;
(q) report to and advise the Minister on the legal, technical, financial, economic aspects of telecommunications, and the social impact of telecommunications;
(r) manage the universal service fund;
(s) perform such other functions as are prescribed.
(2) In the performance of its functions the Commission shall where necessary, consult and liaise with ECTEL.

Powers of Commission
***13.**— (1) The Commission shall have the power to do all things necessary or convenient to be done for or in connection with the performance of its functions.*
(2) Without limiting the generality of subsection (1), the Commission has the power to —
(a) acquire information relevant to the performance of its

functions including whether or not a person is in breach of a licence, frequency authorisation or this Act;
(b) require payment of fees;
(c) initiate legal proceedings against a licensee or authorised frequency holder for the purposes of compliance;
(d) hold public hearings pertaining to its functions;
(e) sit as a tribunal;
(f) do anything incidental to its powers.

…

Commission to provide guidelines
***15.**— (1) The Commission may, on the recommendation of ECTEL, provide guidelines as to the cost and pricing standards on which the reasonableness of the rates, terms and conditions of interconnections will be determined, and on other matters as prescribed.*
(2) Guidelines determined by the Commissioner under subsection (1) shall be Available to the public at the office of the Commission during business hours or made available to a person on payment of the prescribed fee.
(3) The Commission may give written directions to a licensee or frequency authorisation holder in connection with the performance of its functions or to implement the guidelines of the Commission.

Commission to investigate complaints
***16.**— (1) The Commission shall investigate a complaint by a person who is aggrieved by the actions or conduct of a telecommunications provider in respect of a decision against that person.*
(2) The Commission shall investigate a complaint only where that person has first sought redress for the complaint from that telecommunications provider and that complaint has not been amicably resolved.

Disputes between licensees
***17.**— (1) The Commission, when presented with a dispute between licensees requiring an interpretation of licences, frequency authorisations or regulations, shall refer the matter to ECTEL with a request that ECTEL provide the Commission with an opinion, or with the consent of the licensees refer the matter to ECTEL for mediation or arbitration and in keeping with the provisions of the Treaty.*
(2) The Commission shall take account of the opinion and recommendation of ECTEL in resolving the relevant dispute.

Dispute resolution
***18.**— (1) The Commission shall, wherever practicable, apply conciliation, mediation, and alternative dispute resolution techniques in resolving disputes*
(2) For the following purposes the Commission is hereby established as a telecommunications tribunal —
(a) to hear and determine disputes between licensees of telecommunications services;
(b) to hear and adjudicate disputes between licensees and the

public involving alleged breaches of the Act or regulations, or licences or frequency authorisations;
(c) to hear and determine complaints by subscribers relating to rates payable for telecommunications services;
(d) to hear and determine claims by a licensee for a change in rates payable for any of its services;
(e) to hear and determine objections to agreements between licensees;
(f) of its own motion or at the instance of the Minister, to review and determine the rate payable for any telecommunications service;
(g) to hear and determine complaints between licensees and members of the public.
(3) The tribunal under subsection (2) shall comprise the chairperson and two other Commissioners nominated for the purpose by the Chairperson.
(4) Where a Commissioner withdraws from any proceedings on a matter before the Commission on account of interest, illness or otherwise, the Commission shall not be disqualified for the transaction of business by reason of such vacancy among its members, save that in the case of an equality of votes the Chairperson shall have a casting vote.

Hearing of matter by Commission
19.*— (1) The Commission shall expeditiously hear and inquire into and investigate any matter which is before it, and in particular shall hear, receive and consider statements, arguments and evidence made, presented or tendered —*
(a) by or on behalf of any complainant;
(b) by or on behalf of the telecommunications licensee or provider;
(c) on behalf of the Minister.
(2) The Commission shall determine the periods that are reasonably necessary for the fair and adequate presentation of the matter by the respective parties thereto and the Commission may require those matters to be presented within the respective periods so determined.
(3) The Commission may require evidence or arguments to be presented in writing and may decide the matters upon which it will hear oral evidence or arguments.
(4) All matters brought before the Commission shall be determined by a majority of the members thereof.
(5) Any party to a matter brought before the Commission shall be entitled as of right to appeal to the Court of Appeal from any judgement, order or award of the Commission.

Appearance
20. *Every party to a matter shall be entitled to appear at the hearing thereon, and may be represented by an attorney or any other person who in the opinion of the tribunal is competent to assist such person in the presentation of the matter.*

Powers of Commission when sitting as a tribunal
21.*— (1) The Commission shall have powers to:*
(a) issue summons to compel the attendance of witnesses;

(b) examine witnesses on oath, affirmation or otherwise; and
(c) compel the production of documents.
(2) Summons issued by the Commission shall be under the hand of the Chairperson.
(3) Sections 64, 65, 66 and 67 shall apply in respect of the commission when sitting as a tribunal.

Awards
22. *In addition to the powers conferred on the Commission under section 13, the Commission may, in relation to any matter brought before it —*
(a) make provisional or interim orders or awards relating to the matters or part thereof, or give directions in pursuance of the hearing or determination;
(b) dismiss any matter or part of a matter or refrain from further hearing or from determining the matter or part thereof if it appears that the matter or part thereof is trivial or vexatious or that further proceedings are not necessary or desirable in the public interest;
(c) order any party to pay costs and expenses, including expenses of witnesses, as are specified in the order;
(d) generally give all such directions and do all such things s are necessary or expedient for the expeditious and just hearing and determination of the matter.

Review by Commission
23. *The commission may review, vary or rescind its decisions or order made by it; and where a hearing is required before that decision or order is made, the decision or order shall not be suspended or revoked without a further hearing.*

Directions by the Minister
24. *The Minister may give directions to the Commission of a policy nature, and the Commission shall comply with those directions.*

11. Part III of the 2000 Act deals with licensing of Telecommunications Providers. The more relevant provisions are as follows:

Prohibition on engaging in services without a licence
29. *— (1) A person shall not establish or operate a telecommunications network or provide a telecommunications service without a licence.*
(2) Where a frequency authorisation is necessary for or in relation to the operation of a telecommunications network or a telecommunications service, a person shall not operate that network or service without that authorisation.
(3) A person who wishes to land or operate submarine cables within the territory of Saint Lucia for the purpose of connecting to a telecommunications network shall first obtain a licence, in addition to any other approvals, licences or permits required under the law in force in Saint Lucia.

(4) A person who contravenes subsection (1) or (2) or (3) commits an offence and shall be liable on indictment to a fine not exceeding one million dollars or to imprisonment for a period not exceeding ten years.

Procedure of grant of individual licence

***30.**— (1) An applicant for an individual licence shall submit his application in the prescribed form to the Commission for consideration by ECTEL, together with the prescribed fee.*

(2) The Commission shall immediately transmit the application to ECTEL, for its review and recommendation.

(3) On receipt of the recommendation from ECTEL, the Commission shall transmit the application together with ECTEL's recommendation to the Minister for consideration of the grant of an individual licence.

(2) Where in the absence of an invitation to tender in respect of telecommunications network or service there is only one applicant the Commission shall submit the application to ECTEL for its review and recommendation;

Content of individual licence

***31.**— (1) The Minister may, in granting the individual licence, include all or any of the terms and conditions specified in Part 1 of the Second Schedule.*

(2) An individual licence shall include the terms and conditions specified in Part 2 of the Second Schedule.

Grant of individual licence

***32.**— (1) The Minister shall, before granting an individual licence, take into account —*

(a) the purposes of the Treaty ;

(b) the recommendation of ECTEL;

(c) whether the objective of universal service will be promoted including the provision of public telephony services sufficient to meet reasonable demand at affordable prices;

(d) whether the interests of subscribers, purchasers and other users of telecommunications services will be protected;

(e) whether competition among telecommunications providers of telecommunications services will be promoted;

(f) whether research, development and introduction of new telecommunications services will be promoted;

(g) whether foreign and domestic investors will be encouraged to invest in telecommunications;

(h) appropriate technical and financial requirements;

(i) whether the public interest and national security interests will be safeguarded;

(j) such other matters as are prescribed.

(2) The Minister shall not grant an individual licence unless ECTEL recommends accordingly.

…

Suspension and revocation of licences and authorisation
41.*— (1) The Minister may suspend or revoke a licence, or vary a term and condition of that licence if it is not a statutory term or condition by a notice in writing served on the licensee.*
(2) The Minister may suspend, revoke or refuse to renew a licence where —
(a) the radio apparatus or station in respect of which the licence was granted interferes with a telecommunication service provided by a person to whom a licence is already granted for that purpose;
(b) the licensee contravenes this Act;
(c) the licensee fails to observe a term or condition specified in his or her licence;
(d) the licensee is in default of payment of the licence or renewal fee or any other money owed to the Government;.
(e) ECTEL recommends the suspension or revocation;
(f) the suspension or revocation is necessary for reasons of national security or the public interest.
(3) Before suspending or revoking a licence under subsection (2), the Minister shall give the licensee one month notice in writing of his or her intention to do so, specifying the grounds on which it proposes to suspend or revoke the licence, and shall give the licensee an opportunity —
(a) to present his or her views;
(b) to remedy the breach of the licence or term and condition; or
(c) to submit to the Minister within such time as the Minister may specify, a written statement of objections to the suspension or revocation of the licence,
which the Minister shall take into account before reaching a decision.
(4) This section also applies with any necessary modification to a frequency authorisation holder.

12. Part IV of the 2000 Act deals with the provision of universal service, interconnection, infrastructure sharing and numbering. The more relevant provisions are as follows:

Provision of universal service
43.*— (1) The Minister may, on the recommendation of ECTEL, include as a condition in the licence of a telecommunications provider a requirement to provide universal service, except that such requirement shall be carried out in a transparent, non-discriminatory and competitively neutral manner.*
(2) A telecommunications provider who is required by its licence to provide universal service to any person shall do so at such price and with the quality of service specified in the licence.
…

Interconnection and infrastructure sharing
46.*— (1) Subject to subsection (5), a telecommunications provider who operates a public telecommunications network shall not refuse, obstruct, or in any way impede another telecommunications provider from making an interconnection with his or her telecommunications network.*

(2) A telecommunications provider who wishes to interconnect with the telecommunications network of another telecommunications provider shall make a request to that other telecommunications provider in writing.
(3) A telecommunications provider to whom a request for interconnection is made, shall, in writing, respond to the request within a period of four weeks from the date of the request.
(4) A telecommunications provider in granting a request pursuant to subsection (3) shall agree, with the person making the request, the date the interconnection shall be effected.
(5) A telecommunications provider to whom a request for interconnection is made may in his response refuse that request in writing on reasonable technical grounds only.
(6) A telecommunications provider on receipt of a refusal for interconnection may refer that refusal to the Commission for review and possible dispute resolution.
(7) A telecommunications provider providing an interconnection service in accordance with this section shall impose reasonable cost based rates, and such other reasonable terms and conditions as the Commission may, on the recommendation of ECTEL, determine.
(8) Any interconnection service provided by a telecommunications provider pursuant to the provisions of subsection (7) above shall be on terms which are not less favourable than:
(a) those of the provider of the interconnection service;
(b) the services of non-affiliated suppliers; or
(c) the services of the subsidiaries or affiliates of the provider of the interconnection service.
(9) No telecommunications provider shall, in respect to any rates charged for interconnection services provided to another telecommunications provider, vary the rates on the basis of the type of customers to be served, or on the type of services that the telecommunications provider requesting the interconnection services intends to provide.

Interconnection agreements
47.*— (1) No person shall enter into any interconnection agreement, implement or provide interconnection service without first submitting the proposed agreement to the Commission for its approval, which approval shall be in writing.*
(2) Interconnection agreements between telecommunications providers shall be in writing, and copies of the agreements shall be kept in a public registry maintained by the Commission for that purpose and open to public inspection during normal working hours.
(3) The Commission shall, after consulting ECTEL, prepare, publish, and make available copies of the procedures to be followed by the telecommunications providers when negotiating interconnection agreements.

Cost of interconnection
48.*— (1) The cost of establishing any interconnection to the telecommunications network of another telecommunications provider shall be borne by the telecommunications provider requesting the interconnection.*

(2) The cost referred to in subsection (1) shall be based on costoriented rates that are —
(a) reasonable and arrived at in a transparent manner having regard to economic feasibility; and
(b) sufficiently unbundled such that the provider requesting the interconnection service does not have to pay for network components that are not required for the interconnection service to be provided.

Infrastructure sharing
49. *Sections 46, 47 and 48 shall apply to infrastructure sharing, mutatis mutandis.*

Access to towers sites and underground facilities
50. *— (1) Where access to telecommunications towers, sites and underground facilities is technically feasible, a telecommunications provider (in this section referred to as the first provider) must, upon request, give another telecommunications provider (in this section referred to as the second provide) access to —*
(a) a telecommunications tower owned or operated by the first provider; or
(b) a site owned, occupied or controlled by the first provider;
(c) an eligible underground facility owned or operated by the first carrier;
for the sole purpose of enabling the second provider to install a facility for use in connection with the supply of a telecommunications service.
(2) A telecommunications provider, in planning the provision of future telecommunications services, must co-operate with other telecommunications providers to share sites and eligible underground facilities.
(3) Access to sites, towers or eligible underground facilities shall, mutatis mutandis, be on such terms as set out in sections 46 to 48 above; and —
(a) on such terms and conditions as are agreed between providers; or
(b) failing agreement as determined by the Commission.

13. Part V of the 2000 Act contains provisions dealing with compliance and management. The more relevant provisions are as follows:

Appointment of inspectors
54. *— (1) The Commission may by instrument in writing appoint inspectors for the purposes of this Act.*
(2) The Commission shall furnish each inspector with an identity card containing a photograph of the holder which he or she shall produce on request in the performance of his functions.
(3) An inspector may investigate any complaint or conduct concerning an allegation of a breach of the Act, licence or frequency authorisation.

…

Parties eligible to seek orders for forfeiture or injunction relief
58. *The court may, on application of the Commission or an interested party—*
(a) make an order for forfeiture of any equipment used for the commission of the offence; and
(b) grant an order restraining a person from engaging in activities contrary to this Act.

14. Part VI of the 2000 Act is concerned with certain defined matters which amount to criminal offences. It is not necessary to refer to the detailed provisions.

15. Part VII of the 2000 Act contains miscellaneous provisions which include the following:

Liability of public and private officials
72. *Where a breach of this Act or licence has been committed by a person other than an individual any individual including a public officer who at the time of the breach was director, manager, supervisor, partner or other similarly responsible individual, may be found individually liable for that breach if,*
(a) having regard to the nature of his of Saint Lucia or her functions;
(b) and his or reasonable ability to prevent that breach;
the breach was committed with his consent or connivance, or he or she failed to exercise reasonable diligence to prevent the breach.

…

Regulations
74.*— (1) The Minister may make Regulations to give effect to this Act.*
(2) Without limiting the generality of sub-section (1), the Minister may make Regulations providing, in particular, for or in relation to —
(a) forms and procedures in respect of the grant of a licence or a frequency authorisation;
(b) matters relating to the provision of universal service and the management of the Universal Service Fund;
(c) the type of terminal equipment to be connected to a public telecommunications network;
(d) interconnection between telecommunications providers, and the sharing of infrastructure by telecommunications providers;
(e) interconnection agreements;
(f) matters relating to the allocation of numbers among the telecommunications providers;
(g) stoppage or interception of telecommunications;
(h) management of the spectrum;
(i) adopting industry codes of practice, with or without amendment;
(j) the procedure and standards relating to the submission, review and approval by the Commission of telecommunications tariffs;

(k) the control, measurement and suppression of electrical interference in relation to the working of telecommunications apparatus;
(l) matters of confidentiality including on the part of all persons employed in or in anyway connected with the maintenance and working of any telecommunications network or telecommunications apparatus;
(m) public inspection of records of the Commission;
(n) procedures for the treatment of complaints;
(o) procedures for dispute resolution;
(p) matters for which guidelines are to be issued by the Commission;
(q) matters relating to the quality of telecommunications services;
(r) technical regulation and setting of technical standards;
(s) fees, including the amount and circumstances in which they are payable;
(t) conduct of public hearings;
(u) private networks and VSATS;
(v) cost studies and pricing models.
(w) submarine cables and landing rights;
(x) registration and management of Domain Names
(3) Where ECTEL recommends regulations for adoption for the purpose of the Agreement the Minister shall take all reasonable steps to ensure their promulgation.

16. Part 1 of the Second Schedule to the 2000 Act sets out the conditions that may be included in licences. These conditions are as follows:

1. Licences and frequency authorisations granted under this Act may contain any or all of the following conditions:
(a) the networks and services which the licensee or authorisation holder is and is not entitled to operate and provide, and the networks to which the network of the licensee or authorisation holder can be connected;
(b) the duration of the licence or authorisation;
(c) the build-out of the network and geographical and subscriber targets for the provision of the relevant services;
(d) the use of radio spectrum;
(e) the provision of services to rural or sparsely populated areas or other specified areas in which it would otherwise be uneconomical to provide services;
(f) the provision of services to the blind, deaf, physically and medically handicapped and other disadvantaged persons;
(g) the interconnection of the licensee's network with those of other operators;
(h) the sharing of telecommunications infrastructure;
(i) prohibitions of anti-competitive conduct;
(j) the allocation and use by the licensee of numbers; and
(k) provision of universal service.

17. Part 2 of the Second Schedule to the 2000 Act sets out the conditions that must be included in licences. It is not necessary to refer to any of these conditions.

THE TELECOMMUNICATIONS (INTERCONNECTION) REGULATIONS 2002

18. The Telecommunications (Interconnection) Regulations 2002 were made pursuant to the Telecommunications Act 2000.

19. Regulation 3 of the 2002 Regulations contains the following material definitions:

> *…*
>
> *"interconnecting operator" means a public telecommunications network operator who requests interconnection from another public telecommunications network operator under the Act;*
>
> *"interconnection capacity" means the ability to provide interconnection;*
>
> *"interconnection provider" means a public telecommunications network operator who receives a request to provide interconnection under the Act;*
>
> *"dominant interconnection provider" means an interconnection provider designated by the Commission as a dominant interconnection provider under regulation 9;*
>
> *"point of interconnection" means the point or points of interconnection where the exchange of telecommunications between the telecommunications network of an interconnection provider and the telecommunications network of an interconnecting operator takes place;*
>
> *…*
>
> *"reference interconnection offer" means a document setting out the terms on which the telecommunications provider proposes to offer interconnection services and that includes a description of the interconnection and other services offered to interconnecting operators and specifies the charges and other terms and conditions on which those services are offered (and "reference interconnection offer provider" shall have a corresponding meaning);*
>
> *…*

20. The Regulations which are relevant for present purposes are as follows:

Notice of request
4. (1) An interconnecting operator shall notify the Commission of any request for interconnection by forwarding two copies of the written request to the Commission, one of which shall be addressed to ECTEL.
(2) A request for interconnection shall contain at least the following information:
(a) a copy of the licence of the interconnecting operator;
(b) the services with respect to which interconnection is sought; and
(c) any other information as specified in the RIO or reasonably required in order for the telecommunications provider to respond to that request.

Equal responsibility
5. An interconnection provider and an interconnecting operator shall act in a manner that enables interconnection to be established as soon as reasonably practicable.

Non-discrimination transparency
6. (1) In providing interconnection, an interconnection provider shall act in accordance with the following principles:
(a) interconnection shall be provided on non-discriminatory terms and conditions including charges and quality of service;
(b) interconnection shall be provided to interconnecting operators under no less favourable terms and of no less favourable quality as the inter-connection provider provides similar services for itself; and
(c) an interconnection provider shall provide on request information reasonably necessary to interconnecting operators considering inter-connection, in order to facilitate the conclusion of any agreements.
(2) The information provided shall include planned changes for implementation within the next 6 months following a request, unless otherwise agreed by the Commission.

Confidentiality
7. (1) A person shall not knowingly communicate, or allow access to information received from a telecommunications provider in respect of interconnection, except to the extent authorised by the telecommunications provider in writing, or by the Act.
(2) Notwithstanding any law, an interconnection provider shall not be required, in connection with any legal proceedings, to produce any statement or other record containing information referred to in sub-regulation (1), or to give evidence relating to it, unless the proceedings relate to the enforcement of this Act.

…

Dominant interconnection provider
9. The Commission shall, acting on the recommendation of ECTEL, by notice published in the Gazette, designate as a dominant telecommunications provider in respect of a particular telecommunications market or markets in Saint Lucia if the

Commission or ECTEL has determined that, after a public consultation process, with respect to that telecommunications provider:
(a) possesses significant market power with respect to the market or markets for telecommunications services in Saint Lucia; and
(b) it is in the long-term interests of consumers of telecommunications services in Saint Lucia that the service be so designated.

…

Burden of proof
11. The burden of providing that interconnection rates are reasonable cost-oriented rates shall lie with the inter-connection provider.

Rate structure
12. (1) The interconnection rates shall be imposed in a transparent manner and shall identify clearly:
(a) charges for interconnection services; and
(b) the contribution to the interconnection provider's access deficit.
(2) Charges for interconnection services shall be cost-oriented, where "cost-oriented" means those charges shall be no higher than the fully allocated cost of providing that service and no lower than the total service long-run incremental cost of providing that service.
(3) Services other than interconnection services provided to an interconnecting operator shall be provided at a rate not exceeding the best retail prices minus avoidable costs of the dominant interconnection provider provided that such prices are not less than the total service long-run incremental cost of the dominant interconnection provider.

Reference
13. (1) Each dominant interconnection provider shall publish a reference interconnection offer.
(2) The reference interconnection offer provider may set different tariffs, terms and conditions for different interconnection services, where such differences can be objectively justified and do not result in the unfair distortion of competition.
(3) The reference interconnection offer provider shall apply the appropriate interconnection tariffs, terms and conditions when providing interconnection for its own services or those of its affiliates, subsidiaries or partners.
(4) The charges of the reference interconnection offer shall be sufficiently unbundled to ensure that the inter-connecting operator requesting interconnection is not required to pay for services not related to the service requested.
(5) Interconnection rates set out in the reference interconnection offer shall be cost-oriented.

Points of interconnection
14. An interconnection provider shall offer interconnection services at any technically feasible point of its telecommunications network, upon request by an interconnecting operator, which shall pay for the investment operations and maintenance expenses of the facilities necessary to reach the point or points of interconnection within the network of the interconnection provider.

…

Form and contents of agreement

16. (1) All interconnection agreements and reference interconnection offers must be in writing and the following matters shall be specified in those agreements except where a particular matter is irrelevant to the specific form of the interconnection requested:

(a) access to ancillary, supplementary and advanced services;

(b) adequate capacity and service levels including the remedies for any failure to meet those service levels;

(c) a provision that deals with regulatory change, including determinations by the Commission;

(d) duration and renegotiation of interconnection agreements;

(e) forecasting, ordering, provisioning and testing procedures;

(f) dispute resolution procedures;

(g) geographical and technical characteristics and locations of the points of interconnection;

(h) information handling and confidentiality provisions;

(i) intellectual property rights;

(j) measures anticipated for avoiding interference or damage to the networks of the parties involved or third parties;

(k) national and international appropriate indexes for service quality;

(l) procedures in the event of alterations being proposed to the network or service offerings of one of the parties;

(m) provisions for the formation of appropriate working groups to discuss matters relating to interconnection and to resolve any disputes;

(n) if appropriate, provision of infrastructure sharing and identification of collocation and their terms;

(o) provision of network information;

(p) technical specifications and standards;

(q) terms of payment, including billing and settlement procedures;

(r) the maintenance of end-to-end quality of service;

(s) the procedures to detect and repair faults, as well as an estimate of acceptable average indexes for detection and repair times;

(t) the scope and description of the interconnection services to be provided;

(u) the technical characteristics of all the main and auxiliary signals to be transmitted by the system and the technical conditions of the interfaces;

(v) transmission of Calling Line Identity, where available to be transmitted;

(w) ways and procedures for the supply of other services that the parties agree to supply to each other, such as operation, administration, maintenance, emergency calls, operator assistance, automated information for use, information on directories, calling cards and intelligent network services;

(x) any other relevant issue; and

(y) the obligations and responsibilities of each party in the event that inadequate or defective equipment is connected to their respective networks.

(2) Public network operators shall make available to interested parties, proposed interconnection agreements or reference interconnection offers.

Connectivity

17. (1) An interconnection agreement shall include provision for any-to-any connectivity to allow each end-user of that network to communicate with each other end-user of public telecommunications services, regardless of whether the end-users are connected to the same, or different, networks.
(2) An interconnection agreement shall include provision for the suspension, termination or amendment of the agreement in the event of:
(a) conduct that is illegal or interferes with the obligations of the telecommunications provider, under the relevant licence, Act or Regulations;
(b) requirements that are not technically feasible;
(c) health or safety problems;
(d) requirements for space that is unavailable; or
(e) circumstances that pose an unreasonable risk to the integrity or security of the network or services of the telecommunications provider, from which the sharing arrangement is requested.
(3) An interconnection agreement shall include a provision to allow for the suspension of interconnection where it is necessary to deal with a material degradation of the telecommunications network or services.

Non-inclusion

18. An interconnection agreement shall not contain any provision which has the effect of:
(a) imposing any unfair or discriminatory penalty or disadvantage upon a person in the exercise of the person's right to be provided with interconnection;
(b) precluding or frustrating the exercise of a person's rights or privileges afforded under the Act or Regulations; and
(c) preventing a licensee from lawfully providing an interconnection service to another telecommunications provider.

Amendment of agreement

19. (1) The parties to an interconnection agreement may amend or modify an agreement which has been approved by the Commission by:
(a) giving not less than 20 days written notice prior to the effective date of the amendment or modification; and
(b) submitting a copy of the proposed amendment or modification to the Commission.
(2) Notwithstanding any provision of the agreement, no interconnection provider shall terminate an interconnection agreement for breach of that agreement unless:
(a) the interconnection provider has given the interconnecting operator a written notice stating the breach, and providing for a period of not less than 3 months during which time the breach may be cured; and
(b) the interconnecting operator has failed to remedy the breach within the notice period; and
(c) if the services provided under the Agreement are essential

services, the Commission, after due notice, has consented to the termination provided that, in the case of an interconnection agreement that provides both essential and other services, only termination with respect to those essential services shall be so restricted.

Procedures for application

20. (1) The parties shall submit a written application of a proposed interconnection agreement to the Commission at least 30 working days prior to the proposed effective date of the agreement.

(2) The Commission shall approve the proposed interconnection agreement if it is satisfied that the proposed interconnection agreement is consistent with:

(a) any reference interconnection offer in force;

(b) where no reference interconnection offer is in force, the principles of interconnection set out in Section 6 of these Regulations.

(3) The Commission shall consult with ECTEL for its advice and recommendations concerning the application, before determining whether to approve the proposed interconnection agreement.

(4) The Commission may request additional information from the parties to a proposed interconnection agreement where it considers it necessary to further evaluate the terms, conditions and charges contained in the proposed inter-connection agreement.

(5) If the Commission notifies the parties that it does not consider that the proposed interconnection agreement is consistent with the principles set out in regulation 6, the interconnection provider and the inter-connecting operator shall negotiate and submit a revised proposed interconnection agreement to the Commission, within a reasonable time, having regard to the matters being the subject of the Commission's request.

(6) Where the Commission does not request additional information or modifications, or rule on the agreement within 30 days of receiving an application for the approval or renewal of the agreement, or 10 days, in the case of an agreement revised in accordance with sub-regulation (5), the Commission shall approve the agreement.

Interconnection not permitted

21. A party shall not negotiate or propose to enter into an interconnection agreement where the Commission determines and rules that:

(a) the law prohibits the interconnection;

(b) the interconnection would endanger life or safety, or damage the property or impair the quality of the services of the party providing the interconnection;

(c) the licence issued to the party from whom the interconnection is requested, exempts it from the obligation to interconnect;

(d) the licence issued to the party requesting interconnection does not authorise the telecommunications services for which interconnection is requested;

(e) the requested interconnection is not technically feasible; or

(f) the proposed interconnection is contrary to the law or the public interest.

…

Dispute resolution
28. (1) Where an interconnection provider and an interconnecting operator are unable, after having negotiated in good faith for a reasonable period, to agree the terms and conditions of an interconnection agreement, either party may request the assistance of the Commission in resolving the dispute.
(2) The Commission, in responding to a request for assistance, may choose to take one or more of the following actions:
(a) act as arbitrator of that dispute; or
(b) appoint a mediator to that dispute; or
(c) direct the parties to commence or continue interconnection negotiations.
(3) Where the Commission appoints a mediator, it may direct that payment of the mediator's reasonable costs and expenses are paid for by the relevant parties to the dispute.
(4) Where the parties cannot agree on a date upon which to commence negotiations, the Commission shall be empowered to compel both parties to commence negotiations by a prescribed date.
(5) The Commission may, if requested by either party, set a time limit within which negotiations on interconnection are to be completed and any such direction shall set out the steps to be taken if agreement is not reached within the time limit.

Role of parties to dispute
29. (1) The complaining party shall submit to the Commission a clear and reasoned statement of the issues in dispute, as well as any issues on which there is agreement.
(2) The opposing party shall respond to the complaint within 30 days and shall state the reasons for its position including any statutory or regulatory justification for that position.

Fairness in dispute resolution
30. (1) When a compliant has been referred to the Commission it shall take steps to resolve the dispute:
(a) as promptly as practicable, having regard to the matters in dispute;
(b) preserving any agreements between the parties over issues that are not in dispute; and
(c) consistent with sub-regulation (2) below.
(2) When acting as an arbitrator, the Commission or ECTEL shall attempt to achieve a fair balance between the legitimate interests of the parties to the dispute, and have regard to the circumstance including the following:
(a) whether the proposed ruling promote the long-term interests of consumers of telecommunications services in Saint Lucia;
(b) the interests of persons who have rights to use the telecommunications networks concerned;
(c) the economically efficient operation of a telecommunications network or the provision of a telecommunications service.

Disconnection of networks
31. (1) Any dispute between parties of an interconnection agreement shall

not cause the partial or total disconnection of the relevant network except in accordance with regulation 17.
(2) Notwithstanding sub-regulation (1), the Commission may decide that partial or total disconnection is necessary and so advise the parties.
(3) Whenever the Commission takes action in accordance with sub-regulation (2), it shall recommend and instruct that preliminary measures are applied to minimise any negative effects on the users of one or both networks.

Guidelines for resolving dispute
32. In exercising its duties under regulation 30, the Commission shall take into account the:
(a) availability of technically and commercially viable alternatives to the interconnection requested;
(b) desirability of providing users with a wide range of telecommunications services;
(c) interests of the users;
(d) nature of the request, in relation to the resources available to meet the request;
(e) need to maintain a universal service;
(f) need to maintain the integrity of the public telecommunications network and the interoperability of services;
(g) promotion of competition;
(h) public interest;
(i) regulatory obligations or constraints imposed on any of the parties; and
(j) her (sic) *relevant and appropriate consideration.*

…

THE LICENCES

21. On 10th October 2001, with effect from 11th October 2001, the relevant Minister granted to CWWI a licence to establish and operate a Fixed Public Telecommunications Network/Service within SLU. The licence was non-exclusive and was for a period of 15 years from 11th October 2001. The licence was stated to be subject to suspension and revocation in accordance with sections 40 and 41 of the Telecommunications Act 2000.

22. Condition 6.4 of the licence conditions stated that the licensee was not to engage in any activities, whether by act or omission, which had or were intended to have or were likely to have the effect of unfairly preventing, restricting or distorting competition in any market for Licensed Services, as specified in Regulations issued by the Minister (presumably the Regulations made under the Act). By condition 6.5, any act or omission was not to involve an abuse of a dominant position or any contract or concerted practice where the effect was or was likely to be a substantial lessening of competition in any market.

23. By condition 12.1, the licensee was to comply with all legislation and regulations and the directions orders and recommendations issued by the Minister or the Commission.

24. On 10th October 2001, with effect from 11th October 2001, the relevant Minister granted to Cable and Wireless Caribbean Cellular (Saint Lucia) Limited a licence to establish and operate a Public Cellular Mobile Telecommunications Network/Service within SLU. The licence was non-exclusive and was for a period of 15 years from 11th October 2001.

25. The licence to Cable and Wireless Caribbean Cellular (Saint Lucia) Limited contained essentially the same terms as those set out above in relation to the fixed network licence.

26. Cable & Wireless Caribbean Cellular (Saint Lucia) Limited is not sued as a Defendant in these proceedings.

27. On 6th September 2002, with effect from 6th September 2002, the relevant Minister granted to Digicel (St Lucia) Limited a licence to establish and operate a Public Cellular Mobile Telecommunications Network/Service within SLU. The licence was non-exclusive and was for a period of 15 years from 6th September 2002.

28. By clause 4.1 of this licence, the Licensee was within 3 months of the effective date (i.e. by 6th December 2002) to commence operations leading to the provision to customers of the Licensed Services. By clause 4.2 of the licence, the Licensee was within 12 months of the effective date (i.e. by 6th September 2003) to provide full service to customers in accordance with the terms of the licence.

THE FACTS

29. On 6th June 2002, Digicel SLU wrote to the carrier services team, acting for CWWI, in relation to interconnection in SLU. Digicel SLU made what it described as a "formal request" for a number of interconnection services.

30. Digicel SLU and CWWI entered into a non-disclosure agreement on 14th June 2002.

31. Representatives of these parties met on 4th July 2002. At this stage, Digicel SLU did not have a telecommunications licence in SLU. It only obtained such a licence on 6th September 2002. CWWI was not prepared to negotiate with Digicel SLU in earnest on the terms of an interconnection agreement in SLU. Those representing CWWI took the view that there was no obligation on CWWI either under the Telecommunications Act or under the relevant regulations to negotiate the subject of interconnection with someone who was not yet a licensee. Digicel SLU also believed this was the position at that stage.

32. Initially, in these proceedings, Digicel SLU contended that CWWI's unwillingness to negotiate the terms of an interconnection agreement in the period before Digicel SLU obtained its licence was a breach of the Telecommunications Act and a breach of the

regulations. It is not necessary to discuss how Digicel SLU put its case in that regard as Digicel SLU now accepts that it cannot put forward any such case.

33. Digicel SLU does allege, however, that a failure by CWWI to negotiate with Digicel SLU from June to September 2002, a period during which Digicel SLU had the status of a potential competitor, was a breach of the terms of CWWI's licence which sought to outlaw various kinds of anti-competitive behaviour. I have already ruled that this attempt to rely on the terms of the licence is unfounded. It follows that CWWI's stance in relation to negotiations prior to the grant of a licence to Digicel SLU on 6th September 2002 did not involve a breach of any duty owed by CWWI.

34. Digicel SLU invites the Court to have regard to what happened, or did not happen, during this period for two other reasons. First, it suggests that CWWI's stance shows that CWWI wished to delay Digicel SLU's entry into the market. Secondly, Digicel SLU says that the fact that a formal request for interconnection was made on 6th June 2002 is part of the background when one assesses CWWI's response following 6th September 2002 to a valid request for interconnection. As to the first of these points, I accept that the principal reason for CWWI being reluctant to attempt to make progress in negotiations prior to 6th September 2002 is that CWWI did not wish to co-operate with Digicel SLU, at that stage, in order to bring forward Digicel SLU's entry into the market. Although CWWI and those representing it were reticent about admitting that fact in the course of the evidence and although it is possible to identify arguments based on other grounds to support CWWI's stance, I accept that the primary reason for its behaviour is as I have described. As to the second point made by Digicel SLU, although the events, or non-events, in the period from 6th June 2002 to 6th September 2002 are potentially relevant to what happened later, in the event, I have not found this background to be of any particular significance when assessing the arguments in relation to the allegations about breaches of duty on or after 6th September 2002.

35. I now deal with the topic of the possible ordering of equipment by CWWI before the parties had agreed the terms of an interconnection agreement. As stated above, Digicel SLU obtained its licence in St Lucia on 6th September 2002. On the same day, Digicel SLU wrote to the carrier services team, acting for CWWI, to request interconnection. Representatives of the two sides met on 11th September 2002. Digicel SLU asked CWWI to order the equipment intended to be used on the CWWI side of physical interconnection at that stage rather than waiting until the interconnection agreement was finalised. There is a minor dispute of fact as to CWWI's response to that request. I find that Mr Batstone of carrier services, on behalf of CWWI, stated that he would take this request for pre-ordering equipment back to Mr Thompson. Mr Batstone did not, as was alleged at the trial, agree at that meeting to pre-order equipment.

36. There is another minor dispute of fact as to what was discussed at that meeting. This relates to the question whether it was Digicel SLU who was to provide a list of the equipment it needed to CWWI or CWWI was to provide to Digicel SLU a list of the equipment which Digicel SLU needed. I find as a fact that what was discussed was

that Digicel SLU would provide to CWWI a list of the equipment which Digicel SLU believed it needed.

37. The parties met again on the 17th September 2002. Mr Batstone on behalf of CWWI told Digicel SLU that CWWI would not order equipment in advance of finalising the interconnection agreement. He gave three reasons for CWWI's stance. He said, first, that ordering equipment for interconnection with Digicel SLU would be an unhelpful precedent in the case of other persons requesting interconnection, secondly, that it would expose CWWI to financial risk and, thirdly, there would be difficulties with obtaining internal approval at CWWI for the capital expenditure involved. He did not say that CWWI's reasons were, or included, the consideration that postponing the ordering of equipment until the interconnection terms were agreed would assist CWWI in the negotiations as to those terms.

38. At the meeting on 17th September 2002, Digicel SLU stated that it would order the equipment needed for the CWWI side of physical interconnection and transfer ownership later. Mr Batstone stated that CWWI would have to place the order itself in order to get a discount on the price from the supplier, Nortel.

39. Mr Thompson was not at the meeting on 17th September 2002. On the same day as the meeting, Mr Thompson sent an email to Errald Miller, who was the CEO of CWWI at that time. Mr Thompson told Mr Miller that he had instructed the carrier services team conducting the negotiations on behalf of CWWI that CWWI would not purchase equipment nor agree to take over equipment purchased by Digicel SLU on CWWI's behalf until the interconnection agreement had been approved by the regulator. Mr Thompson stated his belief that the best chance to get a "reasonable agreement approved is to introduce time pressure into the process." Mr Thompson stated that he expected that the ministers and/or the regulator might try to pressurise CWWI into early ordering of equipment.

40. There were further communications between the parties on this question of ordering equipment before the interconnection agreement was finalised and/or approved by the regulator. Digicel SLU continued to press CWWI hard on this point. CWWI continued to resist. The communications contained arguments as to the three grounds of objection put forward by Mr Batstone at the meeting of 11th September 2002. Digicel SLU explained its view that pre-ordering would not be an unfortunate precedent. It also explained that the question of financial exposure could be dealt with by provision of security by Digicel SLU and it questioned the reality of the suggested difficulty in relation to capital expenditure.

41. The parties met again on 4th October 2002. The carrier services team on behalf of CWWI repeated that CWWI would not order its equipment until the interconnection agreement was approved by the regulator. Digicel SLU suggested that the parties should try to agree an interim agreement setting out all the matters they could agree, and leaving other maters to be determined by the regulator, but so that interconnection could proceed on the basis of the interim agreement. CWWI did not accept that suggestion.

42. Digicel SLU asked CWWI to get in touch with Nortel to forecast for Nortel's benefit the equipment which CWWI was likely to order in due course so that Nortel could schedule the manufacture of that equipment into its production schedule. CWWI turned down this request. In evidence at the trial, Mr Thompson accepted that there would not have been any prejudice to CWWI in giving a forecast of that kind to Nortel.

43. On 19th October 2002, Digicel SLU requested CWWI to give permission for a Nortel representative to carry out a survey of two possible points of interconnection on CWWI sites. On 22nd October 2002, CWWI replied that they would consider the requested Nortel survey when the parties had entered into a signed interconnection agreement. The evidence on behalf of CWWI at the trial was that CWWI would be happy for a Nortel engineer to carry out a survey but only if CWWI instructed the engineer and invited the engineer to its site.

44. On 24th October 2002, there is an internal email from Mr Thompson of carrier services, acting on behalf of CWWI, referring to the fact that Digicel SLU was intending to buy equipment for the CWWI side of physical interconnection. Mr Thompson made plain his opposition to that suggestion. He suggested that someone from carrier services should have "a subtle chat" with the right person in Nortel essentially for the purpose of advising Nortel that it was not to use any information it had from C&W as a client to assist when fulfilling the order to be placed by Digicel SLU.

45. Digicel SLU ordered the equipment for CWWI's side of physical interconnection around this time (the precise date does not matter) and told CWWI that it had done so on the 27th September 2002. That equipment was delivered to SLU on or about 24th November 2002.

46. In January 2003, there were a number of days of negotiations between Digicel SLU and CWWI. Those negotiations were attended by government representatives from SLU (and SVG). Mr Thompson of carrier services on behalf of CWWI obviously saw the question of CWWI ordering equipment, or using the equipment which Digicel had ordered and which was in SLU, as a difficult topic in the negotiations. On 20th January 2003, Mr Thompson sent an email to Mr Lerwill, who was the Deputy Chief Executive of C&W Plc and the Chief Executive of C&W Regional. Mr Thompson contacted Mr Lerwill because he needed Mr Lerwill's approval to the capital expenditure involved in the proposal contained in the email. At that time there was a freeze on capital expenditure and Mr Lerwill was the only person in C&W Regional allowed to authorise the relevant expenditure. Mr Thompson explained to Mr Lerwill that the carrier services team's policy had been to purchase equipment only when the parties had finalised an interconnection agreement which had been approved by the regulator. Mr Thompson stated that Digicel SLU, having bought the equipment for CWWI, was applying pressure for CWWI to accept ownership of the equipment to speed up physical interconnection. Mr Thompson thought this would be an unhelpful precedent. He stated that the lead time for delivery of the main items of the equipment was typically 4 to 6 weeks. Mr Thompson believed that he could resist the pressure to

accept the equipment which had been purchased by Digicel SLU for CWWI if he could tell the Government representatives and Digicel SLU that CWWI had actually placed an order for its own equipment. The value of ordering equipment at that stage was described by Mr Thompson as "tactical". On 21st January 2003, Mr Lerwill approved the capital expenditure involved in Mr Thompson's request. CWWI then ordered the equipment on or about 24th January 2003.

47. Further negotiations took place in SLU on 19th, 21st and 22nd January 2003 and in Miami on 28th and 29th January 2003. Digicel SLU says that it finally agreed terms with CWWI because it wanted to get on with physical interconnection. The parties signed an interconnection agreement on 31st January 2003. That agreement was submitted to the regulator for his approval and the agreement was approved on 13th March 2003. In the meantime, the equipment ordered by CWWI arrived in SLU on 19th February 2003 and cleared customs on or about 26th February 2003.

48. I can summarise the position as follows. On 11th September 2002, Digicel SLU requested CWWI to order, at that stage, the equipment needed by CWWI. On 17th September 2002, CWWI stated that it would not order the equipment at that stage. CWWI at all times thereafter until 24th January 2003 maintained the stance that it would not order equipment until the parties had finalised an interconnection agreement and/or that agreement was approved by the regulator. CWWI and the carrier services team did not believe that this stance amounted to a breach of the duty on CWWI under the 2000 Act or the regulations. CWWI and the carrier services team thought that the Act and the regulations permitted CWWI to take the stance that the parties should agree terms first, have those terms approved and then implement the agreement by, amongst other things, ordering equipment. In particular, Mr Batstone and Mr Thompson believed that this was the position. I do not find that anyone at CWWI or the carrier services team believed that there was a legal prohibition on CWWI pre-ordering equipment. Even if anyone had believed that, it was clear that the government representatives and the regulator positively wanted CWWI to pre-order equipment.

49. It was an important part of the reasoning of the carrier services team, on behalf of CWWI, that a tactic of not pre-ordering equipment would give to CWWI a negotiating advantage and a better chance of getting the best available terms agreed with Digicel SLU and then approved by the regulator. CWWI did not ever state to Digicel SLU that this was an important part of its reasoning. It saw no reason so to state but, in particular, it probably felt that a disclosure of its negotiating tactic might diminish the effect of the tactic and lead the government representatives or the regulator to apply further pressure on CWWI.

50. As to the three reasons put forward by CWWI for its decision not to pre-order, the alleged precedent effect could easily have been dealt with. The third reason, the need for capital expenditure approval, could also have been dealt with. It was suggested that capital expenditure approval would not have been given to incur expenditure when CWWI did not have the benefit of an enforceable interconnection agreement with Digicel SLU. I do not believe that there would have been any real difficulty in

that respect, if CWWI had security for reimbursement of the cost from Digicel SLU. As to the provision of security for reimbursement of the costs, Digicel SLU caused an unnecessary difficulty by contending that it was not liable to pay for the equipment ordered by CWWI. However, Digicel SLU did make various offers to provide security for any liability it had to reimburse the costs to CWWI. If this question of security had been the only issue standing in the way of pre-ordering equipment, then it is more likely than not that terms, which ought to have been satisfactory to CWWI, could have been agreed.

51. As regards the overall time which would be taken to finalise an interconnection agreement and then to begin and complete physical interconnection thereafter, Digicel SLU wanted matters to proceed very quickly. Digicel SLU may have been unrealistic as to the length of time that would be needed. CWWI did not wish matters to proceed quickly. By adopting the tactic of finalising the interconnection agreement first and ordering equipment second, the result might be that the process would take longer overall. This was not inevitably so. The period of time from ordering equipment to delivery of equipment might be as short as four weeks (as it actually was in SLU) or might be predicted to be some eight weeks. The tactic of withholding ordering of equipment until interconnection terms were agreed might hasten the time when those terms were agreed. If the parties did agree terms quickly, probably terms which were more favourable to CWWI than might otherwise have been the case, then time would be saved thereby and ordering of equipment would follow. If, on the other hand, the negotiations became protracted, then one way of looking at the matter was that Digicel SLU's refusal to accept CWWI's terms would prolong the matter overall. That would be a concern to Digicel SLU but would not be a concern to CWWI.

52. In my main judgment, I have given my reasons for the conclusion that CWWI did not breach its duty under section 46(1) of the 2000 Act or regulation 5 by using the tactic of not ordering equipment before an interconnection agreement was signed to assist CWWI in its negotiations. In my judgment, on the facts in relation to SLU, because an important part of CWWI's reasoning was that this tactic was available to it and could and should be used, the result is that CWWI did not, on the facts, commit a breach of its duties in this respect.

53. CWWI's refusal to give a forecast to Nortel of the equipment it was likely to order in due course and CWWI's refusal to permit a Nortel engineer to undertake a site survey was un-cooperative behaviour. CWWI's motive was that it did not wish to take any action to bring forward Digicel SLU's entry into the market unless it was obliged to do so and it felt it was not obliged to do so. It is not possible to identify any delay which was, in the event, caused by this un-cooperative attitude on its part. CWWI's position in this respect appears to have been overtaken by the later event of CWWI ordering its equipment on 24th January 2003 which was before the parties finalised the interconnection agreement on 31st January 2003.

54. Initially, Digicel SLU's only complaint about the pace of physical interconnection in SLU related to the fact that CWWI had not ordered the equipment it needed prior to 24th January 2003. However, at the outset of the trial, Digicel SLU obtained

permission to amend its Particulars of Claim to allege that CWWI had refused at the negotiation meetings in Miami on 28th to 29th January 2003 to accept the equipment which Digicel SLU had previously ordered for CWWI's side of the interconnection and which had arrived in SLU on or about 24th November 2002. In its closing submissions, Digicel SLU said that the effect of CWWI's refusal to accept the equipment which had been ordered by Digicel SLU introduced a further period of delay, of approximately 3 to 4 weeks, into the process of physical interconnection. I note that Digicel SLU does not say that CWWI was in breach by not accepting Digicel SLU's offer to buy equipment on CWWI's behalf much earlier in the process or that CWWI was in breach by not accepting this equipment when it was delivered to SLU on or about 24th November 2002. This can be understood on the basis that whereas Digicel SLU argues that CWWI was under an obligation to obtain the necessary equipment before finalising the interconnection agreement, Digicel SLU does not argue that there was an obligation to install and test that equipment at any time before finalising the interconnection agreement. I note that in other jurisdictions, the Claimants contend that there was an obligation to install and test equipment before finalising the interconnection agreement.

55. CWWI contends that when the parties finalised the terms as to interconnection at the end of January 2003, it was appreciated that there were two possible ways forward as regards obtaining the equipment needed by CWWI. The first method was to use the equipment which had been ordered by Digicel SLU and the second method was for CWWI to continue with the order it had placed on 24th January 2003, to wait for that equipment to be delivered and then to proceed accordingly. It is clear from the notes of the meetings in late January 2003, that the parties expressly referred to both possibilities.

56. Mr Black of Digicel referred to these meetings in his witness statement. At paragraph 43(b) he described matters in a way which was, at least, suggestive of the possibility that it was for CWWI to decide which route to follow. What CWWI conceded at that stage was that it would get on with physical interconnection and would not wait for the terms, agreed between the parties, to be approved by the regulator. When cross-examined, Mr Black suggested that his witness statement needed elaboration and what had been envisaged was that CWWI could only choose whichever of the two methods which was going to deliver physical interconnection earlier. I have considered Mr Black's evidence in chief and in cross-examination together with such indications as there are in the contemporaneous documents. For the reasons which I will explain, I do not accept Mr Black's evidence insofar as he suggests that there was an agreement obliging CWWI to accept the faster option.

57. The Defendants relied on a note taken by Mr Batstone on behalf of carrier services, acting for CWWI, of a discussion on 28th January 2003. I do not regard that note as very helpful in resolving this present point and certainly not as clear as other indications in the documents.

58. What does emerge from the documents is that on 30th January 2003, representatives of Digicel SLU were in the course of exploring with Nortel which of the two options

would be faster. Nortel pointed out that the equipment delivered to Digicel SLU in November 2002 was not the same as the equipment ordered by CWWI on 24th January 2003. In particular, there were differences in the software. Nortel's position was that if the equipment which had been delivered to Digicel SLU was to be transferred to CWWI so that there would be, effectively, a contract of sale between Nortel and CWWI, containing the usual warranties, it would be necessary for the equipment in Digicel SLU's possession to be returned to Nortel, for changes to be carried out and then for it to be re-delivered to CWWI. At the trial, Mr Doyle of Digicel suggested that the representative of Nortel dealing with the matter was reluctant to permit the equipment which had been delivered to Digicel SLU to be redirected to CWWI. It was suggested that he was concerned about his commission on the sale of the equipment to Digicel SLU; it was suggested that if the equipment was redirected to CWWI, a different salesman in Nortel would receive the commission. Therefore, the first salesman in Nortel was trying to make it difficult for the equipment to be redirected to CWWI. Whether there is substance in that explanation does not matter. It was Nortel who was causing a difficulty about the equipment being transferred to CWWI. Further, Digicel SLU knew that Nortel was causing a difficulty.

59. Against that background, I can consider the evidence of Mr Thompson of carrier services, acting for CWWI. He said that this question as to the choice between the Digicel SLU equipment and the equipment which had been newly ordered by CWWI was not a particularly contentious issue. Mr Thompson expressed a preference for CWWI staying with the equipment it had recently ordered. He thought that the Digicel SLU representatives were "comfortable enough" with that. Mr Thompson's evidence was not challenged in cross-examination. Further, in a C&W internal email of 5th February 2003, it was stated that Digicel SLU had agreed on 4th February 2003 to await the arrival of the equipment newly ordered by CWWI, which was expected on 19th February 2003.

60. My conclusion is that Digicel SLU and CWWI, at the end of January 2003 and the beginning of February 2003, left it to CWWI to decide whether to take over the equipment which had been delivered to Digicel SLU, or to stay with the order which CWWI had placed on 24th January 2003. CWWI had reasons of its own, explained by Mr Thompson, for preferring to take the equipment it had itself ordered. Digicel SLU was not on the whole concerned about that possibility because it understood that there were difficulties, created by Nortel, in carrying out the proposal to transfer the Digicel SLU equipment to CWWI. Even if, which I reject, CWWI were in breach of duty by staying with the order it had placed for its equipment, it is not possible to identify any delay caused by that decision. The equipment which had been delivered to Digicel SLU did differ from the equipment ordered, and needed, by CWWI. Some differences may have been easy to deal with. One example of that would be the cables, where different lengths of cables could be ordered, if needed, and they would probably not take an undue time to deliver. However, there was a more serious problem. As Digicel SLU was informed by Nortel, the software in the two sets of equipment was different. Mr Fisher, a witness on behalf of the Defendants, explained that C&W had its own standards and requirements as regards software. If the Digicel

SLU equipment had been transferred to CWWI, the software in that equipment would not fit those requirements. Something had to be done. The route suggested by Nortel to Digicel SLU and the route which Mr Fisher independently thought was appropriate was for the appropriate software to be installed in Nortel's factory so that the equipment when delivered to the customer, CWWI, would have what the customer needed. It was suggested to Mr Fisher in cross-examination that it would have been satisfactory for CWWI to take delivery of the equipment with the inappropriate software and then install the right software, and indeed everything else that needed to be changed, on site. Mr Fisher explained why that was not appropriate. I conclude that Mr Fisher had adequate grounds for his point of view.

61. It should also be remembered that the equipment ordered by CWWI was in fact delivered extremely quickly. It arrived in SLU by 19th February 2003. It is a matter of speculation whether the alternative of returning the Digicel SLU equipment to Nortel for the right software to be inserted, and other alterations made, followed by delivery to CWWI, would have been any quicker. In my judgment, it has certainly not been proven on the balance of probabilities that it would have been quicker. It is more likely that the alternative of using the Digicel SLU equipment following adaptation by Nortel would have taken longer than CWWI staying with the order it had placed on 24th January 2003.

62. The remaining allegations made by the Claimants in relation to SLU concern alleged delays to the contractual negotiations as to the terms of the interconnection agreement. It will be remembered that the Claimants submitted as a matter of law that there was no obligation imposed on CWWI by section 46(1) of the 2000 Act (and possibly also no obligation under the regulations) as to contractual interconnection. However, consistently with that case, the Claimants contended that because CWWI took the stance that ordering of equipment would have to await finalisation of an interconnection agreement, the delays in the negotiations as to the terms of such an agreement did thereby cause delay to physical interconnection. In the event, I have held that section 46(1) imposes a duty in relation to both physical and contractual interconnection. The Claimants' allegations as to delays to the contractual negotiations were fully explored at the trial and I will therefore proceed to address them on the basis that section 46(1) did impose on CWWI a duty in relation to the progress of contractual interconnection.

63. The Claimants' first complaint is that CWWI was slow in producing the draft documents which would need to be negotiated in order to finalise an interconnection agreement. I will set out the relevant timetable. Digicel SLU made a valid request for interconnection on 6th September 2002. The parties met on 11th September 2002. On 13th September 2002, CWWI provided a draft Joint Working Manual. This ran to 52 pages. Those 52 pages contain a considerable amount of technical data and information. However, Mr Doyle of Digicel stressed that to the technical persons involved on either side, much of this content could have been predicted so that the focus in negotiations would be upon a relatively small part only of those details. The parties met again on 17th September 2002. Later on that day, CWWI sent to Digicel SLU a draft of the Definitions Schedule and the Legal Framework. The Definitions

Schedule ran to 10 pages. The Legal Framework ran to 25 pages. Obviously, the detail of these documents was important to the parties and, indeed, three terms in particular in the Legal Framework agreement became seriously contentious in later negotiations. On 25th September 2002, CWWI sent to Digicel SLU drafts of the Parameter Schedule, the Service Schedule and the Service Descriptions. The Parameter Schedule ran to 4 pages, the Service Schedule ran to 5 pages and the Service Descriptions comprised 25 pages. The facsimile letter dated 25th September 2002, which attached these three documents, stated that the only remaining document was the Tariff Schedule which CWWI hoped to provide "shortly". The parties met again on the 27th September 2002 and the 4th October 2002. At the end of the day on the 4th October 2002, CWWI sent to Digicel SLU the draft Tariff Schedule, comprising 6 pages of detailed figures.

64. In their closing submissions, the Claimants submit that CWWI failed to deliver draft documentation "promptly". They also submitted that CWWI intentionally delayed production of the Tariff Schedule for as long as possible. In support of the submission that the documents were not delivered "promptly", the Claimants referred to some background evidence. At a meeting on 4th July 2002, CWWI had told Digicel SLU that a draft RIO was due at the end of July. This reference to a draft RIO is a reference to a draft interconnection agreement. Further, there was evidence that C&W companies were assisted in preparing a draft RIO by Price Waterhouse Coopers and there was apparently a draft document of that kind in February 2002. In relation to the Tariff Schedule, the Claimants submit that it was reasonable to expect an incumbent to have prepared a tariff schedule at an early point in the lead up to liberalisation and ensuing interconnection. The Claimants point out that Mr McNaughton sent an internal email in May 2002 referring to the possibility that Digicel and another operator would begin negotiations shortly thereafter and C&W should ensure that its tariffs were ready.

65. The tariff schedule which was provided on 4th October 2002 was prepared by Mr Forrest, of the carrier services team acting on behalf of CWWI. In paragraphs 48 to 76 of his witness statement, he described the work which had gone into the preparation of the Tariff Schedule, the stage which that work had reached at various points in time and his own working on the Tariff Schedule until the last moment when it was provided to Digicel SLU. The Claimants submit that this evidence as to why CWWI took so long to provide a draft tariff schedule was "unconvincing".

66. As described above, the Claimants say that CWWI did not deliver the draft documents "promptly". I do not understand the Claimants to allege that the documents had been drafted and were available for a period before they were provided to Digicel SLU. There is no evidence to support a finding to that effect. That allegation was not put to the Defendants' witnesses. The Claimants submit that the Defendants "intentionally" delayed production of the Tariff Schedule. It may be that in the course of making their general allegations as to deliberate delay by the Defendants, the Claimants also mean to submit that there was intentional or deliberate delay in producing the draft documents. I do not believe that any specific allegation of that kind was put to the Defendants' witnesses including Mr Forrest. Nonetheless,

the Claimants do say that these documents could have been prepared earlier and the reason why they were not prepared earlier is either because the Defendants took an unreasonably long time to get the work done or that they deliberately took a long time to do so.

67. The issue for the Court is whether CWWI broke the duty on it pursuant to section 46(1) of the 2000 Act or regulation 5 in the way in which it, and carrier services on its behalf, dealt with this matter. In answering that question, it seems to me that as a matter of law the duty in question arose for the first time on 6th September 2002. The duties in question are owed to another licensee. The duties are not owed to the public generally or to the Government of SLU. Accordingly, it must follow that no duty is owed prior to the time that there is an identified other licensee who requests interconnection. That must mean that CWWI cannot be said to be in breach of that duty by reason of anything it did, or failed to do, prior to 6th September 2002. If that is right, then I need to examine the period from 6th September 2002 to 4th October 2002 to see whether, during that period, CWWI did something or failed to do something which amounted to a breach of duty. Even if it were right to consider the period before 6th September 2002 as well as the period after that date, the task would seem to involve findings as to the steps which were actually taken and an assessment as to whether those steps could have been taken earlier. I have evidence, in particular from Mr Forrest in relation to the Tariff Schedule, as to the steps which were taken to prepare these draft documents.

68. In their closing submissions, the Claimants did not identify an alternative time table which ought to have been followed by a reasonable operator seeking to perform its duty under the Act and the regulations. The Claimants did not identify the length of the period which would have been reasonable for the preparation of these documents. In these circumstances, it does not seem to me to be possible to reach any conclusion that some other identified period was a reasonable period shorter than the actual period of time taken by the Defendants. Further, if I concentrate on the period 6th September 2002 to 4th October 2002, which I consider is the right thing to do, then again I do not have any identified reasonable period shorter than the actual time taken by the Defendants to produce the draft documents. In these circumstances, I conclude that the Claimants have failed to establish that the Defendants should have produced these draft documents on dates earlier than the actual dates they were sent to Digicel SLU.

69. Although I have not relied on this point when reaching my conclusion, I also note the submission made by the Defendants based on section 46(3) of the 2000 Act. That subsection provides that a telecommunications provider, to whom a request for interconnection is made, must respond to the request within 4 weeks from the date of the request. In the present case, the request was dated 6th September 2002 and the period of 4 weeks ran to 4th October 2002. In that period, CWWI provided a complete draft interconnection agreement, as described above. It may be that this submission provides a very short answer to the Claimants' allegation, namely, that CWWI did what it had to do within the period allowed by statute. However, I have, in the event, examined what was done during the relevant period to see whether the Claimants

have established that the Defendants failed to deliver documents within a reasonable time potentially shorter than 28 days and I have concluded that the Claimants have not established that allegation.

70. I should add that if I had held that CWWI had failed, in breach of the duties upon it, to provide the documents promptly and if I had held that all of the documents should have been provided at some earlier point in time than 4th October 2002, I would not have been able to conclude that that breach on its own had caused a delay in the finalisation of the terms of the interconnection agreement. It will be remembered that the terms of the agreement were only settled at the end of January 2003 and signed on 31st January 2003. I do not think that it would be possible for me to say that a week's delay or two week's delay in September 2002 had caused a delay in the finalisation of those negotiations by a period of one week or two weeks, or some other period. The truth is that the parties were very far apart with their proposals as to the terms of the agreement, in particular as to rates. The parties took the time which they took and, eventually, under pressure from the Government representatives and the regulator they reached a reluctant compromise at the end of January 2003.

71. The next allegation made by the Claimants concerns the personnel who attended the meeting on 27th September 2002 on behalf of CWWI. Paragraph 3.19 of schedule B1 to the Amended Particulars of Claim pleads that "the key members" of the CWWI negotiating team who were missing were Mr Batstone and Mr Fisher. In their closing submissions, the Claimants referred to the long list of absences on the CWWI side and in addition to Mr Batstone and Mr Fisher, they referred to Mr Thompson, Mr McNaughton and Mr Forrest. Because the pleaded case only referred to Mr Batstone and Mr Fisher, there is no evidence before the Court as to the whereabouts of the other individuals on the 27th September 2002 or as to whether it would have been possible or convenient for them to attend the meeting on 27th September 2002. As regards Mr Batstone, he was in Dominica that day. He is a lawyer and no regulatory person attended the meeting on behalf of Digicel SLU either. As to Mr Fisher, he had attended a specialist technical meeting with Digicel SLU the previous day. I reject the allegation that the absence of Mr Batstone and Mr Fisher from the meeting amounted to a breach by CWWI of the duties on it. Further, the Claimants have not established on the balance of probabilities that the absence of those two individuals from that meeting affected anything that happened later and, in particular, delayed the time when the interconnection agreement was finalised.

72. Difficulties arose in October 2002 when CWWI alleged that Digicel SLU had broken the terms of the non-disclosure agreement of 14th June 2002. Clause 10 of that agreement placed restrictions on the parties disclosing to others the subject matter, or the substance, of the discussions between the parties on the subject of interconnection. Further, clause 10 prevented the making of public announcements about those discussions. On 4th October 2002, comments appeared in the SLU Mirror. The comments were critical of the approach taken by CWWI to interconnection and the comments were expressed in terms which suggested that the source of the comments was Digicel SLU.

73. The parties met on 4th October 2002 and Mr Thompson of carrier services on behalf of CWWI stated that it was examining the possibility that Digicel SLU had broken the non-disclosure agreement. Mr Hogan of Digicel SLU stated that it had not broken the agreement. Mr Thomson stated that the matter was being investigated.

74. On 11th October 2002, the SLU Mirror published an article referring to the discussions between Digicel SLU and CWWI. The article was highly critical of CWWI and carrier services acting on its behalf. The article referred to certain matters which had been discussed between the parties to the negotiations. It was clear that the source of the information was Digicel SLU.

75. On the same day, Mr Gurley, the general manager of CWWI in SLU sent a copy of this newspaper article to various members of the carrier services team. There was due to be a telephone conference with Mr Forrest on 11th October 2002 and a telephone conference with Mr Batstone on 14th October 2002. Both these conferences were cancelled and it is likely that the decision taken by Mr Forrest and Mr Batstone and others at carrier services to cancel these conferences was influenced by the desire of carrier services to consider their position and how they ought to react to the article of 11th October 2002.

76. At a meeting between the parties on 16th October 2002, Mr Thompson of carrier services on behalf of CWWI told Mr Hogan of Digicel SLU that CWWI would not continue interconnection negotiations until such time as reassurances were provided by Digicel SLU regarding future compliance with the non-disclosure agreement. Also on 16th October 2002, Mr Thompson wrote a detailed letter to Mr Hogan on the same subject referring to the items in the SLU Mirror on the 4th October 2002 and 11th October 2002. Mr Thompson asked for a written apology from Digicel SLU as well as a written undertaking that no further breaches of the non-disclosure agreement would occur. Mr Hogan replied by a letter dated 18th October 2002 which was delivered to Mr Thompson on 21st October 2002. Mr Hogan, on behalf of Digicel SLU, did not accept that it had breached the non-disclosure agreement. Mr Hogan explained that the article which appeared on 11th October 2002 had been delayed and should have appeared earlier. The interview which led to the article of 11th October 2002 had been given prior to the meeting on 4th October 2002, when the question of breaches of the agreement had been raised. Mr Hogan expressed concern that negotiations had been suspended and hoped his letter would suffice to enable the parties to resume discussion. He stated that Digicel SLU did not wish to conduct negotiations with CWWI in the media.

77. On 23rd October 2002, Mr Thompson replied to Mr Hogan's letter. He stated that Mr Hogan's letter had fallen short of the requirements identified in his letter of 16th October 2002 but nonetheless Mr Hogan's comments were sufficient reassurance that the non-disclosure agreement would be honoured in the future. He then proposed the resumption of negotiations. By 28th October 2002, the negotiations had not resumed. Carrier services were proposing that there be a further meeting on 5th November 2002 and Digicel SLU protested at the delay until that date. Mr Hogan sent an email of

complaint on 28th October 2002 and followed that up with a letter of complaint on 29th October 2002.

78. One of the difficulties which existed around that time was that Mr Batstone was giving a presentation at a conference elsewhere and was reluctant to engage in substantive negotiations with Digicel SLU in the evening after the conference. On 30th October 2002, Mr Thompson wrote to Mr Lynch of Digicel, acting for Digicel SLU. Mr Thompson referred to other commitments on the part of members of the carrier services team which meant that a meeting before the week beginning 4th November 2002 could not be arranged.

79. In an internal email on 31st October 2002, Mr Thompson wrote to Mr Miller of CWWI and others, referring to certain commitments on the part of members of the carrier services team. In their closing submissions, the Claimants referred to the "alleged" breach of the non-disclosure agreement and described CWWI's reaction as "a cynical and grossly disproportionate response".

80. At the trial, the Claimants did not accept that Digicel SLU had committed any breach of the non-disclosure agreement. In my judgment, the comments made by Digicel SLU which were printed on 11th October 2002 were a breach by Digicel SLU of clause 10 of the non-disclosure agreement. Clause 10 is in wide terms but those terms were agreed by the parties and were binding on them. It is not relevant to ask whether the information which was published was confidential or sensitive information. It is also not relevant to enquire whether Digicel SLU gave information to the newspaper before or after Mr Thompson's warning on 4th October 2002. CWWI and carrier services genuinely regarded clause 10 of the non-disclosure agreement as an important provision. CWWI genuinely preferred to conduct negotiations without outside pressure from media comment. It cannot be said that CWWI was acting unreasonably in seeking to insist on compliance by Digicel SLU with clause 10 of the agreement.

81. The negotiations between the parties were certainly disrupted from 16th October 2002. It is possible that the conference calls of 11th October 2002 and 14th October 2002 might have happened if it had not been for Digicel SLU's breach of the agreement. When CWWI, acting through carrier services, received Mr Hogan's letter of 18th October 2002 on 21st October 2002, Mr Thompson replied without undue delay on 23rd October 2002 stating that negotiations could be resumed. In my judgment, CWWI was not in breach of the duties on it by its conduct of matters between 11th October 2002 and 23rd October 2002.

82. Time did go by before negotiations resumed on 5th November 2002. The Claimants would wish to say that CWWI and carrier services were guilty of non-cooperation in resuming negotiations promptly after 23rd October 2002. The contemporaneous documents referred to difficulties felt by members of the carrier services team in resuming negotiations prior to 5th November 2002. The Claimants invite me to reject the assertions, or explanations, put forward by CWWI as to the difficulties that were felt at this time in resuming negotiations. However, the Claimants also say that it is

"very difficult" for Digicel SLU to go behind a witness's assertion that he was too busy to meet Digicel SLU. I agree that it is difficult for Digicel SLU to go behind the evidence given by witnesses on behalf of CWWI. In my judgment, it would not be right to hold that the representatives of CWWI were available earlier than they stated and that they deliberately postponed the resumption of negotiations to a date later than was necessary or appropriate. Accordingly, I do not find any breach by CWWI as regards the date when CWWI resumed negotiations following the suspension in October 2002.

83. Digicel SLU makes a number of complaints against CWWI to the effect that the negotiations in November 2002 took place very slowly and did not in the end make progress. By the end of October 2002, Digicel SLU could see that negotiations with CWWI had taken, and were likely to continue to take, a considerable time and that CWWI was insisting on certain matters which Digicel SLU felt most reluctant to agree. It was also apparent to Digicel SLU and, for that matter, to CWWI that Digicel SLU was in a hurry to make progress to conclude interconnection whereas CWWI was not concerned about the passage of time. CWWI was more concerned about the terms it ultimately committed itself to rather than the length of the process.

84. At the end of October 2002, Digicel SLU considered what its approach should be to deal with this problem. In an internal email of 28th October 2002, various representatives of Digicel SLU discussed the desirability of making a formal complaint to the regulator and to the Minister in relation to CWWI's approach to the negotiations. Mr Hogan of Digicel SLU thought that every effort should be made to get CWWI to agree the areas of disagreement, leading to the making of an interim agreement recording all the terms that could be agreed and separating out the terms that could not be agreed. Digicel SLU hoped to "be able to back them into a corner" with the regulator and the Minister. However, Mr Hogan recognised that it was probably necessary to continue negotiations for a further period to convince the regulator and the Minister that the negotiations would not in the end bear fruit and that intervention was necessary.

85. On 30th October 2002, Mr O'Shaugnessy of Digicel phoned Mr Thompson of carrier services, acting for CWWI. Mr O'Shaugnessy explained to Mr Thompson the degree of concern felt by Digicel and its senior management and that Digicel intended to arrive at an early breakdown in negotiations with a view to referring the terms for interconnection to the regulator.

86. An internal email of 1st November 2002 from Mr Thompson to Mr Miller of CWWI shows the internal thinking at CWWI. This email stresses that CWWI needed certain specified pre-conditions to be met before CWWI would be prepared to agree terms for interconnection. This email shows that Mr Thompson on behalf of CWWI was determined not to give ground on what, to him, were important terms.

87. On 4th November 2002, Digicel SLU sent to CWWI draft clauses for an interim agreement separating the terms agreed (and to be given effect) from the terms which were not agreed and which were to be determined by the regulator.

88. The parties met on 5th November 2002. Mr Thompson was not present at the meeting; he had been asked to accompany Mr Gurley of CWWI to a meeting with the relevant minister and the two meetings clashed. CWWI limited, in advance, the length of the meeting to three hours. The lengthy minutes of that meeting show the parties were far apart on certain terms in the Legal Framework document and in relation to tariffs. At the end of the meeting, the carrier services team acting for CWWI stated that Digicel SLU could not expect to hear back from CWWI on outstanding issues for three weeks. The delay was caused by the fact that there were proceedings in Jamaica brought by the Digicel subsidiary in Jamaica and the Cable and Wireless subsidiary in Jamaica was an interested party in those proceedings. Mr Batstone wished to attend those proceedings which were estimated to last for some three weeks. In the event, the hearing scheduled for three weeks in November 2002, was adjourned, a fact which was referred to in later communications between the parties.

89. The day after the meeting of 5th November 2002, Digicel SLU wrote to the relevant minister in SLU, to the regulator in SLU and to the Chairman of C&W plc. Digicel SLU's letter to the Minister set out its case that CWWI was in breach of section 46 of the 2000 Act and in breach of clause 6 of its licence. Digicel SLU asked the Minister to use his statutory powers including the power to suspend or revoke CWWI's licence. In its letter to the regulator, Digicel SLU made similar points about the conduct of the negotiations and CWWI's position and asked the regulator to intervene. The letter to the Chairman of C&W plc was written by Mr O'Brien, the chairman of Digicel (Caribbean) Limited. Mr O'Brien referred to a conversation he had with C&W plc's Deputy Chief Executive, Mr Lerwill. Mr O'Brien wrote that "Cable & Wireless is blatantly attempting to delay interconnection with Digicel". Mr O'Brien stated that Digicel intended to take whatever steps were necessary to protect its interests including submitting a formal complaint to the regulator and calling on the Minister to exercise his statutory functions and powers to commence the procedure for suspending or revoking CWWI's licences.

90. On 8th November 2002, Mr Lerwill of C&W plc replied to Mr O'Brien's letter of 6th November 2002. On 11th November 2002, Mr Lynch on behalf of Digicel SLU wrote to CWWI expressing disappointment at the outcome of the negotiations on 5th November 2002. On 12th November 2002, Mr Hogan of Digicel SLU wrote to Mr Thompson similarly expressing disappointment. He referred to the fact that the court proceedings in Jamaica had been adjourned and suggested it should now be possible for the parties to meet immediately. There was further correspondence between Mr O'Brien and Mr Lerwill on 13th, 14th and 15th November 2002. The parties were very far apart in their description of what had occurred and what should next be done.

91. On the 18th November 2002, Mr Thompson sent an internal note to Mr Miller of CWWI which shows how carrier services were approaching the matter at that stage. The note referred to CWWI seeking to negotiate interconnection terms simultaneously with approximately ten new entrants in the OECS. Mr Thompson was concerned about the question of precedent involved in agreeing terms with any one new entrant. He described the negotiations as being 80% advanced. He referred to the fact that new entrants were seeking to advance their positions by approaching the

ministers in the relevant countries. He stated that CWWI would not purchase the interconnection equipment needed for its side of physical interconnection until there was an approved interconnection agreement. He noted that the benefit of this stance was that the regulator could not easily force CWWI to enter into an interim agreement and the regulator was required to deal with matters "in a more expeditious and timely manner" than otherwise. Mr Thompson also stressed a number of terms which were regarded as "important principles" for CWWI. He suggested that CWWI could not afford to compromise on these essential terms.

92. On 19th November 2002, Digicel SLU wrote to Mr Thompson referring to the terms of the interconnection agreement which had been discussed. The letter attached two schedules referred to as schedule A and schedule B. Schedule A was designed to set out the terms which were thought to be agreed and schedule B was designed to set out the matters that were not agreed. Digicel SLU asked Mr Thompson on behalf of CWWI to confirm that the position was accurately described in these two schedules.

93. On 19th November 2002, Digicel SLU wrote to the regulator referring to the complaint submitted on 6th November 2002. The regulator was requested to treat the complaint as a dispute referred to the regulator, who was asked to exercise his powers in relation to such a dispute.

94. On 22nd November 2002, Mr Batstone on behalf of CWWI wrote to Digicel SLU. Mr Batstone referred to the two documents, schedule A and schedule B, which had been provided. He disagreed that the negotiations were "at an impasse". He referred to the court proceedings in Jamaica having been adjourned which had enabled him to revise the documents and to send with his letter a red-lined version of the Legal Framework document and the Joint Working Manual. He referred to the possibility of a meeting on 27th November 2002.

95. Digicel SLU replied on 25th November 2002 and stated that the meeting on the 27th November 2002 was to be without prejudice to the reference they had made to the regulator. Also on 25th November 2002, the regulator in SLU wrote to CWWI asking for an early response to Digicel SLU's complaint.

96. Although not strictly relevant to SLU, as it concerned SVG, I will briefly refer to the position in SVG at this stage. Digicel SVG had made a complaint to the regulator in SVG which was essentially the same as the complaint made by Digicel SLU to the regulator in SLU. On 26th November 2002, the regulator in SVG gave directions to Digicel SVG and CWWI as to the negotiations between them on the terms of an interconnection agreement. In particular, the regulator in SVG directed that negotiations on interconnection were to be completed by 9th December 2002. However, the regulator in SVG had acted prematurely. He had not given, as required by the regulations in SVG, the requisite period of time for CWWI to respond to the complaint made by Digicel SVG. CWWI sought judicial review of the regulator's direction of 26th November 2002. On 16th December 2002, the Eastern Caribbean Supreme Court granted CWWI leave to apply for judicial review and ordered the decision of 26th November 2002 to be stayed. On 30th December 2002, the regulator

in SVG wrote to CWWI rescinding the decision in the letter of 26th November 2002. The regulator stated that if CWWI had, instead of seeking judicial review, pointed out that it had not been given the requisite period of time for a response, the regulator would have varied the decision of 26th November 2002.

97. Returning to the events in SLU, the parties had a lengthy meeting on 27th November 2002. Digicel SLU wanted CWWI to identify what was agreed (to be placed in schedule A) and what was not agreed (to be placed in schedule B). Digicel SLU essentially wanted there to be an interim agreement to implement the schedule A matters, leaving the schedule B matters to be determined by the regulator, if not later agreed. CWWI, in accordance with the internal document to which I have referred, wanted to insist on certain matters which it regarded as essential. The parties did not reach any agreement at the meeting on 27th November 2002.

98. The Claimants point to the events of November 2002 and the lack of progress in negotiations during that month. The Claimants say that CWWI was guilty of delay in relation to these negotiations and thereby was in breach of Section 46(1) of the 2000 Act and of regulation 5. In my judgment, the events of November 2002 did not involve a breach by CWWI. The 2000 Act and the regulations contemplate that the parties will negotiate with a view to reaching agreement. If the parties cannot reach agreement then it is open to one party to refer the matter to the regulator for its determination. CWWI put forward the terms that it wanted to achieve. CWWI genuinely was reluctant to make concessions in respect of some terms which it regarded as essential. It was not a breach of any duty on it for it to take that stance and to negotiate hard to achieve its position. The events of November 2002 revealed very clearly that Digicel SLU was deeply frustrated by the lack of progress but CWWI was more concerned with getting the right set of terms, however long it took, rather than making rapid progress.

99. It is convenient at this point to complete the narrative of the events involving Digicel SLU's reference to the regulator. On 25th November 2002, CWWI had been notified by the regulator of this reference. On 6th December 2002, CWWI wrote to the regulator stating that it expected it would require the full 30 day period allowed by the regulations for a response. CWWI's response came on the 23rd December 2002, within the 30 day period. The response consisted of a 2 page covering letter and a 51 page document. Mr Batstone gave evidence that the carrier services team operating in SLU did not have all the manpower it needed to provide this response and that it sought assistance from the regulatory group at C&W plc in London. The covering letter to the response stressed the commercial confidentiality of the figures in the document. In addition to providing a document containing all the relevant figures, CWWI provided an abridged version, for public consumption if need be, which omitted the relevant figures.

100. The 51 page submission made by CWWI was extremely detailed. It is worth referring briefly to some of the matters dealt with in this submission in order to illustrate the nature of the points that divided the parties at that time. One such point was the question of ADCs. CWWI addressed the issue of ADCs over some 13 pages

of detailed reasoning. ADC stands for access deficit contribution. CWWI's position was that it should be able to pass on an access deficit contribution in the charges which it made to Digicel SLU for interconnection. Digicel SLU was opposed to paying any such contribution. A second matter of substance was the debate as to fixed origination rates as against mobile termination rates. CWWI did not wish there to be a fixed origination rate but preferred a mobile termination rate. Digicel SLU took the opposite position. The issues of ADCs and fixed origination versus mobile termination were complex and of great financial significance to both parties. The submission of 23rd December 2002 also dealt with two clauses in the Legal Framework document. Clause 35.1 sought to impose restrictions on both sides, as parties to the expected interconnection agreement, from making certain public announcements connected with the matters covered by the interconnection agreement. Clause 37.1 was designed to deal with the situation where the parties had agreed an interconnection agreement which had been submitted to the regulator for approval, but where the regulator had withheld its approval to those agreed terms. CWWI wanted both these clauses to be in the agreement and Digicel SLU was strongly opposed to both clauses. The submission of 23rd December 2002 also discussed the powers of the Minister to revoke CWWI's licence and the various powers of the regulator. In particular, CWWI submitted that the regulator did not have the power to impose an interim agreement, not dealing with all the matters that needed ultimately to be agreed for the purposes of an interconnection agreement. CWWI's stated position was that the parties should reach agreement on all issues prior to commencing interconnection.

101. On 6th January 2003, Digicel SLU wrote to the regulator giving its comments on CWWI's submission of 23rd December 2002. Digicel SLU urged the regulator to act straightaway to ensure the immediate interconnection of the networks. Digicel SLU suggested that matters such as ADCs and retail rates should be looked at in detail following interconnection on an interim basis.

102. On 9th January 2003, Digicel SLU wrote again to the regulator. It suggested that mediation and arbitration were not appropriate. It stated that CWWI's submission contained new information by way of purported justification for the rates disclosed in the submission. In those circumstances, Digicel SLU asked the regulator to direct that negotiations should continue but if they were not successfully concluded within 10 working days, Digicel SLU would consider applying to the regulator to place a finite limit on further negotiations.

103. On 10th January 2003, the regulator gave its decision on the reference to it made by Digicel SLU. The regulator held that there was an interconnection dispute within regulation 28 of the Telecommunications (Interconnection) Regulations 2002. The regulator directed that the parties immediately resume or continue negotiation and that if no agreement was reached by 27th January 2003, the regulator would appoint a mediator to facilitate a resolution to the dispute. If the parties failed to conclude an agreement by 28th February 2003 then the regulator would determine the further steps to be taken.

104. On the same day, Digicel SLU wrote to the regulator suggesting that the regulator might not have received Digicel SLU's letter of 9th January 2003. Digicel SLU asked the regulator to reconsider its position and contended that the reference to negotiations continuing until 27th January 2003 was outwith the powers of the regulator.

105. It is next relevant to refer to certain matters which occurred in November 2002 as regards the provision of information on rates by CWWI to Digicel SLU. It will be remembered that CWWI provided its tariff schedule (but not including a transit rate) at the end of 4th October 2002. There was to have been a conference call with Mr Forrest of carrier services on 11th October 2002 for the purpose of Mr Forrest giving further information about the rates. That call was cancelled as earlier described. Digicel SLU made written comments on the rates on 14th October 2002. Rates were discussed at the meeting on 5th November 2002 but little progress was made and Digicel SLU sought further information. On 6th November 2002, Mr Forrest sent to Mr Thompson and Mr Batstone a draft of a presentation designed to give more information as to the cost modelling which had been used by CWWI for the purpose of producing the rates in the tariff schedule. The presentation comprised some 8 pages or slides. Mr Forrest wrote to Mr Thompson and Mr Batstone on 6th November 2002 stating that the request for further information was not unreasonable. His 8 page presentation had been cut down to the bare minimum so that Digicel SLU would not have an undue advantage should there be legal discussions at a later stage. Mr Forrest stated he wanted to be "seen" to be helping the discussion process. Mr Batstone was prepared to agree with Mr Forrest's approach. Mr Thompson was not convinced that the explanation should be put in writing; he preferred it to be delivered orally. On 11th November 2002, Mr Forrest explained his point of view. He thought that Digicel SLU ought to be given the information. A refusal to give that kind of information would only lead to the matter being taken to the regulator whereas Mr Forrest preferred to continue the debate. He did not want to give any information that would cause any harm to CWWI. Mr Thompson remained unconvinced and on 14th November 2002, Mr Forrest suggested there be a discussion as to the desirability of giving this information to Digicel SLU. He wanted to be "seen" to be moving things forward particularly if CWWI ended up "limiting/spreading out the number of meetings and calls". Mr Forrest was cross-examined about this phrase and his evidence was that the carrier services team were limited as to the amount of time they could spend on any one carrier as they had other carriers to deal with. Digicel SLU wanted CWWI's carrier services team to spend much more time on the matter than the carrier services team could afford. The slide presentation was provided to Digicel SLU at the meeting on 27th November 2002.

106. This history reveals CWWI's attitude to its confidential costs information. CWWI and Digicel SLU were going to be in competition as telecommunications operators. CWWI was reluctant to give its costs information to a potential competitor. CWWI was prepared to give the information to the regulator to convince the regulator, if need be, that its rates were an appropriate reflection of underlying costs. Digicel SLU did object strongly to CWWI's proposed rates. Digicel SLU's reluctance to

agree those rates was not in any way lessened by the limited information only being provided by CWWI.

107. Digicel SLU complains that CWWI failed to meet commitments which they had undertaken at the meeting on 27th November 2002. The first of these complaints relates to CWWI's statement of its position in relation to Digicel SLU's suggestion that the terms should be divided between schedule A (terms which had been agreed) and schedule B (terms which had not been agreed). It will be remembered that the day before the meeting of 27th November 2002, the regulator in SVG had given a direction pursuant to Digicel SVG's reference of the matter to the regulator, but without having waited for any response to the reference from CWWI. The regulator's direction was that the parties should complete negotiations by the 9th December 2002. If all matters were not agreed by that date, the regulator directed that there would be an interim interconnection agreement in place on or about 18th December 2002. The meeting on 27th November 2002 between the parties was for the purpose of discussing not only SLU, but also SVG. A considerable time was spent at the meeting on the 27th November 2002 discussing Digicel SLU's suggestion of a process involving schedule A and schedule B. CWWI would not commit to that process at the meeting. Digicel SLU pressed CWWI to confirm its position as quickly as possible. CWWI stated that it ought to be in a position to confirm its position by Friday of that week. It was stated that while CWWI could make a commitment on when it would respond to Digicel SLU it did not commit that it would "respond on proposal". I understand the quoted words to mean that CWWI was not committing that it would accept the process suggested by Digicel SLU. CWWI stated that it needed to explore further the direction from the regulator in SVG.

108. Following the meeting on 27th November 2002, Mr Batstone of carrier services on behalf of CWWI drew up a list of action points. One action point was a response to the schedule A and schedule B proposal. He circulated his list of action points by email on 27th November 2002. It seems to be accepted that he wrongly stated the date when this action point was to be dealt with. The intention was that it would be dealt with on or by 29th November 2002. Mr Batstone's list of action points suggests that Mr Batstone and the other members of the carrier services team genuinely intended to comply with the requirements on the list. Further, Mr McNaughton of the carrier services team responded to Mr Batstone's list by encouraging everyone in the team to ensure that the requirements in the action points were complied with. Mr McNaughton's response again indicates that the carrier services team genuinely intended to comply with those requirements. The Claimants suggest that CWWI never did intend to comply with the requirements. I do not accept that submission in view of the emails to which I have referred from Mr Batstone and from Mr McNaughton.

109. On 28th November 2002, Digicel SLU wrote to CWWI referring to CWWI's agreement to respond to Digicel SLU by 29th November 2002 on the schedule A and schedule B proposal. The letter also referred to the direction given by the regulator in SVG.

110. On 29th November 2002, Mr Batstone on behalf of CWWI replied to the letter of 28th November 2002. Mr Batstone wrote that "as was stated at the meeting", it was necessary to engage staff and fully consider the issues raised by Digicel SLU's request. Mr Batstone stated that CWWI was not yet in a position to respond. He referred to a forthcoming conference call scheduled for 2nd December 2002 and he expressed the hope that progress could be made at that time.

111. The conference call duly took place on 2nd December 2002. Digicel SLU's proposal as to the process to be adopted was raised as a topic. CWWI stated that it was not refusing to accept the procedure but nor was it accepting it. The background to these communications is explained by Mr Batstone's evidence at the trial. CWWI was in the process of taking legal advice on its response to the direction by the SVG regulator given on 26th November 2002. CWWI saw the regulator's direction and the schedule A and schedule B procedure as driving to the same end, namely, that of an interim agreement with physical interconnection taking place before all of the terms as to interconnection were agreed. Mr Batstone accepted when cross-examined that CWWI's desire to take legal advice on the direction from the SVG regulator meant that it wished to keep matters open when it responded to Digicel SLU on 29th November 2002 and when it recorded its position at the meeting on 2nd December 2002.

112. In my judgment, the communications around this time in relation to the schedule A and schedule B proposal did not involve a breach by CWWI of a duty upon it. CWWI was not obliged to go down the route of an interim agreement. Similarly, it was not obliged to negotiate on the basis of schedule A and schedule B which it considered, rightly, was an attempt by Digicel SLU to back CWWI into an interim agreement. In law, CWWI was entitled to negotiate on the basis that it required all the terms to be agreed before it permitted interconnection to take place. Digicel SLU (and Digicel SVG for that matter) had whatever rights they had under the legislation and the regulations to refer any stalemate or deadlock to the regulator. In fact, at this stage, the Digicel companies had referred the matter to the regulators. If the Digicel companies thought that an agreed process of schedule A and schedule B would help them with the reference to the regulator, then, as stated above, CWWI was not obliged to agree that process. If the Digicel companies thought that a refusal by CWWI to agree that process could be used by the Digicel companies as evidence of a lack of co-operation or a lack of progress on CWWI's part, then the Digicel companies already had the fact, to which they could refer in their favour, that they had proposed a schedule A and schedule B process and there had not been a positive acceptance of it by CWWI.

113. Digicel SLU also complained about the time that CWWI took to provide Digicel SLU with the tariff for the joining service in SLU. Mr Batstone's list of action points on 27th November 2002 records that this tariff was to be provided to Digicel SLU by 6th December 2002. In fact, it was only provided on 11th December 2002. Mr Forrest explained in his witness statement (at paragraphs 97 and 105-108) the steps he took to ascertain the appropriate rate to be communicated to Digicel SLU. The Claimants put to Mr Forrest in cross-examination that there was "orchestrated inefficiency" in this

respect. Mr Forrest did not accept that suggestion. He said that work was being undertaken and there was a person or persons on leave whose input was needed. He had explained that matter in his witness statement. The Claimants asked me to reject Mr Forrest's evidence and, I assume, determine that the rate was available earlier but there was a deliberate decision not to communicate the rate to Digicel SLU, or that the rate could have been made available earlier if CWWI had taken appropriate action to ascertain it. There is no evidence that the rate had been ascertained before the 10th or 11th December 2002 and that CWWI deliberately withheld it from Digicel SLU. As regards a reasonable time for the purpose of ascertaining such a rate, I see the strength of the Claimants' submission that the time taken appears very lengthy for what might have been involved. As against that, the evidence did not reveal precisely what was involved nor what would have been a reasonable period for that purpose. In any event, I do not see how any difficulty in this regard was causative of any delay in relation to the date when the negotiations were ultimately concluded. As earlier explained, the parties were very far apart on matters which they could reasonably regard as fundamental. When the joining service rate was communicated to Digicel SLU, there does not appear to have been any negotiation about it and the rate which was stated on 11th December 2002 was the same rate as was ultimately agreed**.**

114. On 12th December 2002, Mr Batchelor on behalf of CWWI wrote to Mr Hogan of Digicel SLU proposing that the parties meet the following week. Mr Batchelor stated that all relevant CWWI personal were available on 19th December 2002. He enquired as to Digicel SLU's availability for that date. Mr Hogan replied on 16th December 2002. He referred to the procedure which Digicel SLU wished to adopt in relation to schedule A and schedule B terms. He also referred to the direction given by the regulator in SVG. Although the Eastern Caribbean Supreme Court on 16th December 2002 ordered a stay of the direction of the regulator in SVG, it is quite possible that Mr Hogan was not aware of it when he sent his letter. Mr Hogan stated that CWWI appeared to be trying to ensure that "negotiations" continued *ad infinitum* whereas Mr Hogan thought that meaningful negotiations could only take place in the context of an agreed process, by which he meant the process which had been proposed by Digicel SLU. In my judgment, a fair reading of Mr Hogan's letter was that unless CWWI agreed to the schedule A and schedule B procedure then Digicel SLU did not wish to attend a meeting on 19th December 2002, or any other date around that time.

115. On receipt of Mr Hogan's letter, Mr Batchelor did not continue to make arrangements for 19th December 2002 and the personnel at CWWI, who would otherwise have been available to be present at such a meeting, took on other commitments.

116. By 18th December 2002, it seems likely that Mr Hogan had become aware of the order made in the Eastern Caribbean Supreme Court granting a stay in relation to the direction of the SVG regulator. It seems that on 18th December 2002, Mr Hogan contacted Mr Batchelor stating that Digicel SLU wished after all to proceed with the meeting on the 19th December 2002. Mr Batchelor wrote to Mr Hogan on 18th December 2002 indicating that the relevant personnel of CWWI were no longer available and the parties should attempt to agree a new date.

117. The Claimants have criticised CWWI for "unilaterally" cancelling an arranged meeting on 19th December 2002. That is not how I see the relevant sequence of events. CWWI proposed a meeting on 19th December 2002 and Digicel SLU was not prepared to agree to a meeting, save on their terms. Accordingly, there was no meeting arranged for 19th December 2002. Following the news of the court order granting a stay of the direction by the regulator in SVG, Digicel SLU had a change of heart and requested a meeting on the day following the request, but that was no longer possible.

118. There were several lengthy meetings between the parties over six days in January 2003. These meetings took place on 16th January 2003, 19th January 2003, 21st January 2003 and 22nd January 2003, and, in Miami, on 28th and 29th January 2003. The negotiations were intense. Some of the negotiations were in the presence of the Prime Ministers of SLU and SVG and other government representatives. Eventually all the terms of an interconnection agreement, including rates, were settled.

119. In their closing submissions, the Claimants refer to the key events during the six days of negotiations but, as I understand it, do not criticise any specific behaviour on the part of CWWI at this stage. The Claimants do submit that CWWI's continuing refusal over a lengthy period to order equipment needed for CWWI's side of the physical interconnection before all the terms of an interconnection agreement were signed had eventually brought so much pressure on Digicel SLU that the latter had to compromise.

120. In their closing submissions, the Defendants are sharply critical of the way in which Digicel SLU conducted itself during these meetings. Of course, the Defendants do not make any counterclaim or any allegation of breach by Digicel SLU in these respects. It seems to me that it is not necessary to set out the tortuous course of six days of negotiations in any detail. I will however refer to the essential matters that became agreed at those meetings. Throughout all the negotiations up to this date, Digicel SLU had set its face against paying an ADC, that is, an access deficit contribution. However, in the course of the January meetings, Digicel SLU gave way on this and agreed to pay an ADC. In order to avoid creating an unfortunate precedent for other jurisdictions, Digicel wanted the ADC, or access deficit contribution, to be re-titled an "accelerated deployment contribution". This linked the payment, not to access deficit charges, but to the fact that CWWI was prepared to agree to order equipment before the terms of the interconnection agreement were approved by the regulator. In fact, CWWI had ordered the relevant equipment on 24th January 2003, as described earlier in this judgment. Digicel SLU also dropped its insistence on a fixed origination service and accepted CWWI's proposal of a mobile termination service. During the January meetings, Digicel SLU, for the first time, put forward a counter-proposal as to the rates payable under an interconnection agreement. There was a lengthy dispute about whether the rates should be reciprocal that is, whether the same rate should be charged by CWWI to Digicel SLU and by Digicel SLU to CWWI. CWWI wanted a reciprocal rate. Initially, Digicel SLU did not but later compromised on a reciprocal rate. Digicel SLU was concerned to agree rates which would generate the best return for its business. There is nothing remotely surprising in that, save that

the legislation and the regulations in SLU required rates to be cost based. I find that the management of Digicel SLU, as distinct from the regulatory advisors to Digicel SLU, were not concerned about whether the rates were cost based, provided that they could secure the approval of the regulator to those rates.

121. The parties signed an interconnection agreement on the 31st January 2003. The agreement was submitted to the regulator on the 3rd February 2003. The regulator raised a number of relatively minor matters and the interconnection agreement was approved by the regulator on 13th March 2003.

122. I can now reach my conclusions as to the Claimants' many criticisms of the way that CWWI dealt with the negotiations as to contractual interconnection from 6th September 2002 to 31st January 2003. In the preceding paragraphs, I have examined the detail of the allegations which the Claimants have made about delay on the part of CWWI. When I have examined the detail, and considered what findings of fact are permissible on the evidence I have been given, I have usually found it very difficult to say that there is specific evidence supporting a finding, on the balance of probabilities, that CWWI deliberately delayed in the relevant respect. However, having examined the detail, I think that I should stand back to try to form a reliable assessment of the overall picture.

123. The parties started their negotiations very far apart as to the appropriate terms and, in particular, as to the appropriate financial terms of an interconnection agreement. These differences between the parties were real differences on matters which both parties regarded as essential from their different standpoints. The parties remained far apart on essential matters until the very last stage, that is, until the meetings in January 2003. Both sides thought, and acted, tactically to achieve the desired outcome from their different points of view. The period of the negotiations was approaching 5 months. For nearly all of that period, both parties adopted very tough negotiating stances, the parties were far apart and neither was in any mood to compromise.

124. I think that Digicel SLU had unrealistic ideas as to how long the process of negotiation would take. Given the number of issues which the parties regarded as essential to a successful outcome and the distance the parties were apart on those issues, and the fact that for most of that period neither party was prepared to move on the essential matters, it was always going to be difficult to arrive at a negotiated compromise. A compromise only came about when Digicel SLU began to move its position and that only happened at the meetings in January 2003.

125. Digicel SLU wanted matters to proceed very quickly. CWWI had no interest of its own in conducting the negotiations particularly quickly. CWWI was not prepared to speed up the negotiations if that might be at the expense of having to give up terms which it regarded as essential.

126. Digicel SLU distrusted CWWI. It formed the view that CWWI was determined to delay the process of negotiations. Digicel SLU felt very frustrated at its inability to make progress. It resented the fact that CWWI would not talk to Digicel SLU in any

detail before Digicel SLU obtained its licence. It resented the fact that CWWI would not order the equipment it needed for interconnection until the parties had agreed all the terms. It correctly saw that this stance gave CWWI a negotiating advantage. Digicel SLU tried a number of tacks to get around this difficulty. It proposed an interim agreement, but CWWI would not agree to that. It proposed the procedure using Schedule A and Schedule B to help it with its reference to the regulator. CWWI would not agree to that either. It referred the matter to the regulator but suffered a setback, first, when the court ordered a stay of the regulator's direction in SVG and, secondly, when the regulator in SLU directed the parties to continue negotiations, with the possibility of a mediator being appointed if they failed to agree. Digicel SLU came to realise that a reference to the regulator and/or a dispute resolution process would take longer than compromising with CWWI. At that point, a compromise became more attractive even though the terms of the compromise might be worse than those that could be secured from the regulator or pursuant to a dispute resolution procedure.

127. CWWI was very concerned not to let Digicel SLU gain any advantage over it. Digicel SLU was considered to be a serious rival. CWWI had to work hard to counteract the pressure Digicel SLU brought to bear through the politicians in SLU.

128. I have said that CWWI had no reason of its own to speed up the negotiation process. It was under an obligation under section 46(1) of the 2000 Act and under regulation 5 not to delay the process of interconnection and to allow interconnection to come about as soon as reasonably practicable. CWWI preferred to arrive at agreed terms by negotiation, rather than have terms imposed by a regulator. It therefore wished to avoid, if possible, the intervention of the regulator. CWWI therefore wanted the regulator to see that it was trying to make progress with the negotiations. How matters appeared was therefore important to CWWI. If the underlying reality matched the outward show, then that would be beneficial. However, CWWI probably understood that, providing the outward show was convincing, the underlying reality could be different. There was no predetermined permitted length for the negotiations. It would be difficult for Digicel SLU or the regulator to prove that CWWI was going slow and causing delay which could have been avoided.

129. There is an issue between the parties as to whether the carrier services team had sufficient resources to deal with Digicel SLU more quickly. I find that Digicel SLU's expectations as regards the provision of documents and information and the holding of meetings did put considerable pressure on the carrier services team. Digicel SLU was very demanding in these respects and failed to see that CWWI did have genuine problems in doing everything that Digicel SLU asked of it.

130. It is clear to me that CWWI did not wish to do more than it was legally obliged to do to co-operate with Digicel SLU and to bring forward the time when Digicel SLU could enter the market in competition with CWWI. The critical question is whether, in its conduct of the negotiations, CWWI crossed over the line which separated steps being taken as soon as reasonably practicable in all the circumstances from steps

being taken too slowly, whether deliberately or otherwise, and therefore in breach of the duties CWWI owed to Digicel SLU.

131. I have already examined the evidence, on a point by point basis, relating to the allegations of delay by CWWI. I have usually found it difficult on the basis of that evidence to make findings on the balance of probability that CWWI was guilty of delay and thereby in breach of duty. Standing back from the detail, I need to bear in mind the overall probabilities of what was happening and the specific evidence given by Mr Francis and Ms Turner to which I have earlier referred. Those probabilities and that evidence, if it is accurate, suggests that CWWI deliberately acted more slowly than it could have done and used various tactics to slow down the pace of the negotiations. In particular, there is reason to believe that CWWI attempted to limit the number of meetings with Digicel SLU and spread out the intervals between those meetings. Taking the matter overall, I think it is probable that CWWI deliberately, and unnecessarily, allowed time to go by when no progress was made. It is much harder to identify the specific occasions on which that occurred and harder still to say what period of time might have been allowed to slip by in that way.

132. In the end, I do not believe it is necessary to struggle to make findings as to the occasions when time was allowed to slip, nor as to the periods of time that might have been involved. This is because I believe that I can make firm findings in relation to the consequences of any default of this kind on the part of CWWI. The evidence does not show that any delay in a particular respect caused delay to the overall outcome of the negotiations. The negotiations did not really move forward until Digicel SLU was prepared to change its position in January 2003. What caused it to change its position in January 2003 was that a period of more than 4 months had gone by, and it still had not settled the terms of the interconnection agreement, and it was facing the prospect of further delay while any matters not agreed were submitted to the regulator for its decision. Digicel SLU was only prepared to end the stand off in the negotiations when it felt the negotiations had gone on for too long and it was better to compromise rather than to continue to resist. In my judgment, the detail of the meetings which preceded that stage, the number of those meetings, the persons who attended and the subjects discussed did not in the end affect the time at which Digicel SLU reached the point I have described, when it was prepared to move its position, leading to the ultimate agreement between the parties. Accordingly, if Digicel SLU had been able to show that CWWI had acted in breach of the duties on it, Digicel SLU has failed to show that any such breach delayed the time when contractual interconnection was completed.

133. The above conclusions essentially dispose of the case that CWWI acted in breach of a duty Digicel owed to Digicel SLU in a way which caused loss.

134. If I had held that CWWI had been under an obligation to order equipment before it actually did so, and had therefore broken that obligation, it would have been appropriate to consider when the equipment should have been ordered and when it would have arrived in SLU. I think that on the evidence I have about delivery periods for the relevant equipment, it would have been possible for me to select a likely

period for the delivery of the equipment. It would then become necessary to consider whether Digicel SLU has pleaded that CWWI was under an obligation to install and test that equipment and whether CWWI was under such an obligation. If I had held that CWWI was under an obligation to install and test the equipment, again on the evidence it would have been possible for me to select a likely period for this work. The position would probably be the same in relation to the civil works needed to connect the two networks.

135. Of course, the completion of physical interconnection would not have allowed Digicel SLU to launch its network. Contractual interconnection had to be provided for. I have already held (against the background that CWWI was not obliged to, and did not, pre-order equipment) that it is not possible to hold that the parties would have agreed the terms for contractual interconnection earlier than was actually the case. Digicel SLU submits that if the equipment had been ordered by CWWI and delivered to SLU, then CWWI would have come under pressure from government ministers and/or the regulator to arrange for installation and testing of that equipment (even if CWWI was not obliged to install and test before an interconnection agreement was made) and would have come under further pressure from the same sources to permit Digicel SLU to launch on the basis of an interim agreement or even to agree terms with Digicel SLU more quickly than in fact happened. I can see that the existence of such pressure is a possibility but I regard the extent of such possible pressure, and the effect of it, as essentially speculative. There is a real possibility that the matter would have been referred to the regulator and a considerable time would have gone by before the regulator gave its decision on the questions of ADCs, fixed origination service and the appropriate rates.

136. The result of the above is that Digicel SLU has not established that CWWI is liable to it for the alleged delay in the parties finally agreeing the terms of an interconnection agreement on 31st January 2003.

137. If I had held that CWWI had been in breach of its duty to Digicel SLU and that the interconnection process ought to have been concluded before 31st January 2003, then a question would have arisen as to whether the delay in concluding the interconnection process caused a delay to Digicel SLU's launch. The launch actually took place on 24th March 2003. The burden of proving that a launch would have taken place earlier is on Digicel SLU. Has it proved that matter?

138. In order to attempt an answer to this question it would be necessary to examine in detail the steps which Digicel SLU took over many months to get itself ready to launch its network. It would be necessary to examine the decisions made by Digicel SLU to see if they were influenced by the rate of progress or lack of it in relation to interconnection. It would be necessary to identify which parts of that lack of progress amounted to a breach of duty by CWWI and to try to assess whether any such breaches caused Digicel SLU to alter its approach to its launch. It would be necessary to examine all of the many steps which had to be taken by Digicel SLU and by others to prepare for its launch. It is clear that not all of the matters which needed attention were under Digicel SLU's direct control. In relation to the actions of third parties, it

would be necessary to assess the prospects, or the chance, that the third party would have acted differently.

139. I do not attempt to carry out the massively detailed exercise of making findings of fact as to whether Digicel SLU's network could and/or would have been launched earlier than 24th March 2003. For the reasons which I set out in my main judgment when I deal with the question of damages, I conclude that it would be disproportionate to spend time examining the question of a delay to Digicel SLU's launch. I will add some brief comments at this point on my reasons for this conclusion.

140. The first comment is that before attempting this hypothetical exercise one needs to know what CWWI should have done differently. I have made my actual findings on that question and, on that basis, the question of delay to Digicel SLU's launch date does not arise. I would therefore have to construct a hypothetical basis of some breach or breaches by CWWI causing some delay in the interconnection process. The difficulty is that there is more than one possible hypothesis that might be taken and the answer to the question as to delay to Digicel SLU's launch date might vary with the hypothesis adopted.

141. The second comment is that on my findings as to the law and as to the facts, there are multiple reasons rather than a single reason why an answer to the question as to Digicel SLU's launch date is not relevant. An appellate court would have to reverse my decisions on the law and on the facts in many cumulative ways before an answer to the question would become relevant.

142. The third comment is that in order to consider the submissions which Digicel SLU made in closing on this question, it would be necessary to consider a large number of documents which had not been examined at any earlier stage of the trial and which were not put to any witness by any party. Whilst I do not consider that this prevents Digicel SLU from putting forward its claim, nonetheless, this factor greatly increases the burden involved in carrying out the exercise and this consideration is relevant to the issue of the proportionality of examining this question.

ANNEX B – ST VINCENT & THE GRENADINES

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THE ECTEL TREATY

1. St Vincent and the Grenadines was a signatory to the Treaty ("the Treaty") establishing the Eastern Caribbean Telecommunications Authority ("ECTEL").

2. The relevant provisions of the ECTEL Treaty are set out in Annex 1 when dealing with St Lucia and need not be repeated here.

THE TELECOMMUNICATIONS ACT 2001

3. The Telecommunications Act 2001 was in force at all material times. The copy of the Act which was provided to me appeared somewhat irregular. The parties have checked with the authorities in SVG but have been told that the copy provided to me is in the form in which the Act is available and no better print of the Act exists. The first five pages set out a list of the sections of the Act but the following pages of the Act do not appear to be the provisions of the Act as enacted but appear to be the provisions of the Bill, pre-enactment. Thus clause 1 of the Bill states that the Act was to be cited as the Telecommunications Act 2000 whereas the Act as printed states that it is Act No. 1 of 2001. The Bill also appears to contain some typographical errors in that the section (or clause) which was intended to be section 45 is numbered section 47 and what was intended to be Part V of the Act has been numbered Part IV. The drafting of the SVG Bill was obviously based upon the SLU Act but the clauses were renumbered and rearranged and this has led to what look like mistakes. For example, section 44(1) states that it is subject to subsection (4) whereas I suspect that it was intended that it would be subject to subsection (2)(d). In setting out the provisions of the Act in this Annex, I have changed the number of the wrongly numbered section that it is section 45 and I have numbered Part V correctly. Otherwise, I have set out the provisions of the Act as printed.

4. Section 2(1) of the Telecommunications Act 2001 contained a number of defined terms, including the following:

> *"interconnection" means the connection of two or more separate telecommunication systems, networks, links, nodes, equipment, circuits and devices involving a physical link or interface;*

…

"telecommunications" means any form of transmission, emission or reception of signs, text, images and sounds or other intelligence of any nature by wire, radio, optical or other electromagnetic means;

"telecommunications facilities" includes a transmission facility, any facility, apparatus or other thing that is used or is capable of being used for telecommunications or for any operation directly connected with telecommunications;

"telecommunications network" means any wire, radio, optical, or other electromagnetic system used to route, switch, or transmit telecommunications;

"telecommunications provider" means a person who is licensed under this Act to operate a telecommunications network or to provide telecommunications services;

"telecommunications services" means services provided by means of telecommunications facilities, the provision in whole or in part of telecommunications facilities and any related equipment, whether by sale, lease or otherwise or such other services as may be prescribed by the Minister from time to time;

5. Section 2(2) of the 2001 Act provided:

(2) Except so far as the contrary intention appears, an expression that is used both in this Act and in the Treaty (whether or not a particular meaning is assigned to it by the Treaty) has in this Act the same meaning as in the Treaty.

6. Section 4 of the 2001 Act gave the relevant Minister the following responsibilities:

(1) The Minister shall ensure that in the administration of this Act –

(a) the purposes of the Treaty are effected;
(b) the telecommunications sector in the State is regulated.

(2) Without limiting the generality of subsection (1) the Minister shall in particular ensure –
(a) open entry, market liberalisation, and competition in telecommunications;
(b) policies and practices in relation to the management of telecommunications are in harmony with those of ECTEL;

(c) the operation of a universal service regime so as to ensure the widest possible access to telecommunications at an affordable rate by the people of the State and in order to enable them to share in the freedom to communicate over an efficient and modern telecommunications network;
(d) fair pricing and the use of cost-based pricing methods by telecommunications providers in the State;
(e) fair competition practices by telecommunications providers;
(f) the introduction of advanced telecommunications technologies and an increased range of services;
(g) that the public interest and national security are preserved;
(h) the application of appropriate standards in the operation of telecommunications:
(i) the overall development of telecommunications in the interest of the sustainable development of the State.

7. Section 5 of the 2001 Act conferred powers on the relevant Minister, as follows:

(1) The Minister may on application grant –
(a) an individual licence;
(b) a class licence;
(c) a frequency authorisation in respect of a licence; or
(d) a special licence.

(2) Where the Minister fails to grant a licence or frequency authorisation he shall give the applicant his reasons for that decision in writing.
(3) The Minister, on receipt of a recommendation from ECTEL shall by notice published in the Gazette, specify the telecommunications networks and services that are subject to an individual licence, a class licence or a frequency authorisation.

(4) In the exercise of his powers the Minister shall consult with the Commission.

(5) The Minister shall wherever practicable in the exercise of his powers –
(a) adopt the form, document, process and subsidiary legislation as recommended by ECTEL; and
(b) implement policy and recommendations proposed by ECTEL.

8. Part III of the 2001 Act established the National Telecommunications Regulatory Commission and contained a number of provisions as to its functions and powers. The most relevant provisions are:

Establishment of National Telecommunication (sic) Regulatory Commission
6. (1) There is established a Commission under the general direction and control of the Minister to be known as the National Telecommunications Regulatory Commission.
(2) The Commission shall consist of not less than three and not more than five Commissioners, all of whom shall be appointed by the Minister by instrument in writing on such terms and conditions as he may specify.
(3) The Minister shall appoint one of the Commissioners to be the Chairperson.

…

Functions of Commission
10. (1) The functions of the Commission are to –
(a) advise the Minister on the formulation of national policy on telecommunications matters with a view to ensuring the efficient, economic and harmonised development of the telecommunication and broadcasting services and radio communications of the State;
(b) ensure compliance with the Government's international obligations on telecommunications;
(c) be responsible for technical regulation and the setting of technical standards of telecommunications and ensure compatibility with international standards;
(d) plan, supervise, regulate and manage the use of the radio frequency spectrum in conjunction with ECTEL, including the assignment and registration of radio frequencies to be used by all stations operating in the State or on any ship, aircraft, vessel or other floating or airborne contrivance or spacecraft registered in the State;
(e) regulate prices for telecommunications services;
(f) advise the Minister in all matters related to tariffs for telecommunications services;
(g) collect all fees prescribed and any other tariffs levied under this Act or regulations;
(h) receive and review applications for class licences and advise the Minister accordingly;
(i) monitor and ensure that licensees comply with the conditions attached to their licences;
(j) review proposed interconnection agreements by telecommunications providers and recommend to the Minister whether or not he should approve such agreements;
(k) investigate and resolve any dispute relating to interconnections or sharing of infrastructure between telecommunications providers;
(l) investigate and resolve complaints related to harmful interference;
(m) monitor anti-competitive practices in the telecommunications sector and advise the national body responsible for the regulation of anti-competitive practices accordingly;
(n) maintain a register of licensees and frequency authorisation holders;
(o) provide the Minister with such information as he may require from time to time;

(p) undertake in conjunction with other institutions and entities where practicable, training, manpower planning, seminars and conferences in areas of national and regional importance in telecommunications;
(q) report to and advise the Minister on the legal, technical, financial, economic aspects of telecommunications and the social impact of telecommunications;
(r) manage the universal service fund;
(s) perform such other functions as are prescribed.

(2) In the performance of its functions the Commission shall consult and liaise with ECTEL.

Powers of Commission
11. (1) The Commission may do all things necessary or convenient to be done for or in connection with the performance of its functions.
(2) Without limiting the generality of subsection (1), the Commission may –
(a) acquire information relevant to the performance of its functions including whether or not a person is in breach of a licence, frequency authorisation or this Act;
(b) require payment of fees;
(c) initiate legal proceedings against a licensee or authorised frequency holder for the purposes of compliance;
(d) hold public hearings pertaining to its functions;
(e) do anything incidental to its powers;
(f) sit as a tribunal.

…

Commission to provide guidelines
13. (1) The Commission may, on the recommendation of ECTEL provide guidelines as to the cost and pricing standards on which the reasonableness of the rates, terms and conditions of interconnections will be determined and on other matters as prescribed.
(2) Guidelines determined by the Commission under subsection (1) shall be available to the public at the office of the Commission during business hours or made available to a person on payment of the prescribed fee.
(3) The Commission may give written directions to a licensee or frequency authorisation holder in connection with the performance of its functions or to implement the guidelines of the Commission.

Commission to investigate complaints
14. (1) The Commission shall investigate a complaint by a person who is aggrieved by the actions or conduct of a telecommunications provider in respect of a decision against that person.
(2) The Commission shall investigate a complaint only where that person has first sought redress for the complaint from the telecommunications provider and that complaint has not been amicably resolved.

Disputes between licensees

15. (1) The Commission, when presented with a dispute between licensees requiring an interpretation of licences frequency authorisations or regulations, shall refer the matter to ECTEL with a request that ECTEL provide the Commission with an opinion, or with the consent of the licensees refer the matter to ECTEL for mediation or arbitration and in keeping with the provisions of the Treaty.

(2) The Commission shall take account of the opinion and recommendation of ECTEL in resolving the relevant dispute.

Dispute resolution

16. (1) The Commission shall, wherever practicable, apply conciliation, mediation and alternative dispute resolution techniques in resolving disputes.

(2) For the following purposes the Commission is hereby established as a telecommunications tribunal –

(a) to hear and determine disputes between licensees of telecommunications services;

(b) to hear and adjudicate disputes between licensees and the public involving alleged breaches of the Act or regulations or licences or frequency authorisations;

(c) to hear and determine complaints by subscribers relating to rates payable for telecommunications services;

(d) to hear and determine claims by a licensee for a change in rates payable for any of its services;

(e) to hear and determine objections to agreements between licensees;

(f) of its own motion or at the instance of the Minister, to review and determine the rate payable for any telecommunications service;

(g) to hear and determine complaints between licensees and members of the public.

(3) The tribunal established under subsection (2) shall comprise the chairperson and two other Commissioners nominated for the purpose by the Chairperson.

(4) Where a Commissioner withdraws from any proceedings on a matter before the Commission on account of interest, illness or otherwise, the Commission shall not be disqualified for the transaction of business by reason of such vacancy among its members, save that in the case of an equality of votes the Chairperson shall have a casting vote.

Hearing by Commission

17. (1) The Commission shall expeditiously hear and inquire into and investigate any matter which is before it, and in particular shall hear, receive and consider statements, arguments and evidence made, presented or tendered –

(a) by or on behalf of any complainant;

(b) by or on behalf of the telecommunications licensee or provider;

(c) on behalf of the Minister.

(2) The Commission shall determine the periods that are reasonably necessary for the fair and adequate presentation of any matter by the respective parties involved and the

Commission may require those matters to be presented within the respective periods so determined.
(3) The Commission may require evidence or arguments to be presented in writing and may decide the matters upon which it will hear oral evidence or arguments.
(4) All matters brought before the Commission shall be determined by a majority of the members thereof.
(5) Any party to a matter brought before the Commission shall be entitled as of right to appeal to the Court of Appeal from any judgement, order or award of the Commission.

Appearance
18. Every party to a matter shall be entitled to appear at the hearing thereon, and may be represented by an attorney or any other person who in the opinion of the tribunal is competent to assist such person in the presentation of the matter.

Powers of Commission sitting as tribunal
19. (1) The Commission shall have powers to –
(a) issue summons to compel the attendance of
.witnesses;
(b) examine witnesses on oath, affirmation or otherwise; and
(c) compel the production of documents.
(2) Summons issued by the Commission shall be under the hand of the Chairperson.
(3) Sections 62, 63, 64 and 65 shall apply in respect of the commission when sitting as a tribunal.

Awards
20. In addition to the powers conferred on the Commission under section 11, the Commission may, in relation to any matter brought before it –
(a) make provisional or interim orders or awards relating to the matter or part thereof or give directions in pursuance of the hearing or determination;
(b) dismiss any matter or part of a matter or refrain from further hearing or from determining the matter or part thereof if it appears that it is trivial or vexatious or that further proceedings are not necessary or desirable in the public interest;
(c) order any party to pay costs and expenses, including expenses of witnesses, as are specified in the order;
(d) generally give all such directions and do all such things as are necessary or expedient for the expeditious and just hearing and determination of the matter.

Review by Commission of its decision
21. The commission may review, vary or rescind any decision or order made by it and where a hearing is required before that decision or order is made, the suspension or revocation shall take place without a further hearing.

Directions by Minister
22. The Minister may give directions to the Commission as regards policy, and the Commission shall comply with those directions.

9. Part IV of the 2001 Act deals with licensing of Telecommunications Providers. The more relevant provisions are as follows:

Prohibition on engaging in telecommunications services without licence
27. (1) A person shall not establish or operate a telecommunications network or provide a telecommunications service
without a licence.
(2) Where a frequency authorisation is necessary for or in relation to the operation of a telecommunications network or a telecommunications service, a person shall not operate that network or service without that authorisation.
(3) A person who wishes to land or operate submarine cables within the territory of the State for the purpose of connecting to a telecommunications network shall first obtain a licence, in addition to any other approvals, licences or permits required under the laws of the State.
(4) A person who contravenes subsection (1), (2) or (3) commits an offence and is liable on indictment to a fine not exceeding one million dollars or to imprisonment for a period not exceeding ten years.

Procedure for grant of individual licence
28. (1) An applicant for an individual licence shall submit
his application in the prescribed form to the Commission for consideration
by ECTEL, together with the prescribed fee.
(2) The Commission shall immediately transmit the application to ECTEL, for its review and recommendation.
(3) On receipt of the recommendation from ECTEL, the Commission shall transmit the application together with ECTEL's recommendation to the Minister for consideration of the grant of an individual licence.
(4) Where in the absence of an invitation to tender in respect of telecommunications network or service there is only one applicant the Commission shall submit the application to ECTEL for its review and recommendation;

Grant of individual licence Second Schedule
29. (1) The Minister may, in granting the individual
licence, include all or any of the terms and conditions specified in Part 1 of the Second Schedule.
(2) An individual licence shall include the terms and conditions specified in Part 2 of the Second Schedule.

Content of individual licence.
30. (1) The Minister shall, before granting an individual
licence, take into account –
(a) the purposes of the Treaty ;
(b) the recommendation of ECTEL;
(c) whether the objective of universal service will be promoted including the provision of public telephony services sufficient to meet reasonable demand at affordable prices;

(d) whether the interests of subscribers, purchasers and other users of telecommunications services will be protected;
(e) whether competition among telecommunications providers of telecommunications services will be promoted;
(f) whether research, development and introduction of new telecommunications services will be promoted;
(g) whether foreign and domestic investors will be encouraged to invest in telecommunications;
(h) appropriate technical and financial requirements;
(i) whether the public interest and national security interests will be safeguarded;
(j) such other matters as are prescribed.

(2) The Minister shall not grant an individual licence unless ECTEL recommends accordingly.

…

Suspension and revocation of licences and authorisations
38. (1) The Minister may suspend or revoke a licence, or vary a non-statutory term and condition of that licence by a notice in writing served on the licensee.
(2) The Minister may suspend, revoke or refuse to renew a licence where –
(a) the radio apparatus or station in respect of which the licence was granted interferes with a telecommunication service provided by a person to whom a licence is already granted for that purpose;
(b) the licensee contravenes this Act;
(c) the licensee fails to observe a term or condition specified in his licence;
(d) the licensee is in default of payment of the licence or renewal fee or any other money owed to the Government;.
(e) ECTEL recommends the suspension or revocation;
(f) the suspension or revocation is necessary for reasons of national security or the public interest.
(3) Before suspending or revoking a licence under subsection (2), the Minister shall give the licensee two months notice in writing of his intention to do so, specifying the grounds on which he proposes to suspend or revoke the licence, and shall give the licensee an opportunity –
(a) to present his views;
(b) to remedy the breach of the licence or the terms and conditions; or
(c) to submit to the Minister within such time as the Minister may specify, a written statement of objections to the suspension or revocation of the licence,
which the Minister shall take into account before reaching a decision.
(4) This section also applies with any necessary modification to a frequency authorisation holder.

10. Part V of the 2001 Act deals with the provision of universal service, interconnection, infrastructure sharing and numbering. The more relevant provisions are as follows:

Provision of universal service
41. (1) The Minister may, on the recommendation of
ECTEL, include as a condition in the licence of a telecommunications provider a requirement to provide universal service, except that such requirement shall be carried out in a transparent, non-discriminatory and competitively neutral manner.
(2) A telecommunications provider who is required by its licence to provide universal service to any person shall do so at such price and with the quality of service specified in the licence.

…

Interconnection and infrastructure sharing.
44. (1) Subject to subsection (4), a telecommunications
provider who operates a public telecommunications network shall not
refuse, obstruct, or in any way impede another telecommunications provider from making an interconnection with his telecommunications network.
(2) A telecommunications provider –
(a) who wishes to interconnect with the telecommunications network of another telecommunications provider shall so request of that provider in writing;
(b) to whom a request for interconnection is made, shall, in writing, respond to the request within a period of four weeks from the date it is made to him;
(c) in acceding within four weeks to the request for interconnection shall nominate the time as agreed to by both parties in which the interconnection shall be effected;
(d) to whom a request for interconnection is made may in his response refuse that request in writing on reasonable technical grounds only;
(e) on receipt of a refusal for interconnection may refer that refusal to the Commission for review and possible dispute resolution;
(f) providing an interconnection service in accordance with this section shall impose reasonable cost based rates, and such other reasonable terms and conditions as the Commission may, on the recommendation of ECTEL, determine.
(3) Any interconnection service provided by a telecommunications provider pursuant to the provisions of subsection (6) shall do so on terms which are not less favourable than –
(a) those of the provider of the interconnection service;
(b) the services of non-affiliated suppliers; or
(c) the services of the subsidiaries or affiliates of the provider of the interconnection service.
(4) A telecommunications provider shall not in respect to any rates charged by him for interconnection services provided by him to another telecommunications provider, vary the rates on the basis of the type of customers to be served, or on the type of services that the telecommunications provider requesting the interconnection services intends to provide.

Interconnection agreements.

45. (1) A person shall not enter into any interconnection agreement, implement or provide interconnection service without first submitting the proposed agreement to the Commission for its approval, which approval shall be in writing.

(2) Interconnection agreements between telecommunications providers shall be in writing, and copies of the agreements shall be kept in a public registry maintained by the Commission for that purpose and open to public inspection during normal working hours.

(3) The Commission shall, after consulting ECTEL, prepare, publish, and make available copies of the procedures to be followed by the telecommunications providers when negotiating interconnection agreements.

Cost of interconnection.

46. (1) The cost of establishing any interconnection to the telecommunications network of another telecommunications provider shall be borne by the telecommunications provider requesting the interconnection.

(2) The cost referred to in subsection (1) shall be based on cost-oriented rates that are reasonable and which are arrived at in a transparent manner having regard to economic feasibility and sufficiently unbundled such that the supplier of the interconnection service does not have to pay for network components that are not required for the interconnection service to be provided.

Infrastructure sharing.

47. Sections 46, 47 and 48 shall apply to infrastructure sharing, mutatis mutandis.

Access to towers sites and underground facilities.

48. (1) Where access to telecommunications towers, sites and underground facilities is technically feasible, a telecommunications provider shall, upon request, give another telecommunications provider who so requests access to any telecommunications tower owned or operated by him, or any to a site owned ,occupied or controlled by him, or to an eligible underground facility owned or operated by the first carrier, for the sole purpose of enabling the second provider to install a facility for use in connection with the supply of a telecommunications service.

(2) A telecommunications provider, in planning the provision of future telecommunications services, shall co-operate with other telecommunications providers to share sites and eligible underground facilities.

(3) Access to sites, towers or eligible underground facilities pursuant to this section shall, mutatis mutandis, be on such terms as set out in sections 46 to 48, and otherwise on such terms and conditions as are agreed between providers or failing agreement, as determined by the Commission.

11. Part VI of the 2001 Act contains provisions dealing with compliance and management. The more relevant provisions are as follows:

Appointment of inspectors
52. (1) The Commission may by instrument in writing appoint inspectors for the purposes of this Act.
(2) The Commission shall furnish each inspector with an identity card containing a photograph of the holder which he shall produce on request in the performance of his functions.
(3) An inspector may investigate any complaint or conduct concerning an allegation of a breach of the Act, licence or frequency authorisation.

Parties eligible to seek orders for forfeiture or injunctive relief
56. The court may, on application of the Commission or an interested party –
(a) make an order for forfeiture of any equipment used for the commission of an offence; and
(b) grant an order restraining a person from engaging in activities contrary to this Act.

12. Part VII of the 2001 Act is concerned with certain defined matters which amount to criminal offences. It is not necessary to refer to the detailed provisions.

13. Part VIII of the 2001 Act contains miscellaneous provisions which include the following:

Liability of public and private officials
70. Where a breach of this Act or licence has been committed by a corporation any individual who at the time of the breach was director, manager, supervisor, partner or other similarly responsible individual of that corporation including a public official, may be found individually liable for that breach if, having regard to the nature of his functions and his reasonable ability to prevent that breach, the breach was committed with his consent or connivance or he failed to exercise reasonable diligence to prevent the breach.

…

Regulations
72. (1) The Minister may make regulations to give effect to the provision of this Act.
(2) Without limiting the generality of subsection (1), the Minister may in particular make regulations providing for or in relation to –
(a) forms and procedures in respect of the grant of a licence or a frequency authorisation;

(b) matters relating to the provision of universal service and the management of the Fund;
(c) the type of terminal equipment to be connected to a public telecommunications network;
(d) interconnection between telecommunications providers, and the sharing of infrastructure by telecommunications providers;
(e) interconnection agreements;
(f) matters relating to the allocation of numbers among the telecommunications providers;
(g) stoppage or interception of telecommunications;
(h) management of the spectrum;
(i) adopting industry codes of practice with or without amendment;
(j) the procedure and standards relating to the submission, review and approval by the Commission of telecommunications tariffs;
(k) the control, measurement and suppression of electrical interference in relation to the working of telecommunications apparatus;
(l) matters of confidentiality including confidentiality on the part of all persons employed in or in anyway connected with the maintenance and working of any telecommunications network. or telecommunications apparatus;
(m) public inspection of records of the Commission;
(n) procedures for the treatment of complaints;
(o) procedures for dispute resolution;
(p) matters for which guidelines are to be issued by the Commission;
(q) matters relating to the quality of telecommunications services;
(r) technical regulation and setting of technical standards;
(s) fees, including the amount and circumstances in which they are payable;
(t) conduct of public hearings;
(u) private networks and VSATS;
(v) cost studies and pricing models;
(w) submarine cables and landing rights;
(x) registration and management of Domain Names

(3) Where ECTEL recommends regulations for adoption for the purpose of the Agreement the Minister shall take all reasonable steps to ensure their promulgation.

14. Part 1 of the Second Schedule to the 2001 Act sets out the conditions that may be included in licences. These conditions are as follows:

1. Licences and frequency authorisations granted under this Act may contain any or all of the following conditions:
(a) the networks and services which the licensee or authorisation holder may or may not operate and provide, and the networks to which the network of the licensee or authorisation holder can be connected;
(b) the duration of the licence or authorisation;
(c) the build-out of the network and geographical and subscriber targets for the provision of the relevant services;
(d) the use of radio spectrum;
(e) the provision of services to rural or sparsely populated areas or other specified areas in which it would otherwise be uneconomical to provide services;

(f) the provision of services to the blind, deaf, physically and mentally handicapped and other disadvantaged persons;
(g) the interconnection of the licensee's network with those of other operators;
(h) the sharing of telecommunications infrastructure;
(i) prohibitions of anti-competitive conduct;
(j) the allocation and use by the licensee of numbers; and
(k) the provisions of universal service.

15. Part 2 of the Second Schedule to the 2001 Act sets out the conditions that must be included in licences. It is not necessary to refer to any of these conditions.

THE TELECOMMUNIATIONS (INTERCONNECTION) REGULATIONS 2002

16. The Telecommunications (Interconnection) Regulations 2002 were made on 29th January 2002 pursuant to section 72 of the 2001 Act and came into force on 1st February 2002.

17. Regulation 2 of the 2002 Regulations contained definitions which included the following defined terms:

…

"interconnecting operator" means a public network operator who requests interconnection from another public network operator under section 44 of the Act;

"interconnection capacity" means the ability to provide interconnection;

"interconnection provider" means a public network operator who receives a request to provide interconnection under section 44 of the Act;

"dominant interconnection provider" means an interconnection provider designated by the Commission as a dominant interconnection provider under regulation 8 of these Regulations;

"point of interconnection" means the point or points of interconnection where the exchange of telecommunications between the telecommunications network of an interconnection provider and the telecommunications network of an interconnecting operator takes place;

…

"reference interconnection offer" means a document setting out the terms on which the telecommunications provider proposes to offer interconnection services and that includes a description of the interconnection and other services offered to interconnecting operators and specifies the charges and other terms and conditions on which those services are offered (and "reference interconnection offer provider" shall have a corresponding meaning).

18. The Regulations which are more relevant for present purposes are as follows:

Notice of request

3. (1) An interconnecting operator shall notify the Commission of any request for interconnection by forwarding two copies of the written request to the Commission, one of which shall be addressed to ECTEL.

(2) A request for interconnection shall contain at least the following information:

(a) a copy of the licence of the interconnecting operator;

(b) the services with respect to which interconnection is sought; and

(c) any other information as specified in the reference interconnection offer or reasonably required in order for the telecommunications provider to respond to that request.

Equal responsibility

4. An interconnection provider and an interconnecting operator shall act in a manner that enables interconnection to be established as soon as reasonably practicable.

Non- discrimination and transparency

5. (1) In providing interconnection, an interconnection provider shall act in accordance with the following principles:

(a) interconnection shall be provided on non-discriminatory terms and conditions including charges and quality of service;

(b) interconnection shall be provided to interconnecting operators under no less favourable terms and of no less favourable quality as the inter- connection provider provides similar services for itself; and

(c) an interconnection provider shall provide on request information reasonably necessary to inter-connecting operators considering interconnection, in order to facilitate the conclusion of any agreements.

(2) The information provided shall include planned changes for implementation within the next six months following a request, unless otherwise agreed by the Commission.

Confidentiality

6. (1) A person shall not knowingly communicate, or allow access to information received from a telecommunications provider in respect of interconnection, except to the extent authorised by the telecommunications provider in writing, or by the Act.

(2) Notwithstanding any law, an interconnection provider shall not be required, in connection with any legal proceedings, to produce any statement or other record containing information referred to in sub-regulation (1), or to give evidence relating to it, unless the proceedings relate to the enforcement of the Act and its Regulations.

…

Dominant interconnection provider

8. The Commission shall, acting on the recommendation of ECTEL, by Notice published in the Gazette, designate as a dominant telecommunications provider in respect of a particular telecommunications market or markets in Saint Vincent and the Grenadines if the Commission has determined that, after a public consultation process, with respect to that telecommunications provider

(a) it possesses significant market power with respect to the market or markets for telecommunications services in Saint Vincent and the Grenadines; and

(b) it is in the long-term interests of consumers of telecommunications services in Saint Vincent and the Grenadines that the service be so designated.

…

Burden of proof

10. The burden of proving that interconnection rates are reasonable cost-oriented rates shall lie with the inter-connection provider.

Rate structure

11. (1) The interconnection rates shall be imposed in a transparent manner and shall identify clearly

(a) charges for interconnection services; and

(b) the contribution to the interconnection provider's access deficit, where applicable.

(2) Charges for interconnection services shall be cost-oriented, where "cost-oriented" means those charges shall be no higher than the fully allocated cost of providing that service and no lower than the total service long-run incremental cost of providing that service.

(3) Services other than interconnection services provided to an interconnecting operator shall be provided at a rate not exceeding the best retail prices minus avoidable costs of the dominant interconnection provider provided that the prices are not less than the total service long-run incremental cost of the dominant interconnection provider.

Reference interconnection offer

12. (1) Each dominant interconnection provider shall publish a reference interconnection offer.

(2) The reference interconnection offer provider may set different tariffs, terms and conditions for different inter-connection services, where the differences can be objectively justified and do not result in the unfair distortion of competition.

(4) The reference interconnection offer provider shall apply the appropriate interconnection tariffs, terms and conditions when providing interconnection for its own services or those of its affiliates, subsidiaries or partners.

(5) The charges of the reference interconnection offer shall be sufficiently unbundled to ensure that the inter-connecting operator requesting interconnection is not required to pay for services not related to the service requested.

(6) Interconnection rates set out in the reference inter-connection offer shall be cost-oriented.

Points of interconnection
13. (1) An interconnection provider shall offer interconnection services at any technically feasible point of its telecommunications network, upon request by an interconnecting operator, which shall pay for the investment, operations and maintenance expenses of the facilities necessary to reach the point or points of interconnection within the network of the interconnection provider.

…

Form and contents of agreement
15. (1) All interconnection agreements and reference interconnection offers must be in writing and the following matters shall be specified in those agreements except where a particular matter is irrelevant to the specific form of the interconnection requested:

(a) access to ancillary, supplementary and advanced services;

(b) adequate capacity and service levels including the remedies for any failure to meet those service levels;

(c) a provision that deals with regulatory change, including determinations by the Commission;

(d) duration and renegotiation of interconnection agreements;

(e) forcasting, ordering, provisioning and testing procedures;

(f) dispute resolution procedures;

(g) geographical and technical characteristics and locations of the points of interconnection;

(h) information handling and confidentiality provisions;

(i) intellectual property rights;

(j) measures anticipated for avoiding interference or damage to the networks of the parties involved or third parties;

(k) national and international appropriate indexes for service quality;

(l) procedures in the event of alterations being proposed to the network or service offerings of one of the parties;

(m) provisions for the formation of appropriate working groups to discuss matters relating to interconnection and to resolve any disputes;

(n) if appropriate, provision of infrastructure sharing and identification of co-location and their terms;

(o) provision of network information;

(p) technical specifications and standards;

(q) terms of payment, including billing and settlement procedures;

(r) the maintenance of end-to-end quality of service;

(s) the procedures to detect and repair faults, as well as an estimate of acceptable average indexes for detection and repair times;

(t) the scope and description of the interconnection services to be provided;

(u) the technical characteristics of all the main and auxiliary signals to be transmitted by the system and the technical conditions of the interfaces;

(v) transmission of Calling Line Identity, where available to be transmitted;

(w) ways and procedures for the supply of other services that the parties agree to supply to each other, such as operation, administration, maintenance, emergency calls, operator assistance, automated information for use, information on directories, calling cards and intelligent network services;

(x) any other relevant issue; and

(y) the obligations and responsibilities of each party in the event that inadequate or defective equipment is connected to their respective networks.

(3) Public network operators shall make available to interested parties, proposed interconnection agreements or reference interconnection offers

Connectivity

16. (1) An interconnection agreement shall include provision for any-to-any connectivity to allow each end-user of that network to communicate with each other end-user of public telecommunications services, regardless of whether the end-users are connected to the same, or different, networks.

(2) An interconnection agreement shall include provision for the suspension, termination or amendment of the agreement in the event of

(a) conduct that is illegal or interferes with the obligations of the telecommunications provider, under the relevant licence, Act or Regulations;

(b) requirements that are not technically feasible;

(c) health or safety problems;

(d) requirements for space that is unavailable; or

(e) circumstances that pose an unreasonable risk to the integrity or security of the network or services of the telecommunications provider, from which the sharing arrangement is requested.

(3) An interconnection agreement shall include a provision to allow for the suspension of interconnection where it is necessary to deal with a material degradation of the telecommunications network or services.

Non-inclusion

17. An interconnection agreement shall not contain any provision that has the effect of

(a) imposing any unfair or discriminatory penalty or disadvantage upon a person in the exercise of the person's right to be provided with interconnection;

(b) precluding or frustrating the exercise of a person's rights or privileges afforded under the Act or Regulations; and

(c) preventing a licensee from lawfully providing an interconnection service to another telecommunications provider.

Amendment of agreement

18. (1) The parties to an interconnection agreement may amend or modify an agreement that has been approved by the Commission by

(a) giving not less than thirty days written notice prior to the effective date of the amendment or modification; and

(b) submitting a copy of the proposed amendment or modification to the Commission.

(2) Notwithstanding any provision of the agreement, no interconnection provider shall terminate an interconnection agreement for breach of that agreement unless

(a) the interconnection provider has given the interconnecting operator a written notice stating the breach, and providing for a period of not less than three months during which time the breach may be cured; and

(b) the interconnecting operator has failed to remedy the breach within the notice period; and

(c) if the services provided under the Agreement are essential services, the Commission, after due notice, has consented to the termination (except that, in the case of an interconnection agreement that provides both essential and other services, only termination with respect to those essential services shall be so restricted).

Procedures for application

19. (1) The parties shall submit a written application of a proposed interconnection agreement to the Commission at least thirty working days prior to the proposed effective date of the agreement.

(2) The Commission shall approve the proposed inter-connection agreement if it is satisfied that the proposed interconnection agreement is consistent with

(a) any reference interconnection offer in force;

(b) the principles of interconnection set out in regulation 5, where no reference interconnection offer is in force.

(3) The Commission shall consult with ECTEL for its advice and recommendations concerning the application, before determining whether to approve the proposed inter-connection agreement.

(4) The Commission may request additional information from the parties to a proposed interconnection agreement where it considers it necessary to further evaluate the terms, conditions and charges contained in the proposed inter-connection agreement.

(5) If the Commission notifies the parties that it does not consider that the proposed interconnection agreement is consistent with the principles set out in regulation 5, the interconnection provider and the inter-connecting operator shall negotiate and submit a revised proposed interconnection agreement to the Commission, within a reasonable time, having regard to the matters being the subject of the Commission's request.

(6) If the Commission does not request additional information or modifications, or rule on the agreement within thirty days of receiving an application for the approval or renewal of the agreement (or ten days, in the case of an agreement revised in accordance with subregulation (5)), the Commission shall approve the agreement.

Interconnection not permitted
20. A party shall not negotiate or propose to enter into an interconnection agreement where the Commission determines and rules that

(a) the law prohibits the interconnection;

(b) the interconnection would endanger life or safety, or damage the property or impair the quality of the services of the party providing the interconnection;

(c) the licence issued to the party from whom the interconnection is requested, exempts it from the obligation to interconnect;

(d) the licence issued to the party requesting interconnection does not authorise the telecommunications services for which interconnection is requested;

(e) the requested interconnection is not technically feasible; or

(f) the proposed interconnection is contrary to the law or the public interest.

…

Dispute resolution
27. (1) If an interconnection provider and an interconnecting operator are unable, after having negotiated in good faith for a reasonable period, to agree the terms and conditions of an interconnection agreement, either party may request the assistance of the Commission in resolving the dispute.

(2) The Commission, in responding to a request for assistance, may choose to take one or more of the following actions:

(a) act as arbitrator of that dispute; or

(b) appoint a mediator to that dispute; or

(c) direct the parties to commence or continue interconnection negotiations.

(3) If the Commission appoints a mediator, it may direct that payment of the mediator's reasonable costs and expenses are paid for by the relevant parties to the dispute.

(4) If the parties cannot agree on a date when negotiations should commence, the Commission shall be empowered to compel both parties to commence negotiations by a prescribed date.

(5) The Commission may, if requested by either party, set a time limit within which negotiations on interconnection are to be completed, and the direction shall set out the steps to be taken if an agreement is not reached within the time limit.

Role of parties to dispute

28. (1) The complaining party shall submit to the Commission a clear and reasoned statement of the issues in dispute, as well as any issues where there is agreement.

(2) The opposing party shall respond to the complaint within thirty days and shall state the reasons for its position including any statutory or regulatory justification for that position.

Fairness in dispute resolution

29. (1) When a complaint has been referred to the Commission it shall take steps to resolve the dispute

(a) as promptly as practicable, having regard to the matters in dispute;

(b) preserving any agreements between the parties over issues that are not in dispute; and

(c) consistent with sub-regulation (2)

(2) When acting as an arbitrator, the Commission or ECTEL shall attempt to achieve a fair balance between the legitimate interests of the parties to the dispute, and have regard to the following factors (which does not limit the factors that may be considered):

(a) whether the proposed ruling promotes the long-term interests of consumers of telecommunications services in Saint Vincent and the Grenadines

(b) the interests of persons who have rights to use the telecommunications networks concerned;

(c) the economically efficient operation of a telecommunications network or the provision of a telecommunications service.

Disconnection of networks
30. (1) A dispute between parties of an interconnection agreement shall not cause the partial or total disconnection of the relevant network except in accordance with regulation 16.

(2) Notwithstanding sub-regulation (1), the Commission may decide that partial or total disconnection is necessary and so advise the parties.

(3) Whenever the Commission takes action in accordance with sub-regulation (2), it shall recommend and instruct that preliminary measures are applied to minimise any negative effects on the users of one or both networks.

Guidelines for resolving dispute
31. In exercising its duties under regulation 29, the Commission shall take into account

(a) the availability of technically and commercially viable alternatives to the interconnection requested;

(b) the desirability of providing users with a wide range of telecommunications services;
(c) the interests of the users;

(d) the nature of the request in relation to the resources available to meet the request;

(e) the need to maintain a universal service;

(f) the need to maintain the integrity of the public telecommunications network and the interoperability of services;

(g) promotion of competition;

(h) the public interest;

(i) regulatory obligations or constraints imposed on any of the parties; and

(j) any other relevant and appropriate consideration.

THE LICENCES

19. On 9th October 2001, with effect from 9th October 2001, the relevant Minister granted to CWWI a licence to establish and operate a Fixed Public Telecommunications Network/Service within SVG. The licence was non-exclusive and was for a period of 15 years from 9th October 2001. The licence was stated to be subject to suspension and revocation in accordance with sections 37 and 38 of the Telecommunications Act 2001.

20. Condition 6.4 of the licence conditions stated that the Licensee was not to engage in any activities, whether by act or omission, which had or were intended to have or were likely to have the effect of unfairly preventing, restricting or distorting competition in any market for Licensed Services, as specified in Regulations issued by the Minister (presumably the Regulations made under the Act). By condition 6.5, any act or omission was not to involve an abuse of a dominant position or any contract or concerted practice

where the effect was or was likely to be a substantial lessening of competition in any market.

21. By condition 12.1, the Licensee was to comply with all legislation and regulations and the directions orders and recommendations issued by the Minister or the Commission.

22. On or about 9th October 2001, with effect from 9th October 2001, the relevant Minister granted to Cable and Wireless Caribbean Cellular (St Vincent and the Grenadines) Limited a licence to establish and operate a Public Cellular Mobile Telecommunications Network/Service within SVG. The licence was non-exclusive and was for a period of 15 years from 9th October 2001.

23. The licence to Cable and Wireless Caribbean Cellular (St Vincent and the Grenadines) Limited contained essentially the same terms as those set out above in relation to the fixed network licence.

24. Cable & Wireless Caribbean Cellular (St Vincent and the Grenadines) Limited is not sued as a Defendant in these proceedings.

25. On 11th September 2002, with effect from 12th September 2002, the relevant Minister granted to Digicel Limited (not Digicel (SVG) Limited) a licence to establish and operate a Public Cellular Mobile Telecommunications Network/Service within SVG. The licence was non-exclusive and was for a period of 15 years from 12th September 2002.

26. By clauses 7.3 and 7.4 of the Licence, if the Licensee did not within 6 months from the date of the licence (i.e. by 11th March 2003) commence operations leading to the provision of its service and/or did not within 12 months from the date of the licence (i.e. by 11th September 2003) provide a full customer service, then in either event the licence would be forfeited.

THE FACTS

27. In general, the parties dealt with SVG at the same time as they dealt with SLU. Accordingly, the chronology which is set out in Annex A also applies, in general terms, to SVG. There were however some differences between SLU and SVG.

28. The formal grant of a mobile network licence to Digicel was on 11th September 2002. This licence had effect from 12th September 2002. As noted earlier, the party named in the licence was "Digicel Limited" and not Digicel SVG.

29. When CWWI provided draft documents in SLU on 13th and 17th September 2002, it did not provide equivalent documents in SVG at the same time.

30. On 18th September 2002, Digicel SVG made a formal request for interconnection with CWWI in SVG.

31. On 26th November 2002, the regulator in SVG reached its decision in relation to Digicel SVG's previous complaint of 6th November 2002. The regulator directed that CWWI and Digicel SVG were to complete negotiations on interconnection by 9th December 2002

and, if necessary, the regulator would impose an interim agreement on or about 18th December 2002.

32. On 3rd December 2002, CWWI provided to Digicel SVG the draft Tariff Schedule and the draft Joint Working Manual. Digicel SVG says that CWWI delayed in providing the draft Tariff Schedule.

33. On 12th December 2002, Digicel SVG replied to CWWI with its comments on the Joint Working Manual.

34. On 16th December 2002, the Eastern Caribbean Supreme Court granted CWWI leave to apply for judicial review of the regulator's decision and ordered a stay of that decision. On 30th December 2002, the regulator rescinded its decision.

35. The meetings between CWWI, and the Digicel companies in January 2003 related to both SLU and SVG.

36. The interconnection agreement in relation to SVG was signed on 30th January 2003.

37. The equipment ordered by CWWI for interconnection in SVG, arrived in SVG on 21st February 2003. The equipment was installed and the interconnection was tested, leading to the completion of testing on 20th March 2003.

38. On 24th March 2003, Digicel SVG launched its mobile telecommunications network in SVG.

39. On 11th September 2003, the licence dated 11th September 2002 (which had been initially granted to Digicel Limited) was assigned to Digicel SVG.

40. In relation to SVG, the Claimants make the same complaints as they made in relation to SLU.

41. The findings of fact which I have made in relation to SLU (set out in detail in Annex A above) apply also to SVG. As to the specific allegation that CWWI delayed the delivery of the Tariff Schedule in SVG, even if CWWI was guilty of delay in this respect, that did not delay the time when the negotiations on contractual interconnection in SVG were concluded.

42. There is no limitation defence put forward by CWWI in relation to SVG, whether in relation to any direct claim based on the provisions of section 44 of the Telecommunications Act 2001 or of regulation 4, or in relation to any conspiracy to injure Digicel SVG by the use of unlawful means.

ANNEX C – GRENADA

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THE ECTEL TREATY

1. Grenada was a signatory to the Treaty ("the Treaty") establishing the Eastern Caribbean Telecommunications Authority ("ECTEL").

2. The relevant provisions of the ECTEL Treaty are set out in Annex A when dealing with St Lucia and need not be repeated here.

THE TELECOMMUNICATIONS ACT 2000

3. The Telecommunications Act 2000 was in force at all material times.

4. The objects of the Telecommunications Act 2000 were set out in section 2 of the Act as follows:

> *(1) The principal object of this Act is to give effect to the purposes of the Treaty and to regulate the telecommunications sector in Grenada.*
>
> *(2) Without limiting the generality of subsection (1) the objects of this Act are to ensure------*
>
> *(a) open entry, market liberalisation, and competition in telecommunications;*
>
> *(b) that policies and practices in relation to the management of telecommunications are in harmony with those of ECTEL.*
>
> *(c) the operation of a universal service regime so as to ensure the widest possible access to telecommunications at an affordable rate by the people of Grenada in order to enable them to share in the freedom to communicate over an efficient and modern telecommunications network;*
>
> *(d) fair pricing and the use of cost-based pricing methods by telecommunications providers in Grenada;*
>
> *(e) fair competition practices by telecommunications providers;*
>
> *(f) the introduction of advanced telecommunications technologies and an increased range of services;*
>
> *(g) that the public interest and national security are preserved;*

(h) the application of appropriate standards in the operation of telecommunications;

(i) the overall development of telecommunications in the interest of the sustainable development of Grenada.

5. Section 3(1) of the Telecommunications Act 2000 contained a number of defined terms, including the following:

"interconnection" means the connection of two or more separate telecommunication systems, networks, links, nodes, equipment, circuits and devices involving a physical link or interface;

…

"telecommunications" means any form of transmission, emission, or reception of signs, text, images and sounds or other intelligence of any nature by wire, radio, optical or other electromagnetic means;

"telecommunications facilities" means any facility, apparatus or other thing that is used or capable of being used for telecommunications or for any operation directly connected with telecommunications, and includes a transmission facility;

"telecommunications network" means any wire, radio, optical, or other electromagnetic system used to route, switch, or transmit telecommunications;

"telecommunications provider" means a person who is licensed under this Act to operate a telecommunications network or to provide telecommunications services;

"telecommunications services" means services provided by means of telecommunications facilities and includes the provision in whole or in part of telecommunications facilities and any related equipment, whether by sale, lease or otherwise, or such other services as may be prescribed by the Minister from time to time;

…

6. Section 3(2) of the 2000 Act provided:

(2) Except so far as the contrary intention appears, an expression that is used both in this Act and in the Treaty (whether or not a particular meaning is assigned to it by the Treaty) has in this Act the same meaning as in the Treaty.

7. Section 6 conferred powers on the relevant Minister, as follows:

(1) The Minister may grant----

(a) an individual licence;
(b) a class licence;
(c) a frequency authorization in respect of a licence; or

(d) a special licence

(2) Where the Minister fails to grant to an applicant a licence or frequency authorisation he shall give that applicant his reasons for that decision in writing

(3) The Minister, on receipt of a recommendation from ECTEL shall by notice published in the Gazette, specify the telecommunications networks and services that are subject to an individual licence, a class licence or a frequency authorisation.

(4) In the exercise of his powers the Minister shall consult with the Commission.

8. Part II of the 2000 Act established the National Telecommunications Regulatory Commission and contained a number of provisions as to its functions and powers. The most relevant provisions are:

Establishment of Commission

7-----*(1) There is established a Commission under the general direction and control of a Minister to be known as the National Telecommunications Regulatory Commission.*

(2) The Commission shall consist of not less than three and not more than five Commissioners, all of whom shall be appointed by the Minister on such terms and conditions as he may specify in their instruments of appointment.

(3) The Minister shall appoint one of the Commissioners to be the Chairperson.

…

Functions of Commission

11*----- (1) The functions of the Commission are to--*

(a) advise the Minister on the formulation of national policy on telecommunications matters with a view to ensuring the efficient, economic and harmonised development of the telecommunication and broadcasting services and radio communications of Grenada;

(b) ensure compliance with the Government of Grenada's international obligations on telecommunications;

(c) be responsible for technical regulation and the setting of technical standards of telecommunications and ensure compatibility with international standards;

(d) plan, supervise, regulate and manage the use of the radio frequency spectrum in conjunction with ECTEL, including the assignment and registration of radio frequencies to be used by all stations operating in Grenada or on any ship, aircraft, vessel, or other floating or airborne contrivance or spacecraft registered in Grenada

(e) regulate prices for telecommunications services;

(f) advise the Minister in all matters related to tariffs for telecommunications service;

(g) collect all fees prescribed and any other tariffs levied under this Act or regulations;

(h) receive and review applications for class licences and advise the Minister accordingly;

(i) monitor and ensure that licensees comply with the conditions attached to their licences;

(j) review proposed interconnection agreements by telecommunications providers and recommend to the Minister whether or not he should approve such agreements;

(k) investigate and resolve any dispute relating to interconnections or sharing of infrastructure between telecommunications providers;

(l) investigate and resolve complaints related to harmful interference;

(m) monitor anti-competitive practices in the telecommunications sector and advise the national body responsible for the regulation of anti-competitive practices accordingly;

(n) maintain a register of licensees and frequency authorisation holders;

(o) provide the Minister with such information as he may require from time to time;

(p) undertake in conjunction with other institutions and entities where practicable, training, man power planning, seminars and conferences in areas of national and regional importance in telecommunications;

(q) report to and advise the Minister on the legal, technical, financial, economic aspects of telecommunications, and the social impact of telecommunications;

(r) manage the universal service fund;

(s) perform such other functions as are prescribed.

(2) In the performance of its functions the Commission shall consult and liaise with ECTEL.

Powers of Commission

12.-*(1) The Commission shall have the power to do all things necessary or convenient to be done for or in connection with the performance of its functions.*

(2) Without limiting the generality of subsection (1), the Commission has the power to----

(a) acquire information relevant to the performance of its functions including whether or not a person is in breach of a licence, frequency authorisation or this Act;

(b) require payment of fees;

(c) initiate legal proceedings against a licensee or authorised frequency holder for the purposes of compliance;

(d) hold public hearing pertaining to its functions;

(e) do anything incidental to its power;

(f) sit as a tribunal

…

Commission to provide guidelines

14.----*(1) The Commission may, on the recommendation of ECTEL, provide guidelines as to the cost and pricing standards on which the reasonableness of the rates, terms and conditions of interconnections will be determined, and on other matters as may be prescribed.*

(2) Guidelines determined by the Commission under subsection (1) shall be available to the public at the office of the Commission during business hours or made available to a person on payment of the prescribed fee.

(3) The Commission may give written directions to a licensee or frequency authorization holder in connection with the performance of its functions or to implement the guidelines of the Commission.

Commission to investigate complaints
15.---- *(1) The Commission shall investigate a complaint by a person who is aggrieved by the actions or conduct of a telecommunications provider in respect of a decision against that person.*

(2) The Commission shall investigate a complaint only where that person has first sought redress for the complaint from the telecommunications provider and that complaint has not been amicably resolved.

Dispute between licensees

16------*(1) The Commission, when presented with a dispute requiring an interpretation of licences, frequency authorizations or regulations, shall refer the matter to ECTEL with a request that ECTEL provide the Commission with an opinion, or with the consent of the licensees refer the matter to ECTEL for mediation or arbitration and in keeping with the provisions of the Treaty.*

(2) The Commission shall take account of the opinion and recommendation of ECTEL in resolving the relevant dispute.

Dispute resolution
17.----- *(1) The Commission shall, wherever practicable, apply conciliation, mediation, and alternative dispute resolution techniques in resolving disputes.*

(2) For the following purposes the Commission is hereby established as a telecommunications tribunal-

(a) to hear and determine disputes between licensees of telecommunications services;

(b) to hear and adjudicate disputes between licensees and the public involving alleged breaches of the Act or regulations; or licences or frequency authority

(c) to hear and determine complaints by subscribers relating to rates payable for telecommunications services;

(d) to hear and determine claims by a licensee for a change in rates payable for any of its services;

(e) to hear and determine objections to agreements between licensees;

(f) of its own motion or at the instance of the Minister, to review and determine the rate payable for any telecommunications service;

(g) to hear and determine complaints between licensees and members of the public.

(3) The tribunal under subsection (2) shall comprise the chairperson and two other Commissioners nominated for the purpose by the Chairperson.

(4) Where a Commissioner withdraws from any proceedings on a matter before the Commission on account of interest, illness or otherwise, the Commission shall not be disqualified for the transaction of business by reason of such vacancy among its members, save that in the case of an equality of votes the Chairperson shall have a casting vote.

Hearing of matters by Commission

18*.----- (1) The Commission shall expeditiously hear and inquire into and investigate any matter which is before it, and in particular shall hear, receive and consider statements, arguments and evidence made, presented or tendered*

(a) by or on behalf of any complainant;

(b) by or on behalf of the telecommunications licensee or provider;

(c) on behalf of the Minister

(2) The Commission shall determine the periods that are reasonably necessary for the fair and adequate presentation of the matter by the respective parties thereto and the Commission may require those matters to be presented within the respective periods so determined.

(3) The Commission may require evidence or arguments to be presented in writing and may decide the matters upon which it will hear oral evidence or arguments.

(4) All matters brought before the Commission shall be determined by a majority of the members thereof.

(5) Any party to a matter brought before the Commission shall be entitled as of right to appeal to the Court of Appeal from any judgement, order or award of the Commission.

Appearance

***19**. Every party to a matter shall be entitled to appear at the hearing thereon, and may be represented by an attorney or any other person who in the opinion of the tribunal is competent to assist such person in the presentation of the matter.*

Powers of Commission when sitting as a tribunal

***20**--- (1) The Commission shall have powers to----*

(a) issue summons to compel the attendance of witnesses;

(b) examine witnesses on oath, affirmation or otherwise; and

(c) compel the production of documents.

(2) Summones issued by the Commission shall be under the hand of the Chairperson.

(3) Sections 63,64,65 and 66 shall apply in respect of the Commission when sitting as a tribunal.

Awards

***21**.. In addition to the powers conferred on the Commission under section 12, the Commission may, in relation to any matter brought before it----*

(a) make provisional or interim orders or awards relating to the matters or part thereof, or give directions in pursuance of the hearing or determination.

(b) dismiss any matter or part of a matter or refrain from further hearing or from determining the matter or part thereof if it appears that the matter or part thereof is trivial or vexatious or that further proceedings are notnecessary or desirable in the public interest;

(c) order any party to pay costs and expenses, including expenses of witnesses, as are specified in the order; and

(d) generally give all such directions and do all such things as are necessary or expedient for the expeditious and just hearing and determination of the matter.

Review by Commission

***22.** The commission may review, vary or rescind its decisions or order made by it; and where a hearing is required before that decision or order is made, the decision or order shall not be suspended or revoked without a further hearing.*

Directions by The Minister

***23.** The Minister may give directions to the Commission of a policy nature, and the Commission shall comply with those directions.*

9. Part III of the 2000 Act deals with licensing of Telecommunications Providers. The more relevant provisions are as follows:

Prohibition of engaging in telecommunications without a licence

28*.---- (1) A person shall not establish or operate a telecommunications network or provide a*
telecommunications service without a licence.

(2) Where a frequency authorisation is necessary for or in relation to the operation of a telecommunications network or a telecommunications service, a person shall not operate that network or service without that authorisation.

(3) A person who wishes to land or operate submarine cables within the territory of Grenada for the purpose of connecting to a telecommunications network shall first obtain a licence, in addition to any other approvals, licences or permits required under the laws of Grenada.

(4) A person who contravenes subsection (1) or (2) or (3) commits an offence and shall be liable on indictment to a fine of not exceeding one million dollars or to imprisonment for a period not exceeding ten years.

Procedure for grant of an individual licence

29.--- *(1) An applicant for an individual licence shall submit his application in the prescribed form to the Commission.*

(2) The Commission shall immediately transmit the application to ECTEL, for its review and recommendation.

(3) On receipt of the recommendation from ECTEL, the Commission shall transmit the application together with ECTEL's recommendation to the Minister for consideration of the grant of an individual licence.

(4) Where in the absence of an invitation to tender in respect of telecommunications network or service there is only one applicant the Commission shall submit the applicant to ECTEL for its review and recommendations;

Content of individual licence Second Schedule
30*.--- (1) The Minister may, in "granting the individual licence, include all or any of the terms and conditions specified in Part 1 of the Second Schedule.*

(2) An individual licence shall include the terms and conditions specified in Part 2 of the Second Schedule.

Grant of individual licence

31.----- *(1) The Minister shall, before granting an individual license*
take into account-----

(a) the purpose of the Treaty;

(b) the recommendation of ECTEL;

(c) whether the objective of universal service will be promoted including the provision of public telephony services sufficient to meet reasonable demand at affordable prices;

(d) whether the interests of subscribers, purchasers and other users of telecommunications services will be protected;

(e) whether competition among telecommunications providers of telecommunications services will be promoted;

(f) whether research, development and introduction of new telecommunications services will be promoted;

(g) whether foreign and domestic investors will be encouraged to invest in telecommunications;

(h) appropriate technical and financial requirements;

(i) whether the public interest and national security interests will be safeguard;

(j) Such other matters as are prescribed

…

Suspension and revocation of licences and authorisation

39*.----(1) The minister may suspend or revoke a licence, or vary a term and condition of that licence if it is not a statutory term or condition by a notice in writing served on the licensee.*

(2) The Minister may suspend, revoke or refuse to renew a licence where

(a) the radio apparatus or station in respect of which the licence was granted interferes with a telecommunication service provided by a person to whom a licence is already granted for that purpose;

(b) the licensee contravenes this Act;

(c) the licensee fails to observe a term or condition specified in his licence;

(d) the licensee is in default of payment of the licence or renewal fee or any other money owed to the Government;

(e) ECTEL recommends the suspension or revocation;

(f) The suspension or revocation is necessary for reasons of national security or the public interest.

(3) Before suspending or revoking a licence under subsection (2), the Minister shall give the licensee two months notice in writing of his intention to do so, specifying the grounds on which it proposes to suspend or revoke the licence, and shall give the licensee an opportunity-

(a) to present his views;

(b) to remedy the breach of the licence or term and condition; or

(c) to submit to the Minister within such time as the Minister may specify, a written statement of objections to the suspension or revocation of the licence,

which the Minister shall take into account before reaching a decision.

(4) This section also applies with any necessary modification to a frequency authorization holder.

10. Part IV of the 2000 Act deals with the provision of universal service, interconnection, infrastructure sharing and numbering. The more relevant provisions are as follows:

Provision of universal service

42*. ---(1)The Minister may include as a condition in the licence of a telecommunications provider a requirement to provide universal service, except that such requirement shall be carried out in a transparent, non-discriminatory and competitively neutral manner.*

(2) A telecommunications provider who is required by its licence to provide universal service to any person shall do so at such price and with the quality of service specified in the licence.

…

Interconnection and infrastructure sharing

45.----- *(1) Subject to subsection (5), a telecommunications provider who operates a public telecommunications network shall not refuse, obstruct, or in any way impede another telecommunications provider from making an interconnection with his telecommunications network.*

(2) A telecommunications provider who wishes to interconnect with the telecommunications network of another telecommunications provider shall so request that provider in writing.

(3) A telecommunications provider to whom a request for interconnection is made, shall, in writing, respond to the request within a period of four weeks from the date it is made to him.

(4) A telecommunications provider in acceding within four weeks to the request for interconnection shall nominate the time as agreed to by both parties in which the interconnection shall be effected.

(5) A telecommunications provider to whom a request for interconnection is made may in his response refuse that request in writing on reasonable technical grounds only.

(6) A telecommunications provider on receipt of a refusal for interconnection may refer that refusal to the Commission for review and possible dispute resolution.

(7) A telecommunications provider providing an interconnection service in accordance with this section shall impose reasonable cost based rates, and such other reasonable terms and conditions as the Commission may determine.

(8) Any interconnection service provided by a telecommunications provider pursuant to the provision of subsection (7) above shall be on terms which are not less favourable than:

(a) those of the provider of the interconnection service;

(b) the services of non-affiliated suppliers; or

(c) the services of the subsidiaries or affiliates of the provider of the interconnection service.

(9) No telecommunications provider shall; in respect to any rates charged by him for interconnection services provided by him to another telecommunications provider, vary the rates on the basis of the type of customers to be served, or on the type of services that the telecommunications provider requesting the interconnection services intends to provide.

Interconnection agreements

46*.----- (1) No person shall enter into any interconnection agreement, implement or provide interconnection service without first submitting the proposed agreement to the Commission for its approval, which approval shall be in writing.*

(2) Interconnection agreements between telecommunications providers shall be in writing, and copies of the agreements shall be kept in a public registry maintained by the Commission for that purpose and open to public inspection during normal working hours.

(3) The Commission shall prepare, publish, and make available copies of the procedures to be followed by the telecommunications providers when negotiating interconnection agreements.

Cost of interconnection

47*.----- (1) The cost of establishing any interconnection to the telecommunications network of another telecommunications provider shall be borne by the telecommunications provider requesting the interconnection.*

(2) The cost referred to in subsection (1) shall be based on cost-oriented rates that are reasonable and arrived at in a transparent manner having regard to economic feasibility, and sufficiently unbundled such that the supplier of the interconnection service does not have to pay for network components that are not required for the interconnection service to be provided.

Infrastructure sharing

48. *Sections 45, 46 and 47 shall apply to infrastructure sharing****, mutates mutandis*** (sic)

Access to towers, sites and underground facilities

49*.----- (1) Where access to telecommunications towers, sites and facilities is technically feasible, a telecommunications provider (the first provider) must, upon request, give another telecommunications provider (the second provider) access to a telecommunications tower owned or operated by the first provider, or to a site owned, occupied or controlled by the first provider, or to an eligible underground facility owned or operated by the first carrier, for the sole purpose of enabling the second provider to install a facility for use in connection with the supply of a telecommunications service.*

(2) A telecommunications provider, in planning the provision of future telecommunications services, must co-operate with other telecommunications providers to share sites and eligible underground facilities.

(3) Access to sites, towers or eligible underground facilities pursuant to this section shall, mutatis mutandis,be on such terms as set out in sections 45 to 47 above, and otherwise on such terms and conditions as are agreed between providers or, failing agreement as determined by the Commission.

11. Part V of the 2000 Act contains provisions dealing with compliance and management. The more relevant provisions are as follows:

Appointment of Inspectors
53.----- *(1) The Commission may by instrument in writing appoint inspectors for the purpose of this Act.*

(2) The Commission shall furnish each inspector with an identity card containing a photograph of the holder which he shall produce on request in the performance of his functions.

(3) An inspector may investigate any complaint or conduct concerning an allegation of a breach of the Act, licence or frequency authorisation.

…

57*. The Court may, on application of the Commission or an interested party,*

(a) make an order for forfeiture of any equipment used for the commission of the offence; and

(b) grant an order restraining a person from engaging in activities contrary to this Act.

12. Part VI of the 2000 Act is concerned with certain defined matters which amount to criminal offences. It is not necessary to refer to the detailed provisions.

13. Part VII of the 2000 Act contains miscellaneous provisions which include the following:

Liability of public private official
71. *Where a breach of this Act or licence has been committed by a person (other than an individual) any individual who at the time of the breach was director, manager, supervisor, partner or other similarly responsible individual, including a public official, may be found individually liable for that breach if, having regard to the nature of his functions and his reasonable ability to prevent that breach, the breach was committed with his consent or connivance or he failed to exercise reasonable diligence to prevent the breach.*

…

Regulations
73.---- *(1) The Minister may make regulations to give effect to this Act.*

(2) Without limiting the generality of subsection (1), the Minister may make regulations providing, in particular, for or in relation to---
(a) forms and procedures in respect of the grant of a licence or a frequency authorization;

(b) matters relating to the provision of universal service and the management of the Universal Service Fund;

(c) the type of terminal equipment to be connected to a public telecommunications network;

(d) interconnection between telecommunications providers, and the sharing of infrastructure by telecommunications providers;

(e) interconnection agreements;

(f) matters relating to the allocation of numbers among the telecommunications providers;

(g) stoppage or interception of the telecommunications;

(h) management of the spectrum;

(i) adopting industry codes of practice, with or without amendments;

(j) the procedure and standards relating to the submission. review and approval by the Commission of telecommunications tariffs;

(k) the control, measurement and suppression of electrical interference in relation to the working of telecommunications apparatus;

(l) matters of confidentiality including on the part of all persons employed in or in anyway connected with the maintenance and working of any telecommunications network, or telecommunications apparatus;

(m) public inspection of records of the Commission;

(n) procedures for the treatment of complaints;

(o) procedures for dispute resolution;

(p) matters for which guidelines are to be issued by the Commission;

(q) matters relating to the quality of telecommunications services;

(r) technical regulation and setting of technical standards;

(s) fees, including the amount and circumstances in which they are payable;

(t) conduct of public hearings;

(u) private networks and VASTS;

(v) cost studies and pricing models;

(w) submarine cables and landing rights;

(x) registration and management of domain names;

(3) Where ECTEL recommends regulations for adoption for the purpose of the Agreement the Minister shall take all reasonable steps to ensure their promulgation.

14. Part 1 of the Second Schedule to the 2000 Act sets out the conditions that may be included in licences. These conditions are as follows:

> *Licences and frequency authorisations granted under this Act may contain any or all of the following conditions:*
>
> *(a) the networks and services which the licensee or authorisation holder is and is not entitled to operate and provide, and the networks to which the network of the licensee or authorisation holder can be connected;*
>
> *(b) the duration of the licence or authorization*
>
> *(c) the build-out of the network and geographical and subscriber targets for the provision of the relevant services;*
>
> *(d) the use of radio spectrum;*
>
> *(e) the provision of services to rural or sparsely populated areas or other specified areas in which it would otherwise be uneconomical to provide services;*
>
> *(f) the provision of services to the blind, deaf, physically and mentally handicapped and other disadvantaged persons;*
>
> *(g) the interconnection of the licensee's network with those of other operators;*
>
> *(h) the sharing of telecommunications infrastructure;*
>
> *(i) prohibitions of anti-competitive conduct;*
>
> *(j) the allocation and use by the licensee of numbers; and*
>
> *(k) provision of universal service.*

15. Part 2 of the Second Schedule to the 2000 Act sets out the conditions that must be included in licences. It is not necessary to refer to any of these conditions.

THE TELECOMMUNICATIONS (INTERCONNECTION) REGULATIONS 2003

16. The Telecommunications (Interconnection) Regulations 2003 were made on 6th February 2003 pursuant to section 73 of the 2000 Act and were deemed to have come into force on 12th October 2001.

17. C&W Grenada had a number of objections to the 2003 Regulations. One objection was that the Regulations were expressed to have retrospective effect. Further, C&W Grenada felt that the Regulations inappropriately departed from earlier draft Regulations. On 27th February 2003, C&W Grenada issued an application for leave to bring judicial review proceedings disputing the legality of the 2003 Regulations and sought a stay of the operation of the Regulations pending the determination of the judicial review proceedings. On 28th February 2003, the Eastern Caribbean Supreme Court granted leave to apply for judicial review and made an interim order staying the implementation of the Regulations until the determination of the application for judicial review. This interim order remained in force until the proceedings were discontinued on 1st December 2003.

18. In the circumstances set out above, the Claimants do not make any claim based on the 2003 Regulations. However, for the sake of completeness, and in the same way as I have done in SLU and SVG, I will set out the more significant regulations.

19. Regulation 3 of the 2003 Regulations contained definitions which included the following defined terms:

> …
>
> *"interconnecting operator" means a public network operator who requests interconnection from another public network operator under section 45 of the Act;*
>
> *"interconnection capacity" means the ability to provide interconnection;*
>
> *"interconnection provider" means a public network operator who receives a request to provide interconnection under section 45 of the Act;*
>
> *"dominant interconnection provider" means an interconnection provider designated by the Commission as a dominant interconnection provider under regulation 9;*
>
> *"point of interconnection" means the point or points of interconnection where the exchange of telecommunications between the telecommunications network of an interconnection provider and the telecommunications network of an interconnecting operator takes place;*
>
> …
>
> *"reference interconnection offer" (RIO) means a document that sets out the terms on which the telecommunications provider proposes to offer interconnection services, that includes a description of the interconnection and other services offered to interconnecting operators and that specifies the charges and other terms and conditions on which those services are offered (and "reference interconnection offer provider" shall have a corresponding meaning).*

20. The more significant Regulations are as follows:

> ***4. Notice of request.***
> *(1) An interconnecting operator shall notify the Commission of any request for interconnection by forwarding to the Commission 2 copies of the written request, one of which shall be addressed to ECTEL.*
> *(2) A request for interconnection shall contain at least the following information_*
> *(a) a copy of the licence of the interconnecting operator; or a certificate from the Commission declaring that the interconnecting operator is duly licenced and indicating the type of licence(s) held.*
>
> *(b) the services with respect to which interconnection is sought; and*
>
> *(c) any other information reasonably required in order for the telecommunications provider to respond to that request.*

5. Equal responsibility.
An interconnection provider and an interconnecting operator shall act in a manner that enables interconnection to be established as soon as is reasonably practicable.

6. Non-discrimination and transparency.
*(1) In providing interconnection, an interconnection provider shall act in accordance with the following principles_*

(a) interconnection shall be provided on non-discriminatory terms and conditions including charges and quality of service;

(b) interconnection shall be provided to interconnecting operators on no less favourable terms and of no less favourable quality than those on which the interconnection provider provides similar services for itself; and

(c) an interconnection provider shall provide on request information reasonably necessary to interconnecting operators considering interconnection, in order to facilitate the conclusion of any agreements.

(2) The information provided shall include planned charges for implementation within the next 6 months following a request, unless otherwise agreed by the Commission.

7. Confidentiality.
(1) A person shall not knowingly communicate, or allow access to, information received from a telecommunications provider in respect of interconnection, except to the extent authorized by the telecommunications provider in writing, or by the Act.

(2) An interconnection provider does not need, in connection with any legal proceedings, to produce any statement or other record containing information referred to in paragraph (1), or to give evidence relating to it, unless the proceedings relate to the enforcement of the Act.

…

9. Dominant interconnection provider.
(1) The Commission, acting on the recommendation of ECTEL, shall by notice in the Gazette designate a dominant telecommunications provider in respect of a particular telecommunications market or markets in Grenada.

(2) In the interim period between the promulgation of these regulations and declaration of dominance by the Commission, the incumbent telecommunications provider in Grenada shall be deemed to be dominant.

*(3) A telecommunications provider can only be designated under paragraph (1) if_*

(a) the Commission or ECTEL has determined, after a public consultation process, that the telecommunications provider possesses significant market power with respect to the market or markets for telecommunications services in Grenada; or

(b) it is in the long-term interests of consumers of telecommunications services in Grenada that the provider be so designated.

…

***11. Burden of proof**.*
The burden of proving that interconnection rates are reasonably cost-oriented rates shall lie with the interconnection provider.

12. Rate structure.
(1) The interconnection rates shall be imposed in a transparent manner and must identify clearly the charges for interconnection services;

(2) Charges for interconnection services shall be cost-oriented and appropriately apportioned.

13. Reference interconnection offer.
(1) Each dominant interconnection provider shall publish a reference interconnection offer.

(2) The reference interconnection offer provider shall set different tariffs, terms and conditions for different interconnection services, if such differences can be objectively justified and do not result in the unfair distortion of competition.

(3) The reference interconnection offer provider shall apply the appropriate interconnection tariffs, terms and conditions when providing interconnection for its own services or those of its affiliates, subsidiaries or partners.

(4) The charges of the reference interconnection offer shall be sufficiently unbundled to ensure that the interconnecting operator requesting interconnection is not required to pay
for services not related to the service requested.

(5) Interconnection rates set out in the reference interconnection offer shall be cost-oriented.

(6) The Commission shall have the authority to ensure that a reference interconnection offer is cost oriented and compliant with the laws and regulations.

14. Points of interconnection.
(1) An interconnection provider shall offer interconnection services at any technically feasible point of its telecommunications network, upon request by an interconnecting operator.

(2) The interconnecting operator shall pay for the investment, operations and maintenance expenses of the facilities necessary to reach the point or points of interconnection within the network of the interconnection provider, and these facilities shall become part of the network of the interconnecting operator who shall be entitled to receive compensation for any use of his facility or network by the interconnection provider.

(3) Where the network of an interconnection provider needs to be upgraded to facilitate interconnection, whether wholly or partly, the interconnecting operator shall be entitled to undertake the upgrading or improvement of the interconnection provider's network and to receive compensation for the works through credits or discounts or through any other form agreed upon, providing that the interconnection provider is unable or unwilling to undertake the upgrading of his network in a cost efficient and timely manner.

…

16. Form and contents of agreement.
*(1) All interconnection agreements and reference interconnection offers shall be in writing and the following matters shall be specified in those agreements unless a particular matter is irrelevant to the specific form of the interconnection requested_*
(i) access to ancillary, supplementary and advanced services;

(ii) adequate capacity and service levels including the remedies for any failure to meet those service levels;

(iii) a provision that deals with regulatory change, including determinations by the

Commission;

(iv) duration and renegotiation of interconnection agreements;

(v) forecasting, ordering, provisioning and testing procedures;

(vi) dispute resolution procedures;

(vii) geographical and technical characteristics and locations of the points of interconnection;

(viii) information handling and confidentiality provisions;

(ix) intellectual property rights;

(x) measures anticipated for avoiding interference or damage to the networks of the parties involved or third parties;

(xi) national and international appropriate indexes for service quality;

(xii) procedures in the event of alterations being proposed to the network or service offerings of one of the parties;

(xiii) provisions for the formation of appropriate working groups to discuss matters relating to interconnection and to resolve any disputes;

(xiv) if appropriate, provision of infrastructure sharing and identification of collocation and their terms;

(xv) provision of network information;

(xvi) technical specifications and standards;

(xvii) terms of payment, including billing and settlement procedures;

(xviii) the maintenance of end-to-end quality of service;

(xix) the procedures to detect and repair faults, as well as an estimate of acceptable average indexes for detection and repair times;

(xx) the scope and description of the interconnection services to be provided;

(xxi) the technical characteristics of all the main and auxiliary signals to be transmitted by the system and the technical conditions of the interfaces;
(xxii) transmission of Calling Line Identity, where available to be transmitted;
(xxiii) ways and procedures for the supply of other services that the parties agree to supply to each other, such as operation, administration, maintenance, emergency calls, operator assistance, automated information for use, information on directories, calling cards and intelligent network services;
(xxiv) any other relevant issue; and
(xxv) the obligations and responsibilities of each party in the event that inadequate or defective equipment is connected to their respective networks.

(3) Public network operators shall make available to interested parties any proposed interconnection agreements or reference interconnection offers.

17. Connectivity.
(1) An interconnection agreement shall include provision for any-to-any connectivity to allow each end-user of a network to communicate with each other end-user of public telecommunications services, regardless of whether the end-users are connected to the same, or different, networks.

*(2) An interconnection agreement shall include provision for the suspension, termination or amendment of the agreement in the event of_*

(a) conduct that is illegal or interferes with the obligations of the telecommunications provider under the relevant license, Act or Regulations;

(b) requirements that are not technically feasible;

(c) health or safety problems;

(d) requirements for space that is unavailable; or

(e) circumstances that pose an unreasonable risk to the integrity or security of the network or services of the telecommunications provider from which the sharing arrangement is requested.

(3) An interconnection agreement shall include a provision to allow for the suspension of interconnection if it is necessary to deal with a material degradation of the telecommunications network or services. Any such suspension must be sanctioned by the Commission.

18. ***Non-inclusion.***
*An interconnection agreement shall not contain any provision which has the effect of_*

(a) imposing any unfair or discriminatory penalty or disadvantage upon a person in the exercise of the person's right to be provided with interconnection;

(b) precluding or frustrating the exercise of a person's rights or privileges afforded under the Act or Regulations; or

(c) preventing a licensee from lawfully providing an interconnection service to another telecommunications provider.

19. Amendment of agreement.
*(l) The parties to an interconnection agreement may amend or modify an agreement which has been approved by the Commission by_*

(a) submitting a copy of the proposed amendment or modification to the Commission for its approval;

(b) Any such amendment shall be submitted to the Commission at least 30 days prior to the requested date of implementation.

*(2) Notwithstanding any provision of the agreement, no interconnection provider shall terminate an interconnection agreement for breach of that agreement unless_*

(a) the interconnection provider has given the interconnecting operator a written notice stating the breach, and providing for a period of not less than 3 months during which the breach can be cured;

(b) the interconnecting operator has failed to remedy the breach within the notice period; and

(c) if the services provided under the Agreement are essential services, the Commission, after due notice, has consented to the termination (provided that, in the case of an interconnection agreement that provides both essential and other services, only termination with respect to those essential services may be so restricted).

20. Procedures for application.
(1) The parties shall submit a written application of a proposed interconnection agreement to the Commission not less than 30 working days prior to the proposed effective date of the agreement.

*(2) The Commission shall approve the proposed inter-connection agreement if it is satisfied that the proposed interconnection agreement is consistent with_*

(a) any reference interconnection offer in force that is cost oriented and compliant with the Laws and Regulations

(b) where no such reference interconnection offer is in force, the principles of interconnections set out in Regulation 6 of these Regulations

(3) The Commission shall consult ECTEL for its advice and recommendations concerning the application, before determining whether to approve the proposed interconnection agreement.

(4) The Commission may request additional information from the parties to a proposed interconnection agreement if it considers it necessary to further evaluate the terms, conditions and charges contained in the proposed interconnection agreement.

(5) If the Commission notifies the parties that it does not consider that the proposed interconnection agreement is consistent with the principles set out in Regulation 6 of these Regulations, the interconnection provider and the interconnecting operator shall negotiate and submit a revised proposed interconnection agreement to the Commission, within a reasonable time, having regard to the matters which are the subject of the Commission's request.

(6) If the Commission does not request additional information or modifications, or rule on the agreement within 30 days of receiving an application for the approval or renewal of the agreement (or 10 days, in the case of an agreement revised in accordance with paragraph (5)), the parties may refer the matter to the Minister for his consideration.

***21. Interconnection not permitted**.*
*A party shall not negotiate or propose to enter into an interconnection agreement if the Commission rules that_*

(a) the law prohibits the interconnection;

(b) the interconnection would endanger life or safety, or damage the property or impair the quality of the services of the party providing the interconnection;

(c) the licence issued to the party from whom the interconnection is requested exempts it from the obligation to interconnect;

(d) the licence issued to the party requesting interconnection does not authorize the telecommunications services for which interconnection is requested;

(e) the requested interconnection is not technically feasible; or

(f) the proposed interconnection is contrary to the law or the public interest.

…

28. Dispute resolution.
(1) If an interconnection provider and an interconnecting operator are unable, after having negotiated in good faith for a reasonable period as determined by the Commission, to agree the terms and conditions of an interconnection agreement, either party may request the assistance of the Commission in resolving the dispute.

*(2) The Commission, in responding, to a request for assistance, may take one or more of the following actions_*

(a) act as arbitrator of that dispute;

(b) appoint a mediator to that dispute;

(c) direct the parties to commence or continue interconnection negotiations.

(3) If the Commission acts as an arbitrator or appoints a mediator, it may direct that payment of reasonable costs and expenses be made by the relevant parties to the dispute.

(4) Where the parties cannot agree on a date upon which to commence negotiations, the Commission shall be empowered to compel both parties to commence negotiations by a specified date.

(5) The Commission may, if requested by either party, set a time limit within which negotiations on interconnection are to be completed. Any such direction shall set out the steps to be taken if agreement is not reached within the time limit. The steps may include the imposition of an interim interconnection agreement by the Commission.

(6) A person who delays or refuses to implement:

(a) the steps (including any interim agreement) set down by the Commission under Regulation 28(5); or

(b) an approved interconnection agreement;

commits an offence and is liable on summary conviction to a fine of two hundred and fifty thousand dollars ($250,000.00) per day for every day the breach remains in effect.

29. Role of parties in dispute.
(1) The complaining party shall submit to the Commission a clear and reasoned statement of the issues in dispute, as well as any issues on which there is agreement.

(2) The opposing party shall respond to the complaint within 30 days if the dispute is in respect of an agreement in force or within 10 days in respect of an agreement being negotiated, and shall state the reason for its position including any statutory or regulatory justification for that position.

30. Fairness in dispute resolution. *(1) When a complaint has been referred to the Commission it shall take steps to resolve the dispute_*

(a) as promptly as practicable, having regard to the matters in dispute;

(b) preserving any agreements between the parties over issues that are not in dispute; and

(c) consistent with paragraph (2) below.

*(2) When acting as an arbitrator, the Commission shall attempt to achieve a fair balance between the legitimate interests of the parties to the dispute, and have regard to the following factors (which do not limit the factors that may be considered)_*

(a) whether the proposed ruling promotes the long-term interests of consumers of telecommunications services in Grenada;

(b) the interests of persons who have rights to use the telecommunications networks concerned;

(c) the economically efficient operation of a telecommunications network or provision of a telecommunications service.

31. Disconnection of networks. *(1) Any dispute between parties to an interconnection agreement shall not cause the partial or total disconnection of the relevant network except in accordance with regulation 17.*

(2) Notwithstanding paragraph (1), the Commission shall decide that partial or total disconnection is necessary and so advise the parties.

(3) Whenever the Commission takes action in accordance with paragraph (2), it shall recommend and instruct that preliminary measures are applied to minimize any negative effects on the users of one or both networks.

32. Guidelines for resolving dispute.
*In performing its duties under regulation 30, the Commission shall take into account the_*

(a) availability of technically and commercially viable alternatives to the interconnection requested;

(b) desirability of providing users with a wide range of telecommunications services;

(c) interests of the users;

(d) nature of the request in relation to the resources available to meet the request;

(e) need to maintain a universal service;

(f) need to maintain the integrity of the public telecommunications network and the interoperability of services;

(g) need for promotion of competition;

(h) public interest;

(i) regulatory obligations or constraints imposed on any of the parties; and

(j) any other relevant and appropriate consideration.

…

THE LICENCES

21. On 12th October 2001, with effect from 12th October 2001, the relevant Minister granted to C&W Grenada a licence to establish and operate a Fixed Public Telecommunications Network/Service within Grenada. The licence was non-exclusive and was for a period of 15 years from 12th October 2001. The licence was

stated to be subject to suspension and revocation in accordance with sections 38 and 39 of the Telecommunications Act 2000.

22. Condition 6.4 of the licence conditions stated that the licensee was not to engage in any activities, whether by act or omission, which had or were intended to have or were likely to have the effect of unfairly preventing, restricting or distorting competition in any market for Licensed Services, as specified in Regulations made by the Minister under the Act. By condition 6.5, any act or omission was not to involve an abuse of a dominant position or any contract or concerted practice where the effect was or was likely to be a substantial lessening of competition in any market.

23. By condition 12.1, the licensee was to comply with all legislation and regulations and the directions orders and recommendations issued by the Minister or the Commission.

24. On 12th October 2001, with effect from 12th October 2001, the relevant Minister granted to C&W Grenada a licence to establish and operate a Public Cellular Mobile Telecommunications Network/Service within Grenada. The licence was non-exclusive and was for a period of 15 years from 12th October 2001.

25. The licence in relation to the mobile network contained essentially the same terms as those set out above in relation to the fixed network licence.

26. On 20th May 2003, with effect from 20th May 2003, the relevant Minister granted to Digicel Grenada a licence to establish and operate a Public Cellular Mobile Telecommunications Network/Service within Grenada. The licence was non-exclusive and was for a period of 15 years from 20th May 2003.

27. By condition 13.1 of this licence, the Licensee was required to proceed expeditiously and diligently with the establishment of its network and service and in any event, the Licensee was within 6 months of the grant of the licence (i.e. by 20th November 2003) to begin to install its network and establish its service.

THE FACTS

28. On 30th January 2003, the relevant parties in SLU and SVG signed interconnection agreements for SLU and SVG.

29. On 6th February 2003, the interconnection regulations for Grenada were promulgated. On 28th February 2003, the regulations were put into suspense by an order of the Eastern Caribbean Supreme Court.

30. The C&W company operating in Grenada was C&W Grenada. The Digicel company which had sought, and later obtained, a licence to operate in Grenada was Digicel Grenada.

31. On 2nd May 2003, the interconnection equipment ordered by Digicel Grenada arrived in Grenada. The equipment took some 7 or 8 weeks to arrive, following the placing of the order for the equipment.

32. Digicel Grenada obtained its licence for Grenada on 20th May 2003. However, much earlier, on 12th December 2002, Digicel Grenada requested C&W Grenada to commence the process of interconnection in Grenada. The relevant letter of request actually came from Digicel SLU and was sent to CWWI but I proceed on the basis that the intention behind the letter was to request interconnection between Digicel Grenada and C&W Grenada. The letter of 12th December 2002 identified the interconnection services requested by Digicel Grenada. It was explained that direct connection to the international gateway of C&W was required to ensure an adequate grade of service and to avoid local congestion.

33. CWWI replied to the request of 12th December 2002 on 8th January 2003 (the reply was wrongly dated 8th December 2003). CWWI stated that it did not consider the request to be a valid request because Digicel Grenada did not have a licence to operate in Grenada and the proper time for the interconnection process to begin was following the grant of such a licence.

34. Insofar as Digicel Grenada asserted at the trial that C&W Grenada's refusal to commence the interconnection process following the request of 12th December 2002 was a breach of duty by C&W Grenada, I do not accept that submission. The obligation under section 45 of the Telecommunications Act 2000 only applied to a party who had the benefit of a telecommunications licence. I need not consider the regulations in Grenada in relation to this allegation. The regulations were not made until the 6th February 2003 and, in any event, on 28th February 2003, the Eastern Caribbean Supreme Court granted an interim order staying their implementation. That order remained in force until 1st December 2003. Further, I do not accept the Claimants' submissions that the terms of the licence held by C&W Grenada obliged that company to begin the interconnection process before the date when this was required by the Telecommunications Act 2000.

35. Before Digicel Grenada obtained its licence, CWWI concluded interconnection agreements with Digicel SLU and Digicel SVG. These agreements were reached on the 31st January 2003. The legal framework agreements in SLU and in SVG contained clause 10.2 which provided:

> "The Parties recognise that rates for Incoming International Calls to a Mobile may need to be adjusted from time to time pursuant to negotiations between the Parties, including to take into account international settlement rates, but for the avoidance of doubt, will only be adjusted in a manner that ensures that the rates for Incoming International Calls to a Mobile remain reciprocal."

36. Clause 34 of the legal framework agreements in SLU and SVG contained a general arbitration clause in relation to all disputes in connection with the agreement.

37. The background to the inclusion of clause 10.2 in the legal framework agreements was that the mobile termination rate payable by CWWI to the Digicel company was EC55 cents whereas the rate payable by a US based carrier for an international call delivered to CWWI was a lower figure. At the relevant time, the US Federal Communications Commission's Benchmarks Order of 2001 provided that US based carriers should not pay a rate for international calls to SLU or SVG in excess of

US19 cents (equivalent to EC51 cents). In fact, the average settlement rate which CWWI had earlier agreed with US carriers was lower than the benchmark at US14 cents (EC37.6 cents). Thus, for an international call carried by a US carrier delivered to CWWI in SLU or SVG and then transmitted on to the Digicel company, CWWI would receive EC37.6 cents and pay to the Digicel company EC55 cents. In this way, each of these calls transmitted by CWWI for the ultimate benefit of the Digicel company would involve CWWI in a significant loss.

38. CWWI considered that there were two possible ways to deal with this situation in SLU and SVG. The first was for CWWI to attempt to persuade some international carriers to pay higher rates to CWWI so as to enable CWWI to make a profit, or at least break even. There was some basis for thinking that this could be achieved but for various reasons, which I need not describe, it turned out to be difficult and in the end was not achieved. The alternative was to adjust the level of mobile termination rate paid by CWWI to the Digicel company so that this rate was below the sum received by CWWI from the international carrier. Clause 10.2 was an attempt to provide for a possible revision of the mobile termination rate in this respect.

39. Mr Black of Digicel accepted in his evidence that the Digicel companies intended to honour the terms of clause 10.2 of the legal framework agreements in SLU and SVG. The question later arose as to whether clause 10.2 was "an agreement to agree" and therefore of no contractual effect. It is not necessary for me to resolve that question of law. The Claimants submitted that clause 10.2 only contemplated re-negotiation in the event of a change in international settlement rates and they point out that there was no change in those rates between 31st January 2003 and the matter receiving attention in and after March 2003. Again, it is not necessary for me to determine whether the Claimants are right in their submission.

40. There does not appear to have been any communication between the relevant parties in SLU and SVG between 31st January 2003 and 12th March 2003 in an attempt to operate the provisions of clause 10.2 of the legal framework agreements. I think it is likely that in that period CWWI did begin to take steps to re-negotiate the rate which CWWI had to pay to certain international carriers. That possibility was discussed in an internal C&W email from Mr McNaughton on 5th March 2003. The matter does not seem to have been given any priority on the part of CWWI. I do not detect any sinister motive in the fact that the subject did not receive more active consideration.

41. On 12th March 2003 Mr White of Digicel SLU sent an email to Mr Thompson of the C&W carrier services team. In that email, Mr White referred to the topic of re-negotiating the mobile termination rate for incoming international calls. Mr White enquired whether there was still a need to re-negotiate. Mr Thompson passed this email to Mr McNaughton. It is clear from Mr McNaughton's response to Mr Thompson that Mr McNaughton, who had not been present at the discussions in Miami in January 2003, was unaware of the provisions of clause 10.2 in the legal framework agreements in SLU and SVG. Mr McNaughton also gave oral evidence to this effect and I accept that evidence. It is also clear from Mr McNaughton's response to Mr Thompson that Mr McNaughton wished to take advantage of the opportunity to re-negotiate the mobile termination rate payable to the Digicel company for such incoming international calls.

42. Not much appears to have happened for a few days after 12th March 2003. By 18th March 2003, physical interconnection in SLU and SVG was well advanced although on 18th March 2003, Mr Miller of CWWI informed Mr Doyle of Digicel that access to CWWI's network for incoming international calls for Digicel would be denied until agreement was reached as to the appropriate mobile termination rate. On 19th March 2003 Digicel SLU wrote to Mr Thompson referring to the message from Mr Miller and stating that a denial of access to incoming international calls would be a breach by CWWI of the interconnection agreement.

43. On 20th March 2003, the parties arranged a meeting for the following day to discuss this question. The meeting duly took place on 21st March 2003 and the point appears to have been discussed in detail. Digicel SLU and Digicel SVG took the line that they were entitled to the transmission of incoming international calls across the C&W network. CWWI expressed the view it would not pass this traffic on terms causing it a financial loss. At the end of the meeting, Mr Thompson thought that the parties had arrived at an interim solution. Mr Batstone of CWWI sent an email to Mr White of Digicel SLU setting out the terms of that interim solution.

44. Later on 21st March 2003, Digicel SLU notified the CWWI carrier services team that Digicel SLU intended to launch its service in SLU on 24th March 2003. On 22nd March 2003, Digicel SVG gave a similar notification to the carrier services team. On 24th March 2003, Digicel's solicitors wrote to CWWI complaining of a breach by CWWI of the interconnection agreements in SLU and SVG by reason of CWWI's failure to permit the transmission of incoming international calls across CWWI's network. On the same day, CWWI replied stating that the matter was being discussed and CWWI was optimistic that a solution could be found. CWWI requested that the matter be referred to arbitration rather than to the courts.

45. On 25th March 2003, Mr McNaughton emailed Mr Hogan of Digicel SLU referring to the fact that negotiations were ongoing. Mr White of Digicel SLU replied to this email demanding that incoming calls be permitted, failing which Digicel SLU would seek a legal remedy. The parties appear to have stood their ground without further negotiations at this point.

46. On 31st March 2003, Mr McNaughton wrote to Mr White of Digicel SLU stating that CWWI had not heard from Digicel SLU since 26th March 2003 and that CWWI was ready to continue negotiations. On 27th March 2003, Mr O'Brien, the Chairman of Digicel, wrote direct to Mr Lapthorne, the Chairman of C&W plc, referring to this matter and calling on CWWI to comply with the interconnection agreements in SLU and SVG.

47. On 3rd April 2003, Mr Lerwill, the Deputy Group Chief Executive and the Chief Executive of Cable and Wireless Regional, replied to Mr O'Brien's letter stating that progress had been made towards a negotiated solution and those negotiations should be finalised.

48. On 9th April 2003, Digicel SLU commenced proceedings against CWWI claiming, amongst other things, an injunction requiring CWWI to permit the passage of international incoming calls across the CWWI network so as to reach Digicel. On

11th April 2003, Digicel SVG commenced similar proceedings claiming similar relief in relation to SVG.

49. This passage in the history has been the subject of allegation and counter allegation. The Claimants say that CWWI was at fault in not pursuing the question of negotiations after 31st January 2003 and were further at fault in blocking international calls destined for the Digicel company. CWWI complains that the matter could have been resolved by negotiation and although credit is to be given to Mr White of Digicel for raising the matter on 12th March 2003, Digicel SLU and Digicel SVG were not prepared to settle the matter at the end of March 2003, when reasonable terms were available. In my judgment, these allegations and counter-allegations are in the end not material to the issues I have to decide. I do not detect anything sinister in the fact that CWWI did not pursue the question of re-negotiation in accordance with clause 10.2 of the interconnection agreement until a late stage when the Digicel company was on the brink of launching its service. I think it is the case that CWWI did commit a breach of the interconnection agreements, or ran a very serious risk of committing a breach of the interconnection agreements, by blocking incoming international calls. However, the rights and wrongs of that matter were subsequently settled and are not for determination in this present litigation.

50. As to the allegation that Digicel SLU and Digicel SVG became difficult to contact at the end of March 2003, it seems clear that those companies decided at that point that their legal rights were better protected by threatening to bring proceedings, and actually bringing proceedings, rather than engaging in negotiations against a background of a continuing block on international incoming calls.

51. On (or about) 17th April 2003, an order was made by consent in the proceedings brought by Digicel SLU. By this order, CWWI undertook to lift the block on incoming international calls crossing CWWI's network so as to reach Digicel SLU. In return, Digicel SLU undertook to commence negotiations on 22nd April 2003 with regard to the rates for incoming international calls terminating on Digicel SLU's mobile network in SLU. I have not seen any similar order in the SVG proceedings but the parties appear to have proceeded on the basis that this arrangement applied in both SLU and SVG.

52. Following the consent order of 17th April 2003, there appear to have been initial difficulties in the parties fixing up meetings or conference calls to negotiate the relevant rate for incoming international calls. CWWI filed affidavit evidence in the SLU proceedings accusing Digicel SLU of failing to honour its undertaking to negotiate the relevant rate. Digicel SLU filed affidavit evidence seeking to challenge this assertion. This was followed by communications between the parties on the subject of a possible compromise of the difficulty in relation to the rates for international incoming calls. CWWI's perception was that the Digicel companies were not seriously engaging in a process of negotiation but were going through the motions on the basis that they were content to rely on the fact that the existing rates were favourable to the Digicel companies and CWWI was, pursuant to the court order of 17th April 2003, passing international traffic to Digicel.

53. At the trial, the Claimants submitted that the right finding was that the Digicel companies were genuinely engaging in negotiations but the fact remained that the

parties were unable in April and May 2003 to reach a compromise. In my judgment, the behaviour of Digicel SLU and Digicel SVG is accurately described in an internal Digicel memorandum of 3rd July 2003 from Mr Black to Mr Buckley and others. Mr Black stated that the Digicel tactic in the negotiations as to the rates for incoming international calls was to avoid doing anything to change the previously prevailing rate. As late as 3rd July 2003, Mr Black referred to the Digicel companies continuing to avoid negotiating a new rate.

54. In any event, by the date that Digicel Grenada was granted its licence in Grenada, 20th May 2003, the question as to the appropriate rate for incoming international calls in SLU and SVG had not been settled.

55. On 20th May 2003, Digicel Grenada was granted a licence to operate a telecommunications service in Grenada. The process of application for this licence had been very protracted. It is not necessary to catalogue the difficulties which Digicel Grenada encountered on the way to obtaining its licence. It is sufficient for me to find that the grant of this licence to Digicel Grenada was very far from being a foregone conclusion and there was doubt and uncertainty as to whether it would obtain its licence until the very last moment when it succeeded in doing so.

56. On 22nd May 2003, Digicel Grenada, or another Digicel company acting on its behalf, wrote to Mr Thompson of CWWI requesting interconnection. Although the request does not say so, the parties have proceeded on the basis that this was a valid request to the relevant operator, C&W Grenada. Appendix 1 to the letter set out the interconnection services which Digicel Grenada requested. Those interconnection services included an international inbound service handling traffic from international callers to Digicel Grenada. It was stated that this was considered an interconnection service up to 1st August 2003 and after that date Digicel Grenada would require a wholesale international service.

57. On 26th May 2003, CWWI, on behalf of C&W Grenada, replied to the request for interconnection in Grenada. CWWI stated that it would send to Digicel Grenada a draft interconnection agreement "shortly". Various amendments to the form used elsewhere in the OECS were referred to and, in particular, it was stated that the earlier form of agreement would need to be modified to address the issue of incoming international calls.

58. At the trial, the parties made submissions as to whether a service of transmitting incoming international calls to Digicel Grenada was or was not an interconnection service, which C&W Grenada was obliged to provide under section 45 of the Telecommunications Act 2000. In my judgment, it is not necessary to reach any conclusion on that matter. At the time of this request for interconnection, the Digicel companies and, in particular, Digicel Grenada were asserting that the service of transmitting incoming international calls was part of an interconnection service. Digicel SLU and Digicel SVG had positively asserted that fact when seeking interim injunctions in the proceedings they brought against CWWI in April 2003. As indicated above, when Digicel Grenada requested interconnection with C&W Grenada on 22nd May 2003, the request for interconnection specifically included a request for a service of transmitting incoming international calls as part of an interconnection service. C&W Grenada proceeded on the basis that Digicel Grenada

was entitled to seek such a service as part of an interconnection service. It seems to me to be nothing to the point that certain individuals within the C&W carrier services team either took the view that an incoming international call service was not part of an interconnection service or that there was some doubt about that question. C&W Grenada were entitled to proceed on the basis that Digicel Grenada were right on the question of incoming international calls being part of an interconnection service. That meant that C&W Grenada and Digicel Grenada had to negotiate and eventually agree a rate for incoming international calls. That subject, of course, was the identical subject outstanding in relation to SLU and SVG pursuant to clause 10.2 of the interconnection agreements in those countries and pursuant to the undertaking given by Digicel SLU in the SLU High Court proceedings. It seems inevitable that the three Digicel companies and CWWI and C&W Grenada would wish to discuss that single subject at the same time for all three countries. I do not see how a discussion of that topic, applicable to all three countries, would be any different as regards content or duration as compared with a discussion of that topic in relation to Grenada alone. That is to say, for so long as Digicel Grenada was requesting an interconnection service in respect of incoming international calls in Grenada, a negotiation on the appropriate rate for that service would not be delayed or lengthened by reason of the fact that the same discussion was taking place with Digicel SLU and Digicel SVG, through the same human agency, at the same time.

59. In addition, clause 9.6 of the legal framework agreements in SLU and SVG provided that the mobile termination rates for, amongst other countries, SLU, SVG and Grenada were to be applied on a uniform basis across these countries. Mr Black accepted when cross-examined that the rate which was agreed between C&W Grenada and Digicel Grenada would inevitably become the rate for incoming international calls in SLU and SVG also.

60. It is convenient at this point to deal with some miscellaneous matters referred to by the Claimants in relation to Grenada. These are put forward by the Claimants as examples of a lack of co-operation by C&W Grenada. They are not pleaded as breaches by C&W Grenada of any duty owed to Digicel Grenada. The matters to which I refer are the Claimants' complaints about a lack of co-operation in identifying the location of a footway box, part of the joining service between the two networks**,** a refusal to provide a quotation for running fibre to Digicel's interconnection equipment, a lack of cooperation in relation to a site survey and the provision of a numbering plan for Grenada. The Defendants say that because these matters of complaint were not pleaded, the Defendants did not come to court prepared with evidence to set out the full story in relation to each matter. On the material before me, the matters of complaint do appear to be indicative of an attitude on the part of C&W Grenada that it would not do anything which it was not obliged to do to assist Digicel Grenada to launch its rival network in Grenada. More precise findings on these matters are probably not necessary. Even in the absence of these matters of complaint being relied upon by the Claimants, I would in any event have made the finding that C&W Grenada was not prepared to volunteer to help Digicel Grenada in relation to matters where it owed no obligation to take any action to assist Digicel Grenada. Further, I accept the Defendants' submission that there was nothing unlawful, and indeed nothing very surprising, in C&W Grenada taking the stance that it would not do things, which it was not legally obliged to do,

for the purpose of improving its negotiating position in relation to matters which had to be negotiated between the parties as part of the process of interconnection.

61. It is convenient at this point to consider the case put forward by the Claimants that for most of the relevant period during which negotiations took place in Grenada the relevant request for interconnection was not the written request made on 22nd May 2003 (which expressly included a request for an incoming international call service) but was instead an oral request made on 12th June 2003 for an interconnection service, which expressly excluded an incoming international calls service. Whilst there was some reference to this possible case in the Claimants' pleading, the full force of the Claimants' case in this respect was only felt in the course of the Claimants' closing submissions.

62. If the relevant operating request in Grenada was a request for an interconnection service which included an incoming international call service, then it would follow that C&W Grenada was obliged under the Telecommunications Act 2000 to deal with such a request and to negotiate the terms of such interconnection. The other side of the coin of C&W Grenada being under an obligation to deal with that request is that it was entitled to negotiate with Digicel Grenada the appropriate rate for incoming international calls to Grenada. As described above, the appropriate rate for incoming international calls to Grenada was going to be the same rate for incoming international calls to SLU and SVG.

63. Conversely, if the relevant operating request from Digicel Grenada was for interconnection without an incoming international call service, then C&W Grenada was not obliged to discuss the rate for such a service in Grenada and, similarly, was not entitled to delay negotiations in Grenada by attempting to negotiate a rate for such a service in Grenada. Further, C&W Grenada would not have been entitled to delay negotiations in Grenada by the time taken to discuss the rate for incoming international calls in SLU and SVG.

64. The Defendants submitted that, on the true construction of the Telecommunications Act 2000, there had only ever been one operating request in Grenada and that was the written request of 22nd May 2003. The parties differed as to the intended operation of section 45 of the 2000 Act. Section 45(2) provides that a telecommunications provider who wished to interconnect with the telecommunications network of another telecommunications provider must request interconnection "in writing". Section 45 continues by referring to other steps which are to be taken by means of requests "in writing": see section 45(3) and (5). The Defendants say that a request for the purpose of section 45(2) must be in writing so that a purported oral request will be of no effect for the purpose of section 45(2). The Claimants appear to accept this basic submission. They did not submit that the reference to writing in section 45(2) was directory rather than mandatory, so that an oral request would suffice. What divided the parties was the question as to what formality, if any, was required for amendments or revisions to be made to a request for interconnection in circumstances where the original request for interconnection had been in writing, in compliance with section 45(2).

65. The parties debated various issues as to the operation of section 45(2). For example, the Defendants submitted that it was not possible for there to be two requests in

operation at any one time. The Defendants also submitted that it was not possible to amend in any way the original request. It may be that the Defendants would accept that a telecommunications provider who had made a written request could formally withdraw that request and make a second written request which would then be the relevant operating request. However, the Defendants do insist that it is not possible for a telecommunications provider, having made a valid written request, to indicate in the course of negotiations that it no longer wishes to have a part of the service initially requested, resulting in the statute taking effect as if the original request had been reduced in scope. The Claimants submit, to the contrary, that it is perfectly open to a telecommunications provider to reduce the scope of its request. The Claimants make that submission so that if the scope of the request is reduced in that way, the party in receipt of the request is no longer bound to negotiate the part of the service that has been removed from the request and, equally, no longer entitled to take time in negotiating the terms of the service which has been removed from the request.

66. In my judgment, if a telecommunications provider makes a written request which complies with section 45(2) of the Act, it is open to that provider, with the agreement of the other party, to reduce the scope of the services requested. If the provider who has made the request does not obtain the agreement of the other party, a statement of a wish to reduce the scope of the request will have some consequences. For example, if the requesting provider states that it no longer wishes to have a particular service, that provider could hardly complain of a breach of duty by the other party if that other party declines to negotiate or provide that matter. However, if the requesting provider has initially requested a particular service and the other party wishes to negotiate and agree terms as to the provision of that service, it is not open to the requesting provider unilaterally to prevent the other party so negotiating, unless the requesting provider withdraws the initial request and replaces it with a second request which complies with section 45(2).

67. Although I will go on to consider the detailed facts of the communications between the parties and the question whether Digicel Grenada ever did reduce the list of services requested on 22nd May 2003, I will at this point express my overall conclusion which is that Digicel Grenada never did withdraw the request of 22nd May 2003 and make a second written request which complied with section 45(2). It follows in my judgment that C&W Grenada were entitled at all times after 22nd May 2003, and in particular after 12th June 2003, to proceed on the basis that it was entitled to negotiate with Digicel Grenada the rates for the provision of incoming international calls to Grenada and the time reasonably taken up by those negotiations was properly to be considered as time spent dealing with the request made on 22nd May 2003.

68. I turn then to consider whether, on the detailed facts, Digicel Grenada ever did revise the list of services requested on 22nd May 2003. There are difficulties in making clear findings on this point because the negotiations between the parties in relation to Grenada were taking place alongside, and in some respects indistinguishably from, negotiations which are admitted to have been without prejudice, where the court has not been given evidence as to the course of those without prejudice negotiations. It will be remembered that on 17th April 2003, the Digicel companies in SLU and SVG agreed to negotiate the rates for incoming

international calls to SLU and SVG. There were complaints from CWWI in late April 2003 to the effect that the Digicel companies in SLU and SVG were not complying with that undertaking. Although this was not initially accepted by the Claimants, it was accepted in closing submissions that without prejudice negotiations on that matter began in April/May 2003. The parties to those negotiations included, at least, CWWI (dealing with SLU and SVG) and Digicel SLU and Digicel SVG. It seems to have been common ground in closing submissions that, at least for some of the time, there were further parties to those without prejudice negotiations, namely, C&W Grenada and Digicel Grenada, both of whom were concerned with the amount of the rate for incoming international calls to Grenada.

69. In addition, C&W Grenada and Digicel Grenada were, after 22nd May 2003, engaged in discussions about an interconnection agreement for Grenada. Speaking generally, the terms of such an interconnection agreement were discussed at open, and not without prejudice, meetings. The exception to this general proposition is that, at least for some of the time, it was necessary in order to settle the terms of the interconnection agreement in Grenada to settle the rate for incoming international calls to Grenada and that last matter was being discussed without prejudice.

70. The parties disagreed as to the scope of the without prejudice privilege. However, their disagreement focused on two documents in particular and I was invited to read those documents *de bene esse*. Accordingly, I will refer to the history of the matter and I will include references to those two documents and I will then indicate my findings and, to the extent necessary, I will determine any issues as to the admissibility of such documents.

71. It will be remembered that Digicel Grenada made its request for interconnection in Grenada on 22nd May 2003. That request included a service in relation to incoming international calls. The stance to be taken by the C&W carrier services team to this request is shown by an internal C&W email from Mr Thompson on 23rd May 2003. He referred to the lack of progress as to negotiation on the rate for incoming international calls in SLU and SVG. He stated that the carrier services team would use the request for interconnection in Grenada as leverage in the negotiations as to the rate for incoming international calls.

72. I was asked to consider an email of 22nd May 2003 from Mr White of Digicel SLU to Mr McNaughton of C&W. There was a dispute between the parties as to whether the relevant part of the email was without prejudice and therefore inadmissible. What one gets from the email is that the solicitors acting for Digicel had contended that clause 10.2 of the legal framework agreements in SLU and SVG was unenforceable as an "agreement to agree" but, without prejudice to that contention, the Digicel companies were prepared to discuss the rate for incoming international calls. It does not seem to me to matter whether this document is admissible in evidence. Other evidence which is agreed to be admissible establishes the same two points and the email of 22nd May 2003 does not add anything else material.

73. The Claimants' case that Digicel Grenada revised its request for interconnection in Grenada is based on what was allegedly said at a meeting between the parties on 12th June 2003. The subject is dealt with in a witness statement of Mr Connor of

Digicel. In paragraphs 57 to 60 of that witness statement, Mr Connor describes the fact that C&W Grenada was not prepared to order the equipment it needed for its side of the interconnection until the parties had obtained the approval of the regulator to a settled interconnection agreement. As I interpret paragraph 60 of Mr Connor's statement, he gave evidence that Digicel Grenada was prepared to sign an interconnection agreement with C&W Grenada on terms that did not include an incoming international calls service to Grenada. Mr Connor on behalf of Digicel Grenada felt that the question of the rate for incoming international calls to Grenada could be negotiated with C&W Grenada after the launch of Digicel's network. He thought that this would take from C&W Grenada the ability to delay negotiations on the interconnection agreement in Grenada by reason of the time needed to agree the rate for incoming international calls.

74. In that paragraph, Mr Connor does not say that Digicel Grenada said to C&W Grenada that it was prepared to sign an interconnection agreement without a service for incoming international calls. His evidence at that point is only describing what Digicel Grenada was prepared to do and not that it had been communicated to C&W Grenada.

75. Later in his witness statement, at paragraph 65, having described a letter from Digicel's solicitors of 26th June 2003, Mr Connor refers to the possibility of removing the terms dealing with incoming international calls from the draft interconnection agreement and he does say that this had been suggested by Digicel Grenada. He does not identify when and in what terms this suggestion was made. Paragraph 65 refers to the possibility of the parties agreeing an interconnection agreement without a rate for incoming international calls, leaving that issue to be negotiated separately. Mr Connor does not appear to be suggesting that Digicel Grenada had stated that it did not require an incoming international call service; rather, its suggestion was that it did require that service but that the negotiations on that service should be split from the negotiations on any other matter relating to the interconnection agreement.

76. Mr Connor was not cross-examined on the evidence he gave in paragraphs 60 and 65 of his witness statement. The Defendants did not raise this question in the cross-examination of any other witness called by the Claimants. The Claimants did not rely on the evidence of any other witness as to what was said at the meeting on 12th June 2003.

77. Following the meeting on 12th June 2003, Mr Batchelor of CWWI sent an internal CWWI email referring to the meeting which he had attended. One paragraph in the email deals with the negotiations as to the rates for incoming international calls although much of the paragraph is redacted on the grounds that the discussion was without prejudice. Another paragraph in the email deals with the negotiations as to the interconnection agreement in Grenada and this paragraph is not redacted. The text dealing with the negotiations as to the interconnection agreement in Grenada refers to Digicel Grenada's concern that C&W Grenada was not prepared to order equipment in advance of there being an approved interconnection agreement. The principal, if not the only, thing delaying negotiations on the interconnection agreement was the rate for incoming international calls to Grenada. Mr Batchelor records that someone on behalf of Digicel Grenada had made the suggestion that the

parties should sign an interconnection agreement without any provision in it dealing with incoming international calls so that the terms as to such calls could be negotiated after interconnection went live. As described in the email, this suggestion from Digicel Grenada was not a suggestion that Digicel Grenada did not wish there to be a service from C&W Grenada in respect of incoming international calls but rather that the negotiations should be split in two. The first part of the negotiations, it was suggested, could lead to a concluded interconnection agreement not dealing with incoming international calls and the second part of the negotiations would then be confined to the rate for incoming international calls.

78. When cross-examined, Mr Batchelor could not remember any detail of the meeting of 12th June 2003. However, on the strength of his email of that date, shortly after the meeting, I can make the finding that someone on behalf of Digicel Grenada did suggest at the meeting on 12th June 2003 that the negotiations be split in two in the way described. That finding is consistent with the way matters were described in paragraph 65 of Mr Connor's witness statement. The suggestion therefore was that the negotiations be split and the parties enter into, in the first instance, an interconnection agreement which did not deal with incoming international calls.

79. In his email of 12th June 2003, Mr Batchelor expressed his view that C&W Grenada should accept this suggestion from Digicel Grenada. He suggested that C&W Grenada should draft an interconnection agreement on that basis.

80. On 16th June 2003, Mr Batchelor sent a further internal CWWI email which enclosed his email of 12th June 2003 and added further comments. It appears from the email of 16th June 2003, that negotiations between the relevant parties as to the rate for incoming international calls were continuing. Mr Batchelor stated that someone at CWWI was dealing with the subject of a draft interconnection agreement which did not deal with incoming international calls. I am not able to find on the basis of that email, together with the other evidence, that anyone at CWWI was actually engaged in the process of drafting such an agreement. There is no suggestion in the evidence that anyone on behalf of C&W Grenada accepted at the meeting on the 12th June 2003, or later, that the negotiations could be split in the way suggested by Digicel Grenada.

81. On 26th June 2003, solicitors for Digicel Grenada wrote to Mr Thompson of the CWWI carrier services team. The letter referred to the request for interconnection on the 22nd May 2003. The letter did not suggest that that request had been superseded by a later amendment or variation and did not suggest that there had been a subsequent different request for interconnection. The letter proceeded on the basis that the request of 22nd May 2003 was the relevant operating request. The letter also referred to the discussions in Miami between CWWI and Digicel SLU and Digicel SVG and proceeded on the basis that those discussions and any agreement which resulted were effective as between C&W Grenada and Digicel Grenada. The letter suggested that the agreement had been broken because C&W Grenada had not been prepared to enter into an interconnection agreement in the same terms as those which had been agreed in SLU and SVG. It will be remembered that the agreements in SLU and SVG provided for an incoming international calls service to be provided as part of the interconnection service. The letter threatened court proceedings to enforce the obligations on C&W Grenada. I

interpret the letter, read as a whole, as stating that the relevant request was the written request of 22nd May 2003 and that C&W Grenada was obliged to provide an interconnection service which included an incoming international calls service.

82. On 30th June 2003 C&W Grenada sent to Digicel Grenada a draft interconnection agreement for Grenada. The draft agreement was based upon the terms agreed in SLU and SVG. A covering email of 30th June 2003 stated that the draft agreement had addressed the issue as to incoming international calls in some detail as it was a complex issue and needed to be addressed in detail.

83. On 3rd July 2003, Mr Black of Digicel sent an internal email to Mr Leslie Buckley and others. The email referred to the draft interconnection agreement in Grenada prepared by C&W Grenada. The email discussed in particular the way in which the draft agreement dealt with the rate for incoming international calls. The email identified two options open to Digicel Grenada. The first was that Digicel Grenada should continue to avoid negotiating a rate for incoming international calls in SLU and SVG but in return C&W Grenada would be able to use the fact that the parties had not agreed this rate (applicable also in Grenada) to prevent conclusion of the interconnection agreement in Grenada. The second option was to agree a rate for incoming international calls in SLU and SVG and also in Grenada.

84. I was asked to consider an email dated 17th July 2003 from Mr Black of Digicel to Mr McNaughton of C&W. The heading to the email is "Grenada - implications of a high international conveyance rate". The main part of the email discusses various possibilities, and their consequences, in relation to a rate for incoming international calls. In my judgment, the main part, if not the entirety of this email, is dealing with matters which were the subject of without prejudice negotiations. The Claimants say that the first paragraph of the email has a different character, is not covered by without prejudice privilege and is admissible. The first paragraph refers to the possibility that unless matters changed on the ensuing day the result would be that the parties were unable to agree the rate for incoming international calls. The consequence of that, it was stated, would be that Digicel Grenada would seek to proceed with the interconnection agreement for Grenada without an incoming international call service. The purpose of the remainder of the email was to persuade the C&W companies not to reach that stage, and in particular, to avoid a break down in negotiations as to the rate for incoming international calls.

85. In my judgment, the first paragraph of this email is as much part of the without prejudice negotiations as the remainder of it. The point being made in the first paragraph was to identify something which the Digicel company said they would do if the negotiations failed. This was being put forward to persuade the C&W companies to conclude the negotiations.

86. In any event, the first paragraph is not a statement having immediate consequences, to the effect that Digicel Grenada was now withdrawing its request for interconnection including an incoming international calls service and was there and then replacing it with a request for interconnection without that service. The first paragraph of the email states what Digicel Grenada would do if negotiations failed on the following day. Thus, even if the email were admissible in evidence,

notwithstanding its without prejudice character, I would not read the first paragraph of the email as having the effect contended for by the Claimants.

87. The Claimants submitted that even if the first paragraph of the email was covered by without prejudice privilege, that privilege had been waived by the Defendant in the course of the preparations for the trial and the trial itself. I doubt if privilege has been waived as alleged but it is not necessary for me to explore that question separately as, having considered the email *de bene esse*, I have not been prepared to construe it in the way contended for by the Claimants in any event.

88. The result of the above reasoning is as follows. First, whilst it would have been open to Digicel Grenada to have withdrawn the request of 22nd May 2003 and replaced it with a written request for interconnection on terms which did not include an incoming international calls service, Digicel Grenada never did serve a revised request in writing and the request of 22nd May 2003 remained the relevant request which C&W Grenada was obliged to, and entitled to, deal with. Further, having considered the detailed communications between the parties, I do not accept the suggestion made by the Claimants that on 12th June 2003, the Claimants orally said enough to amount to a withdrawal of the written request of 22nd May 2003 and the replacement of it with an oral request for interconnection not including the service of incoming international calls. In my judgment, what was suggested orally on 12th June 2003 was that the parties should negotiate in relation to the request of 22nd May 2003 by two stages, the first leading to an interconnection agreement not dealing with incoming international calls and the second part of the negotiation dealing with incoming internal calls. C&W Grenada was not obliged to accept that suggestion and it did not do so.

89. The Claimants complain that C&W Grenada took an unreasonably long time to send to Digicel Grenada a draft interconnection agreement for Grenada. Digicel Grenada requested interconnection on 22nd May 2003 and C&W Grenada sent it a draft interconnection agreement on 30th June 2003. Following Digicel Grenada's request on 22nd May 2003, the CWWI carrier services team wrote on 26th May 2003 to Digicel Grenada stating that a draft agreement would be sent "shortly". The letter went on to describe the changes which needed to be made to the form of agreement used in SLU and SVG. One change was needed to address the issue of incoming international calls. The drafting of the agreement was done by Mr Batstone of CWWI. He went on annual leave from 25th May 2003 to 15th June 2003. Before he left he did substantial work on preparing a first draft of the interconnection agreement. When cross-examined he was uncertain what further work was outstanding but he thought it was probably the drafting of terms dealing with incoming international calls. On 2nd June 2003, there is an internal CWWI email pressing for the draft agreement to be available at an early point as it was felt that the early delivery of the draft agreement would assist with the negotiations on rates for incoming international calls in SLU and SVG, something which CWWI wished to settle.

90. On 11th June 2003, Mr Batchelor of CWWI emailed Mr Black of Digicel stating that Mr Batchelor would ask his "legal associate" to produce a draft interconnection agreement but it would not be available for the meeting on 12th June 2003 because the associate was away on business.

91. When Mr Batstone returned from leave on 15th June 2003 he had a large number of outstanding commitments. His witness statement identified the various commitments in question. Against that background, he attempted to finalise a draft interconnection agreement for Grenada. There was a major issue between the parties as to the incoming international calls service and the appropriate rate for the service. Mr Batstone completed his draft on 30th June 2003 and it was sent on the same day to Digicel Grenada.

92. The Claimants say that the period of time taken from 22nd May 2003 to 30th June 2003 was unacceptably long. They point to a large number of matters before Digicel Grenada obtained its licence on 22nd May 2003 which, the Claimants contend, should have produced the result that C&W Grenada were ready with a draft agreement in May 2003. In my judgment, some of these points are unrealistic given the real uncertainty as to whether Digicel Grenada would obtain a licence. I have earlier referred to the fact that it was far from being a foregone conclusion that Digicel Grenada would have obtained such a licence. In any event, C&W Grenada was not under a statutory duty to Digicel Grenada under section 45 of the 2000 Act, or otherwise, to take any action in this respect until 22nd May 2003.

93. After 22nd May 2003 some five or six weeks went by before Mr Batstone produced a draft agreement on 30th June 2003. As regards Mr Batstone personally, it would probably not be right to conclude that he had acted in an unreasonable way. He was no doubt entitled to take a lengthy period of leave in May and June 2003 and he was busy on his return to work in mid-June 2003. It might be said that the drafting of the agreement for Grenada could have been handled by someone other than Mr Batstone. Although Mr Batstone wanted to see what progress had been made in negotiating a rate for incoming international calls and when he found that the rate was not agreed he wished to be careful as to his drafting on that topic, it could be said that it would have been possible for someone else at C&W to produce a draft agreement for Grenada which simply identified a figure representing C&W's proposal as to the relevant rate, or to draft in a more general way.

94. Accordingly, if it had been of prime importance for C&W Grenada to deliver to Digicel Grenada a draft interconnection agreement shortly after 22nd May 2003, then it could be said that more could have been done and should have been done by C&W Grenada. However, I do not see that it was of prime importance for Digicel Grenada to receive a draft interconnection agreement at an early point. The principal, if not the only, matter outstanding as regards the interconnection agreement in Grenada was the question of the rate for incoming international calls. Until that matter was settled, the delivery of a draft agreement dealing with other matters which were to follow the form of agreement in SLU and SVG was of secondary importance. When the rate for incoming international calls was eventually agreed, the other matters took no time to settle. In these circumstances, I conclude, that C&W Grenada were not at fault in failing to provide a draft agreement before the 30th June 2003 and, in any event, any such fault did not delay interconnection and, therefore, was not a breach of duty.

95. The negotiations as to the rate for incoming international calls continued in June and July 2003. The negotiations which related to the rate which would be applicable in

SLU and SVG were without prejudice. At some point, the without prejudice negotiations included the rate which would be payable in Grenada also. Because the negotiations were without prejudice, I have no real evidence about when the without prejudice negotiations extended to the rate payable in Grenada. The Claimants say that this happened on and after 14th July 2003. The Defendants would say that the without prejudice negotiations about the rate for incoming international calls extended to Grenada from an earlier point in time. In the event, it is not necessary to determine precisely when that point was reached.

96. By 24th July 2003, Digicel Grenada and C&W Grenada were close to agreement on the rate for incoming international calls in Grenada. The primary matter outstanding at that point did not relate to Grenada but related to SLU and SVG. That outstanding point was of concern to the parties in SLU and SVG who were different from the relevant parties in Grenada. The relevant parties in SLU and SVG were CWWI on one side and Digicel SLU and Digicel SVG on the other side.

97. By 30th July 2003, C&W Grenada and Digicel Grenada had finally agreed all the terms that related to Grenada. What remained outstanding was a question as to when the new rate for incoming international calls would apply in SLU and SVG. CWWI wanted the new rate to apply with effect from the date of the launch by the Digicel company in SLU and SVG (24th March 2003). Digicel SLU and Digicel SVG were not prepared to agree to back date the new rate. They were also not prepared, initially at any rate, to agree that the new rate in SLU and SVG should apply from the date of the new agreement. Instead, they wanted the new rate in SLU and SVG to apply from the date of completion of interconnection in Grenada. Thus, Digicel SLU and Digicel SVG were seeking to link the negotiations in SLU and SVG and the negotiations in Grenada so as to provide an incentive to C&W Grenada to achieve physical interconnection sooner rather than later in Grenada.

98. All matters in these respects were finally resolved by written agreements entered into by all relevant parties on 13th August 2003. The principal agreement entered into on that date was an agreement between C&W Grenada and Digicel Grenada in the form of a comprehensive interconnection agreement setting out the descriptions of the services to be provided and the tariffs which were appropriate. The interconnection agreement in Grenada provided for an incoming international calls service.

99. A further agreement was signed on 13th August 2003 to which the parties were CWWI and C&W Grenada on the one hand and Digicel SLU, Digicel SVG and Digicel Grenada on the other. CWWI and Digicel SLU and Digicel SVG were necessary parties because this agreement of 13th August 2003 varied the interconnection agreements those parties had made in SLU and SVG respectively. C&W Grenada and Digicel Grenada were necessary parties to this agreement because the agreement contained terms relevant to interconnection in Grenada. By clause 3 of this agreement, C&W Grenada agreed to use reasonable endeavours to ensure that the Activation Date would occur on or before 16th October 2003. Activation Date was the date by which all of the tests to be carried out on the interconnection in Grenada had been successfully completed and the interconnection in Grenada was capable of carrying live commercial traffic. There was a link between this obligation as to interconnection in Grenada and the rate

payable for incoming international calls in SLU and SVG. Clause 3 of the agreement spelled out the effect on the rates payable in SLU and SVG if the Activation Date in Grenada was after 16th October 2003 or, conversely, before 16th October 2003.

100. The agreement contained a recital, recital (E) in these terms:

> "In recognition of the fact that C&W and C&W Grenada and Digicel STL, Digicel SVG and Digicel Grenada are associated companies and that the parties agreed to link the negotiation of the modification of the STL agreement and SVG agreement with the good faith negotiations of the Grenada agreement;"

101. The reference to C&W is a reference to CWWI. The reference to Digicel STL is a reference to Digicel SLU. The STL agreement is the interconnection agreement in SLU. The SVG agreement is the interconnection agreement in SVG.

102. There was considerable argument before me as to the effect of this agreement, and in particular recital (E), on the Claimants' allegations as to breach of duty by C&W Grenada. In my view, I need only consider the impact of this agreement on the arguments which the Claimants have put forward that C&W Grenada acted in breach of duty to Digicel Grenada by linking the negotiations on the interconnection agreement in Grenada with the renegotiation of the rate for incoming international calls in SLU and SVG.

103. I have already discussed the facts relevant to this allegation. For the reasons earlier given, I hold that C&W Grenada were not in breach of duty, at any rate until 24th July 2003 or possibly 30th July 2003, in discussing the rate for incoming international calls in Grenada at the same time as discussing the rate for incoming international calls in SLU and SVG. However, I can see that it is arguable that C&W Grenada committed a breach of duty at the stage when the parties were capable of agreeing the rate for incoming international calls in Grenada and, indeed all the terms of an interconnection agreement in Grenada, and C&W Grenada failed to enter into an interconnection agreement in Grenada; at that stage the parties were continuing to discuss a topic which only applied in SLU and SVG, namely, the date when the new rate for incoming international calls would apply in SLU and SVG. I am not positively finding that C&W Grenada was in breach in this way as there is a counter argument to the effect that Digicel Grenada also wanted a linkage between interconnection in Grenada and the other matters at that stage.

104. I heard elaborate submissions as to the effect of the agreement of 13th August 2003 and, in particular, recital (E). There was argument as to whether recital (E) meant that C&W Grenada was not in breach of duty in any way. There was argument as to whether C&W Grenada had a defence of *volenti non fit injuria* to the alleged breach of statutory duty. This gave rise to subsidiary arguments as to whether such a defence operated in relation to the statutory duty in question and whether Digicel Grenada had given free and voluntary consent to the breach of duty. There was also argument as to C&W Grenada's defence of waiver and estoppel based on recital (E). In my judgment, particularly in view of my finding that the only arguable case of breach of statutory duty, arising from a linkage of the

negotiations, applies to a period from around 24th July 2003 onwards, it is not necessary to examine these elaborate arguments in greater detail.

105. In the course of closing submissions, the Claimants made clear that they accepted that recital (E) had some effect by way of a defence to what might otherwise be alleged to be a breach of statutory duty. The Claimants accepted that from the date on which the agreement, referred to in recital (E), was made, the linkage in the negotiations was not a breach of statutory duty. The parties did not agree on the date which I should find to be the relevant date for the purposes of recital (E). The Defendants contended that the date was the date of the negotiations concerning SLU and SVG which took place in Miami in January 2003. The Claimants contended that the date was 14th July 2003 when (they said) there began without prejudice negotiations which involved a link between interconnection in Grenada and the rate for incoming international calls in SLU and SVG. In view of the fact that 14th July 2003 is before 24th July 2003 and in view of the Claimants' clear concession that from 14th July 2003 the linkage in negotiations did not involve a breach of duty by C&W Grenada, those matters of themselves produce the result that it is not open to the Claimants to argue that the linkage in negotiations which I have described from 24th July 2003 to 13th August 2003 was a breach of duty by C&W Grenada.

106. Digicel Grenada contend that C&W Grenada were in breach of section 45 of the Telecommunications Act 2000 by failing to order the equipment needed for C&W Grenada's side of the interconnection on or shortly after the request for interconnection on 22nd May 2003. It is right that Digicel Grenada wanted C&W Grenada to order this equipment before the parties had reached agreement on the terms of an interconnection agreement and before those terms were approved by the regulator. The stance taken by C&W Grenada was in accordance with the stance taken by the C&W companies generally, which was not to order equipment until the terms of an interconnection agreement were settled and approved by the regulator. In the event, the parties had reached substantial agreement on the terms of an interconnection agreement for Grenada by 30th July 2003 and on 31st July 2003, C&W Grenada ordered the equipment it needed. The interconnection agreement was in due course signed on 13th August 2003 and approved by the regulator on 18th September 2003. In my judgment, for the reasons which I have given in much greater detail in relation to SLU, C&W Grenada was entitled to postpone the ordering of its equipment for the purpose of assisting it in its negotiations with Digicel Grenada as to the terms of the interconnection agreement and, accordingly, C&W Grenada was not in breach of any duty it owed to Digicel Grenada in this respect.

107. I referred earlier to the fact that clause 3 of the agreement of 13th August 2003 identified a target date for completion of physical interconnection in Grenada. The target date was 16th October 2003 and, in the event, physical interconnection was completed on 15th October 2003. In their closing submissions, the Claimants did not make any complaints about the pace of physical interconnection, apart from the allegation concerning the ordering of equipment, with which I have already dealt. The Claimants had pleaded two other matters in relation to physical interconnection but those matters were not repeated in their closing submissions. The first was an alleged failure by C&W Grenada to use a second hand MUX and the second related to the way in which a test of the installation was interrupted because of a defective

cable. The Defendants' submissions dealt with these two matters in detail and put forward several reasons why the allegations could not be sustained. In these circumstances, I will not deal with the detail of the allegations but I will record that I do not make a finding of breach by C&W Grenada in these two respects.

108. The result of the above is that the only area where it is arguable that C&W Grenada was at fault was in relation to the non-provision of a draft interconnection agreement prior to 30th June 2003. I have held that if the draft interconnection agreement had been provided earlier, this would not have changed the date when the interconnection agreement in Grenada was ultimately finalised. Accordingly, any arguable fault in this respect did not delay interconnection, was not a breach of duty and has not caused any loss to Digicel Grenada.

109. As in the case of SLU, I have considered whether I ought to make additional findings in case I am held to be wrong in respect of my earlier findings. I could, for example, discuss what would have happened if C&W Grenada's equipment had been ordered earlier; when would it have been delivered; when would it have been installed and tested and when would Digicel Grenada's side of physical interconnection been ready. I could also consider whether any steps taken to advance physical interconnection would have had any impact upon the date when contractual interconnection was finalised. Finally, if interconnection had been completed prior to 15th October 2003, there is the question whether Digicel Grenada would have been ready to launch its network before 17th October 2003 and, if so, when. For the reasons which I have already spelt out in relation to SLU, I have decided that the appropriate and proportionate response to these possible questions is that I need not and ought not to make additional findings in these respects.

ANNEX D – BARBADOS

THE TELECOMMUNICATIONS ACT 2001 1
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THE TELECOMMUNICATIONS ACT 2001

1. The Telecommunications Act 2001 was in force at all material times.

2. Section 2 of the 2001 Act contains definitions which include the following:

"carrier" means a person who has been granted a licence by the Minister pursuant to this Act to own and operate a public telecommunications network;

…

"interconnection" means the linking of public telecommunications networks to allow users of one licensed carrier to communicate with users of another licensed carrier;

"interconnection provider" means a carrier that provides an interconnection service;

"interconnection service" means a service provided as part of the obligation to provide interconnection under Part VI;

…

"licence" means a licence referred to in this Act;

"licensee" means a person who is the holder of a valid licence granted under this Act;

"mobile telecommunications network" means a telecommunications network used for the provision of mobile telecommunications services that

(a) permits a user to have access to the services irrespective of the location of the user via different mobile base facilities during the provision of a single call known as an "inter-cell hand-over"; and

(b) does not require physical contact between the network and the customer equipment;

"mobile telecommunications service" means a telecommunications service consisting of the emitting, transmitting, switching, conveying or receiving of messages within, into or from Barbados by means of a mobile telecommunications network;

"network termination point" means the point of connection forming part of a telecommunications network designated by a carrier for connection by a customer of customer equipment to that carrier's network;

"person" includes an individual, a partnership, an unincorporated organisation, a Government or Government agency;

…

"service provider" means a person granted a licence by the Minister pursuant to this Act to provide telecommunications services to the public;

…

3. By section 3 of the 2001 Act, subject to the later provisions of the Act, the Crown reserved the exclusive right to provide telecommunications services in Barbados.

4. Part III of the 2001 Act concerned the powers of the Minister and the Fair Trading Commission (established under the Fair Trading Commission Act) as regulators of the telecommunications sector. The more relevant provisions are:

4. Powers and duties of Minister.
(1) The Minister shall have responsibility for the management and regulation of telecommunications in Barbados.

(2) In furtherance of his powers and duties under subsection (1), the Minister shall

(a) develop and review telecommunications policies for the promotion of the objects of this Act;

(b) publish the policies referred to in paragraph (a) as determined in accordance with this Act;

(c) ensure compliance with the Crown's international obligations with respect to telecommunications;

(d) issue licences in respect of the provision of telecommunications services;

(e) determine the category of telecommunications services that are to be subject to regulation;

(f) specify the policy to be applied to each category of telecommunications services;

(g) maintain a register of each category of licences issued under this Act;

(h) monitor and ensure compliance with the terms and conditions that are applicable to each licensee;

(i) specify the interconnection policy;

(j) plan, manage and regulate the use of spectrum in Barbados or between Barbados and elsewhere;

(k) plan, manage and regulate numbering in Barbados in accordance with the National Numbering Plan specified in section 50; and

(l) inform the public about matters related to telecommunications.

5. Delegation
The Minister may by instrument in writing delegate to any public officer such of the Minister's powers and duties as the Minister considers necessary; but such delegation shall not prevent the Minister from exercising any of his powers or duties.

6. Functions of Commission.
(1) The Commission shall

(a) enforce the policies established by the Minister pursuant to this Act;

(b) exercise its regulatory functions in respect of telecommunications in accordance with this Act, the Fair Trading Commission Act and the Utilities Regulation Act;

(c) be responsible for the regulation of competition between all carriers and service providers in accordance with this Act to ensure that the interests of consumers are protected; and

(d) establish and administer mechanisms for the regulation of prices in accordance with this Act, the Fair Trading Commission Act and the Utilities Regulation Act.

…

8. Powers of Commission.

(1) The Commission shall exercise its powers and perform its functions consistently with the purposes and objects of this Act and any law implementing the telecommunications policy objectives of Barbados.

(2) The Commission shall ensure that service providers provide telecommunications services and charge rates in accordance with this Act, the Utilities Regulation Act and the Fair Trading Commission Act.

9. Minister, Commission to refrain from acting.
Where the Minister or the Commission is satisfied on the basis of evidence presented to the Minister or the Commission, as the case may be, that the market is sufficiently competitive to ensure that the interests of consumers are protected, the Minister or the Commission shall refrain from exercising their respective functions in respect of the rate-setting mechanism referred to under Part VIII by giving notice to that effect.

5. Part IV of the 2001 Act is concerned with licensing requirements in respect of public telecommunications. The more relevant provisions are:

10. General licensing requirements in respect of public telecommunications.
(1) No person shall

(a) own or operate a telecommunications network without a carrier licence issued in accordance with this Part;

(b) provide telecommunications services to the public without a service provider licence issued in accordance with this Part;

(c) use spectrum for the purpose of

(i) operating any telecommunications network; or

(ii) providing a telecommunications service

without a spectrum licence issued in accordance with Part IX

(d) distribute, lease, trade, offer for sale, sell or import for sale any prescribed telecommunications apparatus or radiocommunications apparatus without a dealer's licence issued in accordance with Part XI; or

(e) own or operate a VSAT without a VSAT licence issued in accordance with the provisions of this Act.

(2) Subsection (1) shall not apply to facilities used solely

(a) for non-commercial purposes by the Barbados Defence Force or the Royal Barbados Police Force; or

(b) as part of an electricity distribution network that does not provide telecommunications services.

11. Application for licence.
(1) An application for the grant, renewal or modification of a licence under this Part must
(a) be made in the form prescribed;

(b) contain such information as the regulations prescribe; and

(c) be accompanied by the prescribed fee.

(2) An applicant for a licence under this Part shall be required to satisfy the Minister that
(a) the applicant will comply with all interconnection obligations, universal service obligations, licence limitations, network build-out requirements and any other such obligations imposed by this Act for the type of telecommunications network or telecommunications service in respect of which the applicant seeks a licence;

(b) all legal requirements for the holding of the licence have been complied with;

(c) the applicant possesses the technical qualifications necessary to fully perform the obligations attached to the licence for which the applicant is applying; and

(d) the applicant satisfies the financial requirements, as imposed by the Minister, to construct and operate the telecommunications network or to provide the telecommunications services associated with the licence for which the applicant is applying.

(3) The Minister shall refuse an application for a licence under this Part where

(a) that application does not meet the requirements specified in subsections (1) and (2); or

(b) the application is otherwise contrary to the Act or any law.

12. Grant of licence.

(1) In determining whether to grant a licence under this Part, the Minister shall consider

(a) whether an applicant

(i) is a person of fit and proper character;

(ii) is, or is affiliated with, an undischarged bankrupt; and

(iii) has had a licence revoked or is affiliated with a person who has had a licence revoked; and

(b) any other matter that he considers relevant.

(2) The Minister may grant to an applicant under this Part

(a) a carrier licence for the ownership and operation of a telecommunications network; or

(b) a service provider licence for the provision of telecommunications services,

where the Minister is satisfied that the applicant has complied with the provisions of section 11 and that the applicant satisfies the required criteria referred to in subsection (1).

(3) The Minister is not mandated to grant a licence to any applicant.

…

14. Conditions for the granting of a licence.
(1) Any licence granted under this Part is subject to the following conditions:

(a) the licensee shall operate a telecommunications network or provide the telecommunications services specified in the licence only for the period specified in the licence and only in the manner explicitly authorised by the licence;

(b) the licensee shall not assign or otherwise transfer the licence nor the right granted by the licence except in accordance with this Part;

(c) the licensee shall comply with the requirements specified under section 11; and

(d) the licensee shall adhere to any other conditions deemed reasonably necessary to achieve the objects of this Act.

(2) The conditions of a licence referred to in subsection (1) shall not be varied otherwise than in accordance with this Act.

…

16. Duration of licences.
A licence granted under this Part

(a) shall be for the period specified in the licence and except for a carrier licence, shall not be granted for a period longer than 25 years; and

(b) may be revoked or suspended in accordance with this Act.

17. Renewal of licences.

(1) Where an application for renewal of a licence under section 11 is made, the Minister may refuse to renew that licence if the licensee is or has engaged in conduct that materially contravenes this Act or any regulations made under this Act.

(2) Where the Minister has reasonable grounds for not renewing a licence under subsection (1), he shall inform the licensee by written notice as soon as practicable of his intention not to renew the licence.

(3) A licensee referred to under subsection (2) shall be given 30 days to make written submissions to the Minister in respect of the refusal.

(4) The Minister shall consider any written submissions made under subsection (3) and shall inform the licensee within 7 days of the receipt of the submissions of his decision on the matter.

…

19. Suspension or revocation
(1) The Minister may suspend or revoke a licence granted under this Part where

(a) the licensee contravenes this Act;

(b) the licensee fails to observe a term or condition specified in the licence;

(c) the licensee is in default of payment of any licence fee prescribed; or

(d) the suspension or revocation is necessary in the interest of national security or in the public interest.

(2) Where the Minister has reasonable grounds for believing that a licence granted under this Act ought to be suspended or revoked, the Minister shall, before suspending or revoking the licence, give the licensee 60 days notice in writing of his intention to do so, specifying the date and the grounds on which he proposes to suspend or revoke the licence; and shall give the licensee an opportunity

(a) to make written submissions in respect of those grounds;
(b) to remedy the breach of the licence or a term or condition of the licence; or
(c) to submit to the Minister, within 30 days of the receipt of the notice, or such longer time as the Minister may specify, a written statement of objections to the suspension or revocation of the licence which the Minister shall take into account before reaching a decision.
(3) The suspension or revocation of a licence referred to in subsection (2) shall take effect on the date specified by the Minister in the notice referred to in that subsection or such other date as the Minister specifies.

…

6. Part VI of the 2001 Act deals with interconnection. The more relevant provisions are:

25. Interconnection by carriers.

(1) A carrier shall provide, on request from any other carrier, interconnection services to its public telecommunications network for the purpose of supplying telecommunications services in accordance with the provisions of subsection (2).

(2) Interconnection services referred to in subsection (1) shall

(a) be offered at points, in addition to network termination points offered to the end-users, subject to the payment of charges that reflect the cost of construction of any additional facilities necessary for interconnection;

(b) be on terms that are transparent and non-discriminatory;

(c) in respect of the interconnection charges and service quality of the interconnection services, be no less favourable than similar services provided by the interconnection provider for

(i) its own purposes;

(ii) any non-affiliate service supplier of the carrier;

(iii) a subsidiary of the carrier; or

(iv) for similar facilities so provided;

(d) be made available in a timely fashion;

(e) be offered at charges that are cost-oriented;

(f) be offered in such a way as to allow the requesting carrier to select the services required and not require the carrier to stand the cost of network components, facilities or services that are not required or have not been requested by that carrier; or

(g) allow for end-users of public telecommunications services to exchange telecommunications with other users of similar services regardless of the carrier to which the end-user is connected.

(3) A carrier shall provide interconnection to its network

(a) on such reasonable terms and conditions as the interconnecting parties agree through commercial negotiations;

(b) consistent with an approved Reference Interconnection Offer; or

(c) where there is no agreement between the parties, on such terms and conditions as the Commission determines in accordance with section 29 applying the principles established under this Act, and under any approved Reference Interconnection Offer.

26. Reference Interconnection Offer.

(1) A dominant carrier shall file with the Commission a Reference Interconnection Offer, also referred to in this Act as an "RIO", that sets out the terms and conditions upon which other licensed carriers will be permitted to interconnect with the interconnection provider's public telecommunications network.

(2) The terms and conditions referred to under subsection (1) may include the following:

(a) a description of interconnection services to be provided;

(b) terms of payment, including billing procedures;

(c) location of points of interconnection;

(d) technical standards for interconnection;

(e) processes for the testing and establishment of interconnection;

(f) interconnection charges;

(g) the procedure in event of alterations being proposed to the network or services, of services to be offered by one of the parties;

(h) access to ancillary services;

(i) traffic forecasting and network management;

(j) maintenance and quality of interconnection services;

(k) the duration of the RIO;

(l) limitation of liability;

(m) indemnity;

(n) dispute resolution procedures; and

(o) confidentiality in relation to certain aspects of the agreement.

(3) In this Part "dominant carrier" means a carrier that the Minister determines to be dominant based on that carrier not being effectively constrained by competitive forces in a particular telecommunications market and such other criteria as the Minister prescribes.

27. Approval of Reference Interconnection Offer.
(1) The RIO shall not take effect unless approved in writing by the Commission.

(2) Where the Commission considers that the RIO or any part of the RIO is inconsistent with the principles of interconnection as set out in section 25(2), the Commission may refuse to approve the RIO or a part of the RIO outlining the inconsistency and giving reasons for its decisions.

(3) In deciding whether to approve or refuse an RIO the Commission shall

(a) consult with the carrier providing the RIO and any other carriers likely to seek interconnection to that carrier's network; and

(b) have regard to

(i) the interconnection principles set out in section 25;

(ii) the interconnection policy specified by the Minister under paragraph (i) of subsection (2) of section 4;

(iii) the need to promote competition;

(iv) the long-term interests of end-users; and

(v) the submissions, whether oral or written, of the carriers providing and seeking interconnection.

(4) Where the Commission approves an RIO of a carrier or part of that RIO then it shall make a declaration as to the approval specifying the date on which the approval takes effect.

(5) Where the Commission refuses the RIO of a carrier or part of that RIO, the Commission shall consult with the carrier in order to resolve the inconsistency with the interconnection principles referred to in section 25; and the carrier may amend the RIO to remedy the inconsistency.

(6) Where the Commission is satisfied that an amendment of an RIO by a carrier pursuant to subsection (5) satisfies the interconnection principles referred to in section 25, it shall approve the amended RIO and the carrier shall file the amended RIO with the Commission.

28. Requests for interconnection.

(1) A person who wishes to interconnect with the telecommunications network of a telecommunications provider shall so request that provider in writing giving sufficient information as is reasonably required by a provider to allow for a response to the requests.

(2) Where an RIO is in effect with respect to an interconnection provider, and the person seeking interconnection accepts the terms and conditions set out in the RIO, the parties shall sign an agreement in accordance with those terms and conditions of the RIO within 90 days of the receipt of the request.

(3) Where a person requests an interconnection pursuant to subsection (1) on terms other than those of the RIO that is in effect in relation to the interconnection provider, the parties shall negotiate in good faith to reach an agreement on the terms and conditions of the interconnection; and the negotiations shall commence within 30 days of the receipt of the written request.

(4) A request for interconnection to a public telecommunications network may be refused by an interconnection provider for the following reasons:

(a) for the protection of the

(i) safety of a person;

(ii) security of the network;

(iii) integrity of the network; or

(b) the difficult technical and engineering nature of the interconnection.

(5) Where there is a refusal by the provider under subsection (4), the person seeking interconnection may refer that refusal to the Commission for review.

29. Interconnection agreements.

(1) Where pursuant to subsection (3) of section 28 a person who requests interconnection and an interconnection provider agree on the terms and conditions of interconnection, that agreement shall be filed with the Commission within 30 days of the date of the agreement for the Commission's approval.

(2) The Commission may in respect of any agreement filed with it under subsection (1)

(a) approve the agreement in writing; or

(b) require parties to the agreement to vary the filed agreement

(i) to comply with interconnection principles set out in section 25; or

(ii) if it considers that the interconnection agreement unfairly discriminates against other carriers or is otherwise unlawful.

(3) Any direction for variation under subsection (2) shall be issued within 30 days of an interconnection agreement having been filed with the Commission.

(4) Where parties to an interconnection agreement have failed to vary the agreement at the request of the Commission pursuant to subsection (2), the Commission may, having regard to the matters specified in subsections (1) and (2) of section 31, make an order stating the amendment that is to be made to the interconnection agreement to ensure that the agreement is consistent with this Part.

(5) An interconnection provider may limit or terminate its agreement to offer interconnection services or may cease to offer those services

(a) in the interest of protecting the integrity of its telecommunications network;

(b) in the interest of protecting the safety of any person; or

(c) where the other party to the agreement fails to comply with the terms of the agreement.

(6) Where the interconnection provider takes any action pursuant to subsection (5), in respect of the agreement, the other party to the agreement may refer the matter to the Commission for review.

(7) Where the other party to the agreement refers the matter to the Commission for review under subsection (6), and the Commission determines that matter in favour of the other party, the other party may seek compensation for any financial loss incurred that resulted from the decision by the interconnection provider.

…

31. Interconnection disputes.
(1) Any dispute that arises between parties in respect of the negotiating of an interconnection agreement may be referred to the Commission in writing for resolution by either party to the negotiations where

(a) all reasonable efforts have been made by the parties to resolve the dispute; and

(b) the parties have negotiated in good faith.

(2) In determining a dispute pursuant to subsection (1), the Commission shall have regard to

(a) what is a fair balance between the legitimate interests of the parties;

(b) the interconnection principles established under section 25;

(c) any regulatory obligations or constraints imposed under this Act, the Fair Trading Commission Act and the Utilities Regulation Act on any of the parties pursuant to this Act;

(d) the desirability of stimulating innovative offers in the market;

(e) the desirability of providing consumers with a wide range of telecommunications services;

(f) the availability of technically and commercially available alternatives to the interconnection requested;

(g) the need to maintain the integrity of the public telecommunications network and the interoperability of telecommunications services;

(h) the nature of the request in relation to the resources available to meet the request;

(i) the relative market positions of the parties;

(j) the promotion of competition in Barbados;

(k) the Reference Interconnection Offer of the interconnection provider; and

(l) the interconnection policy specified by the Minister in accordance with paragraph (i) of section 4(2).

(3) The Commission shall conduct any proceedings in respect of dispute resolution referred to it under subsection (1) in camera unless the parties otherwise agree; but the decision taken by the Commission shall be published subject to any requirement for confidentiality under this Act or any other enactment.

(4) The decision of the Commission under subsection (3) in respect of the terms and conditions of an interconnection agreement that are the subject of the dispute shall be consistent with

(a) those terms and conditions which have been agreed on by the parties and are not in dispute; and

(b) the terms of any RIO that is in effect with respect to that interconnection provider.

(5) The provisions of this section in respect of dispute resolution apply in respect of

(a) pre-contract interconnection disputes; and

(b) disputes referred to the Commission under the terms of an interconnection agreement.

7. Part VII of the 2001 Act is concerned with the provision of a universal service. This Part contains a provision dealing with access deficit charges in the following terms:

35. *(1) The Commission shall prescribe a charge to be known as "an access deficit charge" to be paid by all carriers and service providers interconnecting to the service.*
(2) The Commission shall establish guidelines in writing for determining the amount of the access deficit charge.

8. Part VIII of the 2001 Act is concerned with the rates which may be charged by a service provider. The relevant provisions are:

37. Definitions.
(1) For the purposes of this Part, "provider" means a service provider that provides a regulated service under this Act.

(2) "A regulated service" means a service designated by the Minister as a service in respect of which the Commission or the Minister approves the rates of the service in the manner referred to in section 38.

38. *The rates to be charged by a provider are those set in accordance with the provisions of this Part, the Utilities Regulation Act and the Fair Trading Commission Act.*

39. *(1) The Commission shall establish a mechanism for the setting of rates to be charged by a provider in accordance with the provisions of this Act, the Fair Trading Commission Act and the Utilities Regulation Act.*

(2) Subject to this Act, the rates referred to under subsection (1) shall be such as to facilitate the policy of market liberalisation and competitive pricing.

(3) Subject to this Act, the Minister shall at such time as is specified under this Act and after consultation with the Commission require that the Commission use an incentive-based rate-setting mechanism to establish the rates to be charged by a provider.

(4) The incentive-based rate-setting mechanism referred to under subsection (3) shall be established by the Commission in the manner prescribed; and the Commission shall monitor and ensure compliance with the mechanism.

(5) The Commission shall regulate the rates to be charged by a provider in respect of regulated services only where

(a) there is one provider providing that service; and

(b) the Minister finds as a question of fact under subsection (6)

(i) there is a dominant provider; or

(ii) the market is not sufficiently competitive.

(6) The Minister shall, after consulting with the Commission, determine by way of policies or rules established by him for the purpose, as a question of fact whether

(a) a provider is a dominant provider; or

(b) the market is or is not sufficiently competitive.

(7) Section

(a) 36 of the Utilities Regulation Act shall not apply in respect of telecommunications; and

(b) 37 of the Utilities Regulation Act shall not apply in respect of utility services provided by service providers or carriers that are licensed under this Act.

9. Part XIII of the 2001 Act is concerned with various aspects of compliance. The more relevant provisions are:

70. *The Minister may suspend or revoke a licence and in addition, may apply to the Court under section 72 if the Minister first determines that a person has*

(a) knowingly made false statements in an application for a licence or in any statement of fact made to the Minister;
(b) knowingly failed to provide information or evidence that would have warranted the denial of an original application for a licence;
(c) wilfully or repeatedly failed to comply with the terms of a licence including the taking of such action as to have the effect of impacting negatively on the universal service obligation;
(d) wilfully or repeatedly violated, or wilfully or repeatedly failed to observe,
(i) any provision of this Act; or
(ii) any rule, regulation, or order made under this Act;
(e) violated or failed to observe any prohibition order;
(f) provided a telecommunications service beyond the scope of a service provider licence or without such a licence;
(g) engaged in bypass;
(h) operated a telecommunications network without a carrier licence; or
(i) failed to submit payments in a timely manner in connection with the Universal Service Fund.

71. *(1) The Minister, in exercising his powers under this Part, shall have regard to*
(a) the nature and extent of the conduct giving rise to the application;
(b) the nature and extent of any loss suffered by any person as a result of the default;
(c) the circumstances of the default; and
(d) any previous determination against the offending person.
(2) Prior to the taking of any action under this Part, the Minister must consider any relevant circumstances, including the
(a) resources available to the licensee or affected persons or entities;
(b) continued economic viability of the licensee or affected persons or entities; and
(c) behaviour of the competitors of the licensee or affected persons or entities.

72. Application to Court.
(1) Where the Court is satisfied upon an application by the Minister that any person

(a) has contravened the obligations under or any prohibitions in this Act; or

(b) has failed to comply with any Rules made by the Minister under this Act or any order issued by the Minister requiring a person to comply with that order,

the Court may

(A) grant an injunction restraining the alleged offending person from engaging in prohibited conduct notwithstanding that the Minister is conducting an investigation under this Part; and

(B) order the offending person to pay to the Crown such pecuniary penalty as it thinks fit.

(2) The Court, in exercising its powers under subsection (1), shall have regard to

(a) the nature and extent of the default;

(b) the nature and extent of any loss suffered by any person as a result of the default;

(c) the circumstances of the default; and

(d) any previous determination against the offending person.

73. Civil proceedings.
Where a person suffers financial loss or damage to property as a result of another person's

(a) contravention of any of the obligations or prohibitions imposed by this Act;

(b) aiding, abetting, counselling or procuring the contravention of any provision under this Act;

(c) inducing by threats, promises, or otherwise the contravention of any provision under this Act;

(d) being party to any contravention of any provision under this Act; or

(e) conspiring with any other person to contravene any provision under this Act,

there is payable to that other person by the person in default such reasonable amount as is agreed between the parties or, failing agreement, as is determined by a court of competent jurisdiction.

…

75. Inspectors.
(1) The Minister may by instrument in writing appoint inspectors to

(a) investigate any complaint or conduct concerning an allegation of a contravention of this Act or a licence issued under this Act; and

(b) monitor the telecommunications and radiocommunications services.

(2) The Minister shall furnish each inspector with a certificate of authority containing a photograph of the inspector, which the inspector shall produce on request in the performance of his functions.

(3) A complaint referred to in subsection (1) shall be made in writing in such form as the Minister prescribes.

(4) Within 14 days of the receipt of a complaint made under subsection (1), an inspector shall investigate the complaint unless satisfied that

(a) the complaint is

(i) trivial, frivolous or vexatious; or

(ii) not made in good faith; or

(b) the complainant does not have locus standi in the matter.

(5) Before commencing an investigation under subsection (1), an inspector shall inform the alleged offender of the matter to be investigated and shall not make a finding

adverse to the alleged offender or the complainant unless the inspector has given that person the opportunity to make oral or written submissions about the matter to which the investigation relates.

(6) The inspector shall submit a report on the results of every investigation to the Minister; and shall make a copy of that report available to the complainant or the alleged offender as the case may be, where that person is adversely affected by the results of the investigation.

(7) An inspector may on his own motion or upon complaint, investigate harmful interference with telecommunications.

10. Part XIV of the 2001 Act specifies certain offences and penalties. In particular, section 78(1) provides:

78. Unlicensed telecommunications network and service.
(1) A person who

(a) establishes, maintains or operates a telecommunications network without a licence;

(b) provides or offers a telecommunications service without a licence; or

(c) contravenes the conditions of a relevant licence or the provisions of this Act,

commits an offence and is liable on conviction on indictment to a fine of $500 000 or to imprisonment for a term of 5 years and in the case of a continuing offence to a fine of $10 000 for each day or part thereof that the offence continues.

11. Part XVI of the 2001 Act is concerned with the review of decisions made by the Minister or the Commission. The relevant provisions are:

104. Review by Minister
(1) Any person who is aggrieved by a decision of the Minister under this Act may file within 14 days of being notified of that decision, an application for a review of the decision.

(2) An application for a review of a decision under subsection (1) shall be in the form and manner prescribed.

(3) The filing of an application for a review under subsection (1) does not operate as a stay of the decision unless the Minister so provides.

(4) The Minister may on a review of his decision confirm, modify or reverse the findings of his prior decision or any part of that decision; and, where a hearing is required before that decision is reviewed, the decision shall not be reviewed without a further hearing.

(5) The Minister shall on an application made to him pursuant to subsection (1) have regard to relevant considerations.

105. Review by Commission.

(1) A person aggrieved by a decision of the Commission under this Act may file an application for a review within 14 days following the notification of the Commission's decision.

(2) An application for a review of a decision under subsection (1) shall be in the form and manner prescribed.

(3) The filing of an application for review does not

(a) operate as a stay of the decision, unless the Commission so provides; or

(b) preclude an appeal from the Commission's decision to the High Court.

(4) The Commission, on review, may confirm, modify or reverse the findings of its prior decision or any part of that decision.

(5) The Commission shall on an application made to it pursuant to subsection (1) have regard to relevant considerations.

106. Appeal.
Part V of the Fair Trading Commission Act shall apply in respect of decisions of the Commission under this Act.

12. By section 110 of the 2001 Act, the Minister has power to make regulations. The section provides as follows:

110. Power to make regulations, rules and orders.
(1) The Minister may make such rules, regulations and orders as may be required under this Act, including regulations prescribing

(a) forms and procedures in respect of the grant of licences under the Act;

(b) terms and conditions to be contained in licences;

(c) licence fees;

(d) licence application fees;

(e) matters relating to interconnection policy;

(f) matters related to universal service and the funding of universal service;

(g) management of spectrum;

(h) the determination of dominance in relation to regulation of rates charged for telecommunications services;

(i) approvals and certification of customer equipment and wiring;

(j) the certification of technicians;

(k) technical standards for customer equipment;

(l) numbering;

(m) matters relating to radiocommunications;

(n) the treatment of confidential information; and

(o) anything that is by this Act authorised or required to be prescribed.

(2) Regulations made pursuant to the Act

(a) may prescribe penalties for offences committed under those regulations; and

(b) are subject to negative resolution.

(3) The Minister, in making regulations under paragraph (e) of subsection (1), may consult with the Commission, the carriers and such other persons as he deems necessary before doing so.

(4) The Commission may, in accordance with this Act make regulations governing the exercise of its powers with respect to interconnection and shall consult with the Minister and carriers before issuing the regulations.

THE FAIR COMPETITION ACT 2002

13. The Fair Competition Act 2002 was in force at all material times.

14. Part III of the Fair Competition Act 2002 contains provisions dealing with anti-competitive agreements and abuse of dominant position. The more relevant provisions are:

Abuse of dominant position.

16. (1) Subject to subsection (4), the abuse by an enterprise of a dominant position which the enterprise holds is prohibited.
(2) For the purposes of this Act, an enterprise holds a dominant position in a market if, by itself or together with an affiliated company, it occupies such a position of economic strength as will enable it to operate in the market without effective competition from its competitors or potential competitors.
(3) An enterprise abuses a dominant position if it impedes the maintenance or development of effective competition in a market and in particular, but without prejudice to the generality of the foregoing, if it
(a) restricts the entry of any enterprise into that or any other market that supplies or is likely to supply a substitute for the good or service supplied in that market;
(b) prevents or deters any enterprise from engaging in competitive conduct in that or any other market;
(c) eliminates or removes any enterprise from that or any other market;
(d) directly or indirectly imposes unfair purchase or selling prices that are excessive, unreasonable, discriminatory or predatory;
(e) limits production of goods or services to the prejudice of consumers;
(f) makes the conclusion of agreements subject to acceptance by other parties of supplementary obligations which by their nature, or according to commercial usage, have no connection with the subject of such agreements;
(g) engages in exclusive dealing, market restriction or tied

selling; or
(h) uses any other measure unfairly in its trading operations that allows it to maintain dominance.
(4) An enterprise shall not be treated as abusing a dominant position
(a) if it is shown that its behaviour was exclusively directed to improving the production or distribution of goods or to promoting technical or economic progress and consumers were allowed a fair share of the resulting benefit;
(b) the effect or likely effect of its behaviour in the market is the result of its superior competitive performance; or
(c) by reason only that the enterprise enforces or seeks to enforce any right under or existing by virtue of any copyright, patent, registered design or trademark except where the Commission is satisfied that the exercise of those rights
(i) has the effect of lessening competition substantially in a market; and
(ii) impedes the transfer and dissemination of technology.

***Action in relation to abuse of dominant position**.*

17. (1) Where the Commission has reason to believe that an enterprise that has a dominant position in a market has abused or is abusing that position, the Commission may conduct an investigation into the matter.
(2) Where the Commission finds that an enterprise has abused or is abusing a dominant position, the Commission shall prepare a report indicating the practices that constitute the abuse and shall
(a) notify the enterprise of its finding accompanied by a copy of the report; and
(b) direct the enterprise to cease the abusive practice within a specified period.

Finding of abusive practice.

18. (1) Where the Commission finds that the abusive practice constitutes tied selling, the Commission, by notice in writing, shall direct the enterprise concerned to discontinue that practice.
(2) Subject to subsection (4), the Commission shall act in accordance with subsection (3) if it finds that exclusive dealing or market restriction is likely to
(a) impede entry into or expansion of an enterprise in the market;
(b) impede the introduction of goods into or expansion of sales of goods or the provision of services in the market; or
(c) have any other exclusionary effect in the market,
with the result that competition is or is likely to be lessened substantially.
(3) The Commission may direct the supplier referred to in sub-section (2) to discontinue engaging in market restriction or exclusive dealing and require that supplier to take such other action as, in the

Commission's opinion, is necessary to restore or stimulate competition in relation to the supply of goods or services in the market.
(4) The Commission shall not take action under this section where, in its opinion, exclusive dealing or market restriction is or will be engaged in only for a reasonable period of time to facilitate entry of new goods or a new supplier of goods or services into a market.
(5) This section shall not apply in respect of exclusive dealing or market restriction between or among affiliated companies.

15. Section 34 of the Fair Competition Act 2002 provides:

Action to restrain competition.

34. (1) No person shall conspire, combine, agree or arrange with another person to
(a) limit the facilities for transporting, producing, manufacturing, storing or dealing in any goods or supplying any service;
(b) prevent, limit or lessen, the manufacture or production of any goods to enhance unreasonably the price thereof;
(c) lessen unduly competition in the production, manufacture, purchase, sale, supply, rental or transportation of any goods;
(d) lessen, limit or prevent competition in the provision of insurance on persons concerned in or property related to the production, storage, transportation or dealing in any good or the provision of services;
(e) otherwise unduly restrain or injure competition.
(2) Nothing in subsection (1) applies to a case where the arrangements are related to the introduction or maintenance of
(a) standards for products or for the quality of service that are reasonably necessary for the protection of the public;
(b) standards of competence and integrity that are required
(i) in the practice of a trade or profession relating to the service; or
(ii) in the collection and dissemination of information relating to the service.

16. Section 44 of the Fair Competition Act 2002 provides:

Civil liability.

44. (1) Every person who engages in conduct that constitutes
(a) a contravention of any of the obligations or prohibitions imposed in Part III, IV or VI;
(b) aiding, abetting, counselling or procuring the contravention of any provision referred to in paragraph (a);
(c) the inducing by threats, promises or otherwise, of the contravention of any provision;
(d) being knowingly concerned in or party to any contravention

referred to in paragraph (a); or
(e) conspiring with any other person to contravene any provision referred to in paragraph (a),
is liable in damages for any loss caused to any other person by such conduct.
(2) An action under subsection (1) may be commenced at any time within 3 years from the time when the cause of action arose.

THE TELECOMMUNICATIONS (INTERCONNECTION) REGULATIONS 2003

17. The Telecommunications (Interconnection) Regulations 2003 were made on 31st July 2003. The parties proceeded on the basis that they were in force at all times after 31st July 2003 which were material to this case. The reulations were the subject of a minor amendment (to regulation 13) made by the Telecommunications (Interconnection) (Amendment) Regulations 2004 which seem to have had effect from a date in February 2004.

18. The 2003 Regulations, as amended by the 2004 Regulations, contain the following relevant provisions:

3. The general principles of interconnection are those set out in the Barbados Interconnection Policy published in the Daily Nation Newspaper on 11 July, 2003.

4. No person shall be granted interconnection unless that person holds a valid licence for
(a) the operation of a public telecommunications network; and
(b) the provision of telecommunications services to the public.

5. A Reference Interconnection Offer ("RIO") filed under section 26 of the Act may, in addition to those terms and conditions referred to under section 26(2), set out
(a) provisions relating to exchange of information necessary for interconnection;
(b) provisions relating to notifications, default and termination of interconnection;
(c) a technical description of the interconnection interfaces, including the signaling protocol used;
(d) measures of restrictions to ensure network security or integrity;
(e) service level parameters, including availability, security, efficiency and synchronization;
(f) early termination charges;
(g) provisions relating to suspension for breach of the Offer;
(h) penalties for forecast errors;
(i) traffic routing arrangements; and
(j) arrangements for submitting, handling and clearing fault reports.

6. (1) A dominant carrier shall not withdraw a RIO or portion of

a RIO unless the carrier first notifies the Commission in writing of its intention to do so, and the Commission gives its written approval of the withdrawal.
(2) The Commission may in granting approval under paragraph (1), first impose such conditions, as it considers necessary to fulfil the objectives of the Act.
(3) A RIO or a portion of a RIO that has been withdrawn ceases to be effective from the date the Commission determines that its approval of the application for withdrawal of the RIO or portion of the RIO takes effect.

7. An interconnection seeker shall produce a valid carrier licence as proof of being the holder of such a licence as of the date the interconnection commences.

8. (1) No information contained in a RIO shall be designated as confidential.
(2) The entire RIO shall be made available to any person without restriction.
(3) Notwithstanding paragraph (1), an operator may charge any person who requests a RIO, reasonable fees for copying and mailing of the RIO.

9. Interconnection Agreements must be filed with the Commission within 30 days of the agreement between the Interconnection seeker and the Interconnection provider in accordance with the Act.

10. The obligations imposed under section 30 of the Act shall apply to the Commission in relation to the keeping of a Register of Interconnection Agreements.

11. Interconnection disputes shall be determined in accordance with the provisions of the Act and guidelines issued by the Commission.

12. Accounting, costing and pricing principles applicable to a dominant operator shall be set out in guidelines issued by the Commission.

13. [Before the amendment in 2004] *Charges imposed by non-dominant operators for interconnection services shall be unregulated.*

13. [After the amendment in 2004] *(1) Subject to paragraph (2), all charges imposed by non-dominant operators for interconnection services shall be unregulated.*
(2) Notwithstanding paragraph (1), termination charges payable for the termination of calls in respect of interconnection shall be regulated by the Commission.

…

THE LICENCES

19. On 8th August 2003, with effect from 8th August 2003, the relevant Minister granted to C&W Barbados a Service Provider Licence to provide Mobile Telecommunications Services in Barbados. The licence was non-exclusive and was for a period of 15 years

from 8th August 2003. The licence was stated to be subject to suspension and revocation in accordance with the Act.

20. By clause 19.1 of this Licence, it was provided that C&W Barbados should observe and comply with the Act and the Regulaitons.

21. On 8th August 2003, with effect from 8th August 2003, the relevant Minister granted to C&W Barbados a Carrier Licence to own and operate a Mobile Telecommunications Network in Barbados. The licence was non-exclusive and was for a period of 15 years from 8th August 2003. The licence was stated to be subject to suspension and revocation in accordance with the Act.

22. By clause 10.1 of this licence, it was provided that C&W Barbados should provide interconnection services to its Network for the purpose of supplying telecommunications services in accordance with the provisions of the Telecommunications Act 2001, the Telecommunications (Interconnection) Regulations 2003 and Interconnection Guidelines.

23. By clause 23.1 of this Licence, it was provided that C&W Barbados should observe and comply with the Act and the Regulations.

24. On 8th August 2003, with effect from 8th August 2003, the relevant Minister granted to Digicel Barbados a Carrier Licence to own and operate a Mobile Telecommunications Network in Barbados. The licence was non-exclusive and was for a period of 15 years from 8th August 2003. The licence was stated to be subject to suspension and revocation in accordance with the Act.

25. On 3rd November 2003, with effect from 3rd November 2003, the relevant Minister granted to C&W Barbados a Carrier Licence to own and operate a Domestic Public Telecommunications Network in Barbados. The licence was non-exclusive and was for a period of 20 years from 3rd November 2003. The licence was stated to be subject to suspension and revocation in accordance with the Act.

26. By clause 10.1 of this licence, it was provided that C&W Barbados should provide interconnection services to its Network for the purpose of supplying telecommunications services in accordance with the provisions of the Telecommunications Act 2001, Interconnection Policy, the Telecommunications (Interconnection) Regulations 2003 and Interconnection Guidelines.

27. By clause 23.1 of this Licence, it was provided that C&W Barbados should observe and comply with the Act and the Regulations.

THE FACTS

28. Before turning to the detailed history in relation to the negotiations and completion of interconnection in Barbados, it is useful to record some general matters.

29. The Claimants say that the Government of Barbados was keen to see interconnection with C&W Barbados and the entry into the market of new licensed operators to compete with the incumbent C&W Barbados. The Defendants make similar submissions as to the political background to the interconnection process in Barbados. I find that the

government was directly involved with the matter in Barbados from an early stage. The government's chief technical officer, Mr Chelston Bourne, was involved from an early stage, initially in drafting legislation and issuing licences, and then in convening meetings and writing to the parties. The Deputy Prime Minister and Attorney General, Ms Mia Mottley QC, as well as other ministers on a governmental sub-committee for telecommunications, became personally involved. Digicel Barbados saw the opportunity to turn this level of Government interest to its advantage. Digicel Barbados sought to apply political pressure on C&W Barbados. Digicel Barbados would say that it was applying pressure to ensure that C&W Barbados performed its legal obligations. C&W Barbados says that Digicel Barbados was applying political pressure to make C&W Barbados go beyond its legal obligation. In the event, C&W Barbados says that it dealt with certain matters at a time when it was not obliged to deal with those matters. An example of such a matter is the ordering of the equipment needed by C&W Barbados before the parties had finalised the terms of an interconnection agreement.

30. The organisation of certain matters in relation to CWWI and the C&W Barbados business unit was not the same as in the OECS countries to which I have referred, namely, SLU, SVG and Grenada. In the OECS, as has been seen, the interconnection process was conducted by the carrier services team, headed by Mr Thompson. Mr Thompson reported directly to Mr Errald Miller, the Caribbean CEO and not to the general managers of the business units in SLU, SVG and Grenada. However, matters were re-organised in the Caribbean in mid to late 2003. This followed the appointment of Mr Loosemore as Chief Operating Officer of C&W plc. The head of the Barbados business unit at that time was Mr Austin and following re-organisation, Mr Austin reported directly to Mr Loosemore. Mr Loosemore wanted Mr Austin to be accountable for matters relating to Barbados, including interconnection. Thus, it was Mr Austin who was to instruct Mr Thompson of the carrier services team as to the action to be taken in relation to interconnection. Because of this and because the Barbados business unit was close to the political situation in Barbados, the carrier services team were at a somewhat greater remove. On the other hand, the work of drafting documentation for interconnection and conducting negotiations with Digicel Barbados was still done first hand by the carrier services team.

31. Barbados had a distinct system of charging for retail calls. At the relevant time in the OECS, the OECS countries operated a system known as CPP, that is, calling party pays. Under this system, the person who makes the call pays for it. The person who receives the call does not pay for it. The system in Barbados at the relevant time was called RPP or receiving party pays. As explained at the trial, this description is not wholly accurate and a more accurate description would be mobile party pays, or MPP. Under this system, telecommunications operators had the right to charge mobile customers both for making and for receiving calls. As fixed lines were not metered, customers using fixed lines did not pay to make domestic calls or to receive domestic calls. This had significant implications for interconnection charges between telecommunications providers. In the OECS, where there was a fixed to mobile call, the fixed line network obtained retail revenue from such calls. In turn, the fixed network paid a substantial termination rate to the recipient mobile network for terminating the call. This arrangement would not work in Barbados because there the fixed network did not charge fixed line customers for making the call. There was therefore no income stream from which the fixed line network could pay a termination rate to the recipient mobile network. The position was more complex still as regards mobile to mobile calls. As early as 12th February 2003, C&W Barbados was permitted by the government to set the charge, for C&W mobile

customers to receive calls from other C&W mobile customers, at zero. So from 1st March 2003 onwards, C&W Barbados did not charge its customers for receiving mobile to mobile calls from C&W Barbados customers. These were described as on-net mobile to mobile calls, that is, they were calls made within the same mobile network. By August 2003, the position as regards C&W's retail charges was as follows:

(1) C&W fixed customers did not pay to make or receive domestic calls;
(2) C&W mobile customers paid to make calls both to fixed lines and to mobiles;
(3) C&W mobile customers paid to receive calls from fixed lines; and
(4) C&W mobile customers did not pay to receive on-net calls that is from other C&W mobiles.

32. In my judgment, this rather complicated state of affairs was not to be equated with a CPP regime for mobile to mobile calls, as the Claimants suggested at the trial.

33. By August 2003, it was far from clear whether the various operators providing mobile telecommunications services in a liberalised market would charge customers for receiving off-net calls, that is, calls from customers on a different mobile network. C&W Barbados considered that the right of mobile telecommunications operators to charge their own customers for receiving calls undermined the justification for the payment of a mobile termination rate from mobile to mobile calls. Further, the fact that mobile operators could charge their customers for receiving calls from fixed line customers, whereas C&W Barbados' fixed network had no right to charge its fixed line customers who had made the call, could be said to make it appropriate for mobile operators to pay an origination fee to C&W Barbados' fixed network to cover the cost of originating that call.

34. There was considerable debate at the trial as to whether there was uncertainty in Barbados in the middle of 2003 as to the precise requirements of the regulations to be made by the government. I find that the position is as follows. It was not until 8th August 2003 that C&W Barbados obtained its new non-exclusive licence replacing its pre-existing monopoly licence. It was not until 8th August 2003 that potential new entrants into the market obtained licences. The government published its interconnection policy (which was later referred to in the regulations made in Barbados) on 2nd July 2003. The Fair Trading Commission was in the process of consulting on its interconnection guidelines on accounting, costs and pricing principles and its interconnection dispute resolution procedures. These were published on 30th June 2003 and were challenged unsuccessfully by C&W Barbados. The Telecommunications (Interconnection) Regulations 2003 were published on 31st July 2003. These regulations had been made available earlier in draft form and both Digicel Barbados and C&W Barbados had requested amendments to the draft regulations. At one time, it appeared that the amendment requested by C&W Barbados, which would have made it explicit that a person requesting interconnection had to have a licence at the time of the request, was going to be accepted, but in the event the final form of regulation 7 of the regulations did not so provide.

35. Although Digicel Barbados did not obtain a licence to operate a telecommunications service in Barbados until 8th August 2003, it wrote to C&W Barbados on 12th March 2003, requesting interconnection. The letter of 12th March 2003 stated that Digicel Barbados had been awarded a mobile telecommunications licence by the government of Barbados on 10th March 2003. That was not in fact the position. Digicel Barbados then proceeded to make what they described as a formal request for interconnection services.

The letter set out the steps which Digicel Barbados suggested should then be taken to progress interconnection.

36. On 14th March 2003, C&W Barbados replied to this request for interconnection. C&W Barbados asked to be given a copy of the licence which had already been issued on 10th March 2003.

37. On 14th May 2003, Digicel Barbados replied referring to section 28(1) of the Telecommunications Act 2001. In this reply, Digicel Barbados argued that the reference in that sub-section to "a person" extended to someone like Digicel Barbados, even at a time when it did not have a licence. Digicel Barbados said that C&W Barbados was under an obligation to negotiate interconnection in good faith.

38. On 23rd May 2003, C&W Barbados replied to Digicel Barbados. C&W Barbados stated that for "a person" to be able to request interconnection under section 28(1) of the Telecommunications Act 2001, such a person had to be licensed and as Digicel Barbados had not been licensed, C&W Barbados was "unable" to accede to the request for interconnection.

39. On 26th June 2003, Digicel Barbados replied to the letter of 23rd May 2003. Digicel Barbados stated that notwithstanding the disagreement on the interpretation of section 28(1) of the Telecommunications Act 2001, it would like to request, in the interests of the liberalisation of the cellular telecommunication sector in Barbados that the two companies commence interconnection negotiations without further delay. Digicel Barbados pointed out that there was no legal impediment which prohibited C&W Barbados from entering into such negotiations. Digicel Barbados stated that it was concerned that C&W Barbados should thwart the will of the Barbadian government by refusing to commence these negotiations.

40. C&W Barbados maintained its stance, at all times until Digicel Barbados obtained its licence on 8th August 2003, that C&W Barbados was under no obligation to commence interconnection negotiations with Digicel Barbados and that C&W Barbados would not do so. I have held, elsewhere in this judgment, that the legal stance taken by C&W Barbados was correct. Accordingly, it was not a breach of the Telecommunications Act 2001 and, as I have also held, not a breach of section 16 of the Fair Competition Act 2002 for C&W Barbados to decline to begin interconnection negotiations with Digicel Barbados at any time prior to 8th August 2003.

41. It is not, I think, in dispute that C&W Barbados could have started negotiations with Digicel Barbados prior to 8th August 2003 if it had wished so to do. I find that the reason why C&W Barbados did not begin negotiations with Digicel Barbados was that C&W Barbados did not wish to take a step which would bring forward the date when Digicel Barbados would be able to enter the market in Barbados, if C&W Barbados was not under a legal obligation to take that step.

42. On 24th April 2003, the minister with responsibility for telecommunications determined that C&W Barbados was a dominant carrier pursuant to section 26(3) of the Telecommunications Act 2001 in respect of international telecommunication services, fixed telecommunication services and mobile telecommunication services.

43. On 1st July 2003, the Fair Trading Commission wrote to C&W Barbados in exercise of its powers conferred by section 26(1) of the 2001 Act and required C&W Barbados to file a RIO in accordance with that section. C&W Barbados was required to file the RIO within 30 days of 1st July 2003, in accordance with the government's interconnection policy. Attached to the letter of 1st July 2003 was the decision of the Fair Trading Commission setting out interconnection guidelines dealing with the relevant accounting, costing and pricing principles. These guidelines were dated 30th June 2003. The guidelines identified the basis for assessment of interconnection rates. For a period of 3 months, an approach called the FDC historical approach was to be used. For the 6 months thereafter, the FDC current cost approach was to be used and thereafter interconnection charges were to be based on the TSLRIC approach. The FDC (i.e. fully distributed cost) historical cost approach, was explained in paragraphs 22 to 24 of the guidelines. The FDC (i.e. fully distributed cost) current cost approach was explained in paragraphs 25 to 28 of the guidelines. Paragraphs 29 to 37 of the guidelines explained the LRIC (i.e. long run incremental cost) methodology and paragraphs 38 to 42 of the guidelines explained the TSLRIC (i.e. the total service long run incremental cost methodology).

44. On 7th July 2003, Mr Thompson sent an internal C&W email on the subject of mobile termination rates for Barbados. Mr Thompson raised six specific questions as to the variables which would go to make up the relevant mobile termination rate.

45. On 15th July 2003, C&W Barbados applied to the Fair Trading Commission for a review of certain decisions. One of these was the decision by the Fair Trading Commission to publish the interconnection guidelines of 30th June 2003, to which I have referred. Another decision was that of 1st July 2003 requiring C&W Barbados to issue a RIO by 31st July 2003.

46. The application of C&W Barbados was heard by the Fair Trading Commission on 30th July 2003. At that hearing, C&W Barbados made an oral application for an extension of 45 days, commencing on 1st August 2003 to file the RIO. On 31st July 2003, the Commission rejected this application.

47. On 29th July 2003, before the hearing which was due to take place on the following day, members of the carrier services team were preparing themselves to comply with the order of 1st July 2003 which required a RIO to be issued by 31st July 2003. On 29th July 2003, there are internal emails which considered what could be done if the attempt to obtain a stay from the Fair Trading Commission was unsuccessful. As I read Mr Thompson's email of 29th July 2003 at 2:50pm (GMT), Mr Thompson was not saying that it was satisfactory for C&W Barbados to issue a RIO within the original time limit; rather he was saying that if the original time limit stood, C&W Barbados would have to do the best it could. I read Mr Thompson's email of 29th July 2003 at 11:01am in the same way.

48. The refusal of an extension of time by the Fair Trading Commission (on 31st July 2003) was overtaken by a letter dated 31st July 2003 from the Minister of Energy and Public Utilities to the Fair Trading Commission. The Minister informed the Fair Trading Commission that the period of time permitted by the interconnection policy should be revised to 52 days from the order of the Fair Trading Commission. A copy of this letter was sent to C&W Barbados. This revision meant that the time which C&W Barbados had to comply with the order of 1st July 2003 was extended to 22nd August 2003. As will be seen, the RIO was issued on the last day of that period.

49. On 29th August 2003, the Fair Trading Commission published its decision dealing with the application for an extension of the period to 45 days from 1st August 2003. It rejected the application. It is not clear that that application needed to be dealt with on 29th August 2003 but nothing turns on that matter.

50. Mr Forrest was cross-examined as to whether C&W Barbados was in a position to put forward all of its proposed rates in a RIO, or any other interconnection agreement, by the date of the grant of the licence to Digicel Barbados on 8th August 2003. Mr Forrest stated that 90% of the rates were available by that date but that meant that not all of the rates were then available and Mr Forrest went on in his evidence to identify some of the rates that could not be specified at that stage.

51. On 5th August 2003, shortly before the government in Barbados granted C&W Barbados its new non-exclusive licence and granted to Digicel Barbados a licence to operate in Barbados, Mr Batchelor of C&W contacted Mr O'Shaughnessy of Digicel to propose a meeting on 14th August 2003, to discuss interconnection in Barbados. On the same day, Mr O'Shaughnessy confirmed a meeting on the date proposed. He attached a list of services which Digicel Barbados would request from C&W Barbados. The list was headed "requested interconnection services". Under the heading "international", incoming international calls were regarded as an interconnection service but it was pointed out that this would cease to be an interconnection service after 1st August 2003 when it would be regarded as a wholesale service and not an interconnection service.

52. On 8th August 2003, immediately following the grant of its licence, Digicel Barbados wrote to C&W Barbados making a formal request for interconnection. The letter enclosed a list of requested interconnection services and the subject of international incoming calls was described in the same way as in the attachment sent on 5th August 2003.

53. Before the meeting on 14th August 2003, the Ministry of Energy and Public Utilities in Barbados wrote to Miss Medford of C&W Barbados. The Ministry expressed the view that interconnection should proceed as smoothly and speedily as possible. It stated that the equipment necessary to carry out this interconnection should be ordered within a few weeks to remove the delay experienced by interconnection seekers in other countries due to lack of equipment. The letter stated that the government wished to have an assurance that the above principle would be adhered to. The letter arrived with C&W Barbados on 13th August 2003. It appears to have come to the attention of the carrier services team acting for C&W Barbados in the course of the meeting with Digicel Barbados on 14th August 2003. It is also clear from the meeting on 14th August 2003, that Digicel Barbados was aware that this letter had been written to C&W Barbados.

54. At the meeting on 14th August 2003, Digicel Barbados asked C&W Barbados to order the equipment it needed for interconnection in advance of finalising an interconnection agreement. C&W Barbados said that it was not going to state its position at that meeting. It said that the C&W policy in the past was known to Digicel Barbados and C&W Barbados would decide whether to adopt that policy in Barbados also. A note of the meeting records that Digicel Barbados made three suggestions in relation to C&W Barbados obtaining the necessary equipment. The first was that C&W Barbados could use equipment that had been de-commissioned by a C&W subsidiary in Jamaica. The

second was that Digicel Barbados would purchase the equipment on behalf of C&W Barbados. The third was that Digicel Barbados would provide a bond to C&W Barbados in relation to reimbursement of the cost of the equipment.

55. On 19th August 2003, Mr Batchelor of C&W Barbados sent an email to Digicel Barbados stating that it proposed to send to Digicel Barbados a draft interconnection agreement in the week commencing 25th August 2003 and C&W Barbados would notify its position with regard to equipment ordering after that.

56. In August 2003, Digicel Barbados wrote a number of letters to C&W Barbados strongly pressing the latter to order the equipment. Digicel Barbados also wrote several letters to the government in Barbados informing it of the state of play and complaining of C&W Barbados' behaviour in not making a commitment to order equipment at that stage.

57. C&W Barbados provided its draft RIO to the Fair Trading Commission on Friday 22nd August 2003 and on Monday 25th August 2003, sent the document as a draft interconnection agreement to Digicel Barbados.

58. On 27th August 2003, Digicel Barbados sent to C&W Barbados its traffic forecast and information as to the equipment which needed to be ordered. The parties met again on 2nd September 2003. They discussed the question of ordering equipment before an interconnection agreement was finalised. C&W Barbados stated that it was C&W policy not to order equipment until an agreement was approved by the regulator but that this policy might change. On the same day, Digicel Barbados wrote to Ms Mia Mottley QC, the Deputy Prime Minster and Attorney General in Barbados, complaining of the stance taken by C&W Barbados.

59. On 3rd September 2003, Digicel Barbados wrote to Mr Austin the President of C&W Barbados. Digicel Barbados pressed C&W Barbados to order equipment at that stage. Digicel Barbados repeated the three suggestions that it had made at the meeting on 14th August 2003; the third of these suggestions was a bond or bank guarantee or escrow arrangement in relation to the reimbursement of the cost of the equipment. Digicel Barbados also sent a list of the equipment which it believed C&W Barbados would be required to order, install and test in order to provide physical interconnection.

60. Mr Austin asked Mr Thompson of the C&W carrier services team for advice on how to proceed. On 3rd September 2003, Mr Thompson gave that advice by an email sent to Mr Austin and copied to Mr Loosemore of C&W Plc. Mr Loosemore was also a director of C&W Barbados. This email is revealing as to Mr Thompson's thoughts on the question of ordering equipment before the entry into and/or approval of an interconnection agreement. Indeed, Mr Thompson's analysis was not applicable to Barbados only. His analysis in this email is entirely consistent with what I have found was the approach adopted by the CWWI carrier services team in SLU and SVG.

61. Mr Thompson's analysis in his email is closely reasoned. I will not set out the full text of the email but will attempt to summarise the main points. He began by explaining his rationale for making equipment ordering conditional upon regulatory approval. He thought it would be "difficult" for new entrants or regulators to force C&W legally to purchase equipment in advance of an interconnection agreement. Carrier services wished to maximise its negotiating leverage during the interconnection negotiations and

equipment ordering was one of the few areas where carrier services could influence the negotiations, if new entrants failed to negotiate in a way that suited C&W, on issues which were important to C&W such as ADCs and mobile termination rates. The use of "delay" in ordering equipment gave to the carrier services team an ability to secure more swift and favourable terms. New entrants, including Digicel, understood the fact that not ordering equipment gave to the C&W carrier services team a negotiating advantage and the response of new entrants was intense political lobbying. Mr Thompson pointed out that new entrants wanted equipment ordered but they also wanted the equipment to be installed and tested. If the equipment were ordered and delivered then C&W would come under pressure to install and test the equipment and then allow the carriage of live traffic on the basis of an interim agreement. Interim agreements were bad for C&W as it would take a lengthy time for a final interconnection agreement to be arrived at. A refusal to order equipment before finalising an interconnection agreement incentivised new entrants and also made a regulator work "harder and faster" in relation to the approval stage. Mr Thompson thought that in the OECS, the C&W companies had succeeded in making the regulators there work harder and faster. Making the ordering of equipment conditional upon approval of an interconnection agreement also led to a water tight non-discriminatory process, that could not be challenged by a particular new entrant. He thought that in the OECS, the C&W companies had run a considerable risk of difficulties arising as a result of different new entrants not going live at the same time, mostly as a result of differential treatment as regards equipment ordering. This point meant that equipment ordering should be postponed not only to the time when interconnection terms were finalised but to the later time when they were approved by the regulator.

62. Mr Thompson's email of 3rd September 2003 goes on to discuss the "political situation" in Barbados. He did not set out in detail what he thought the political situation was but it is, I think, clear that Mr Thompson was aware that the government in Barbados was putting considerable pressure on C&W Barbados to order equipment at that stage. It is to be inferred that Mr Thompson thought that a lack of co-operation from C&W Barbados in that respect might have political disadvantages. In his email, he sought to balance such disadvantages against the cost of conceding on equipment ordering. He identified three costs. The first was securing less favourable interconnection terms. That comment was consistent with his detailed analysis about the use of equipment ordering as leverage in the negotiations. The second cost he identified was that C&W Barbados might be forced to go live on the basis of an interim agreement determined by the regulator. That comment is also consistent with his earlier analysis. The third cost was expressed as: "seeing xmas activity shared with new entrants and erosion of our ability to better establish our own GSM credentials as the sole provider." Mr Thompson then went on to propose a certain approach if it were felt that the balance of interests in Barbados was best served by facilitating equipment ordering. I will refer to that matter below.

63. In relation to Mr Thompson's email of 3rd September 2003, I find that Mr Thompson's analysis of the use of equipment ordering as leverage in negotiation represented Mr Thompson's view and probably represented the view of many other members of the carrier services team who were assisting C&W Barbados. The analysis as explained in detail by Mr Thompson does not include the objective of delaying Digicel Barbados for the sake of delay but, rather, confines the rationale in relation to equipment ordering to two principal matters, first, the leverage point and, secondly, the desire to have an unchallengeable non-discriminatory process.

64. The Claimants stressed the part of this email which described as a cost of conceding on equipment ordering the points about "xmas activity" and the reduced ability to establish "our own GSM credentials". The Claimants submitted that these references give the game away and show that the C&W carrier services team had the objective of delaying Digicel Barbados for the purpose of keeping Digicel Barbados out of the market at Christmas 2003 and buying time for C&W Barbados to improve its own position in the market in particular in relation to GSM.

65. In my judgment, a fair reading of these references, in the context of the email as a whole, is as follows. Mr Thompson was obviously aware, not least because of his experience in SLU and SVG, that if the C&W company took the recommended stance in relation to equipment ordering and if the Digicel company declined to accept C&W terms in relation to matters such as ADCs and mobile termination rates (and any other relevant matter) then the likely result would be that the negotiations would drag on and would not result in the early settlement of interconnection terms. That passage of time would be harmful to Digicel and conversely would be beneficial to the C&W company. If the delay took Digicel's launch to a date after the forthcoming Christmas period then that would be harmful to Digicel and beneficial to the C&W company. During the period of delay, the C&W company could use the time profitably to improve its own position in the market. All of those matters were foreseeable and were in fact foreseen by Mr Thompson and probably by other members of the carrier services team. However, it would be wrong, in my judgment, to say that the primary objective of C&W's policy in relation to equipment ordering was to produce that result. In my judgment, the primary object of C&W's policy on equipment ordering is explained in the first part of Mr Thompson's email and that explanation does not include the objective of causing delay for delay's sake. If, as I have held, the C&W company was entitled to adopt that approach to its negotiations with Digicel (in Barbados and elsewhere) then it was not disabled from adopting that approach by reason of the fact that it could foresee the consequences of that approach being adopted and the Digicel company declining to agree the terms proposed by C&W.

66. Mr Thompson concluded his email of 3rd September 2003 by proposing a certain approach in the event that C&W Barbados felt that it ought to order equipment before finalising the terms of an interconnection agreement. His proposal identifies various specific stages to be followed through for that purpose. The first stage related to identifying what equipment was needed by all the new entrants and not just Digicel Barbados. Thereafter, C&W Barbados would wish to have credit guarantees from the new entrants in relation to the cost of the equipment. He then proposed that the equipment in question should stay in bond in Barbados rather than being installed and tested and rather than allowing interconnection to go live. This was to be the position until the interconnection agreement was finalised and approved by the regulator. Mr Thompson also wanted to try to persuade the government in Barbados that it should not insist on C&W Barbados entering into interim agreements with new entrants.

67. Later on 3rd September 2003, Mr Thompson sent a further email to Mr Austin; the email was copied to Mr Loosemore. This referred to the question of interconnection being completed before Christmas 2003. Mr Thompson said he did not know whether the government had the expectation that that would occur. For that purpose, Mr Thompson explained that C&W Barbados would need to put in considerable and immediate effort in various respects.

68. On 3rd September 2003, Mr Loosemore replied to Mr Thompson's emails. He stated that Mr Austin was responsible for the strategy in Barbados and accountable for the results. He directed Mr Austin to instruct Mr Thompson as to what needed to be done to "honour our agreement with the PM". It is not clear what agreement Mr Loosemore was referring to. It is probable that this was a reference to much earlier discussions between C&W Barbados and the government on the subject of liberalisation, pursuant to which C&W Barbados agreed to give up its exclusive licence and accept a non-exclusive licence.

69. On 4th September 2003, Mr Austin replied to Mr Thompson setting out his decision on the question of ordering equipment. Mr Austin stated that he would tell the Minister, Ms Mottley QC, that C&W would meet all new entrants and agree what was required; that C&W Barbados should then get the necessary "bonds etc" in place and after that the equipment for all new entrants would be ordered so that it would arrive as soon as possible. The equipment would be held in bond until the agreement was signed.

70. In accordance with this decision, Mr Austin wrote to Digicel Barbados on 5th September 2003. He stated that C&W Barbados was now prepared to consider advanced ordering of equipment as a parallel process to on-going interconnection negotiations. He referred to the position of other new entrants apart from Digicel Barbados. He stated that C&W Barbados would require "a suitable bond or cash deposit" from Digicel Barbados. He also stated that the equipment when delivered to Barbados would remain in bond until an interconnection agreement became legally effective and at that stage C&W Barbados would proceed expeditiously to install and test the equipment so that interconnection could go live.

71. The Claimants say that C&W Barbados was at fault in that the decision communicated on 5th September 2003 to order equipment should have been made and communicated on or shortly after the meeting between the parties on 14th August 2003. If C&W Barbados had been under a duty to Digicel Barbados to order equipment following a request for interconnection then it would follow that some or all of the period between 14th August 2003 and 5th September 2003 amounted to delay in C&W Barbados' compliance with its duty. Conversely, if C&W Barbados was not under an obligation to order equipment until it had contractually committed itself to the terms of an interconnection agreement which so provided then the passage of time between 14th August 2003 and 5th September 2003 was not a breach of duty by C&W Barbados.

72. I have already held that C&W Barbados was not under a duty to order equipment immediately following a request for interconnection. I have also held that C&W Barbados was entitled to approach the negotiations with Digicel Barbados in a way which followed the C&W policy explained by Mr Thompson in his email of 3rd September 2003. It follows from this that C&W Barbados was not in breach of duty by reason of the fact that it communicated its decision to pre-order equipment only on 5th September 2003, rather than at some earlier time.

73. Following C&W Barbados' decision, communicated on 5th September 2003, to order the equipment it needed for its side of the interconnection, there were further stages before the order for the equipment was placed. There was discussion between the parties as to whether Digicel Barbados should provide a bond in relation to the cost of the equipment or provide a cash deposit. Time was taken up in C&W Barbados providing a figure for

the cash deposit. The figure was provided on 24th September 2003 and Digicel Barbados provided its cheque for this amount on 2nd October 2003.

74. Digicel Barbados says that C&W Barbados ordered the equipment in the period 14th to 17th October 2003 and that the equipment was delivered by 19th December 2003. Digicel Barbados alleges that C&W Barbados was in breach of duty owed to Digicel Barbados in various respects during this period. It is said that C&W Barbados delayed, and indeed deliberately delayed, the various stages between 5th September 2003 and delivery of the equipment.

75. Before considering the detailed facts in relation to that period, it is necessary to reflect my earlier conclusion that the legislation in Barbados did not place on C&W Barbados an obligation to order the equipment prior to the parties entering into an interconnection agreement which would contain a contractual provision dealing with that matter. Of course, the case put by Digicel Barbados is that there was a legal obligation to order equipment following the request for interconnection on 8th August 2003. If there were no such obligation, then it is difficult to see how Digicel Barbados can submit that certain stages in the process could have been, and should have been, handled more quickly. On my finding as to the legal position, C&W Barbados was not obliged to order equipment in this period. C&W Barbados had made its decision to order equipment because of the political pressure applied to it. If anything was to control the pace at which C&W Barbados proceeded to order the equipment, it would be the existence or absence of further political pressure and not the existence of a legal obligation to order equipment.

76. I have considered whether it might be said by Digicel Barbados that when C&W Barbados voluntarily took on the burden of ordering equipment, it then came under the obligation in section 25(1) of the 2001 Act to ensure delivery of the equipment in a timely fashion. My conclusion is that the fact that C&W Barbados, on a non-obligatory basis, took on the task of ordering equipment in advance of an interconnection agreement does not impose on C&W Barbados an obligation that would not otherwise be upon it, which is to handle the ordering of equipment in a timely fashion.

77. I have also considered whether Digicel Barbados could argue that because C&W Barbados had bowed to the political pressure on it and made its decision to order equipment on 5th September 2003, there was an obligation on C&W Barbados, possibly under section 28(3) of the 2001 Act, to handle the question of ordering equipment in good faith. I would not accept such a submission. Section 28(3) requires the process of negotiating the terms and conditions of interconnection to be conducted in good faith. It does not say anything about a process, voluntarily undertaken, to arrange for the ordering of equipment, in advance of finalising the terms of an interconnection agreement.

78. It follows from the above that even if Digicel Barbados established the facts of its allegation about the way in which C&W Barbados handled the question of a bond or a cash deposit or the placing of the order for the equipment or the way in which it handled the period between placing the order and delivery of the equipment, any such matter would not result in C&W Barbados being in breach of an obligation owed to Digicel Barbados. In these circumstances, I will examine relatively briefly the facts of the criticisms made by Digicel Barbados.

79. Following C&W Barbados' letter of 5th September 2003 agreeing to order equipment before finalising an interconnection agreement, Digicel Barbados on the same day sent to C&W Barbados two documents which it was said were the draft bond. The documents were described as "an indemnity of insurance bond". The documents were presented in a confusing way although if one had carefully studied the enclosed documents one would have detected that one of the two documents was a draft of a bond from Digicel Barbados to C&W Barbados. The draft envisaged that a bank would also commit itself to the bond. The document which was headed "indemnity for issuance of bond", misdescribed by Digicel Barbados as an "indemnity of insurance bond", was a document to be entered into by Digicel Barbados and its bank and was not the bond being given to C&W Barbados. Digicel Barbados appeared to have dealt with this matter rather quickly and did not itself understand the format of the documents. Later, Digicel Barbados did identify the correct document and re-supplied this to C&W Barbados.

80. However, by 18th September 2003 Mr Thompson had prepared a very detailed letter setting out the proposed conditions for early ordering of interconnection equipment. That letter dealt with matters in addition to the question of reimbursement of the cost of the equipment. In judging whether the time from 5th September 2003 to 18th September 2003 was well spent, one would have to take into account the fact that the other matters of detail in this letter required attention and probably instructions from C&W Barbados to the carrier services team. In any event, the letter of 18th September 2003 stated that C&W Barbados required a cash deposit (rather than a bond) in relation to the cost of the equipment. In my judgment, C&W Barbados was entitled to ask for a cash deposit rather than a bond.

81. If I had to decide whether an undue period of time went by between 5th September 2003 and the sending of the letter on 18th September 2003, I would regard the position as somewhat borderline. It is arguable that the letter of 18th September 2003 (if there had been an obligation to act in a timely fashion) could have been sent a few days earlier.

82. The letter of 18th September 2003 stated that the amount of the cash deposit would be notified to Digicel Barbados by 22nd September 2003. In fact, the amount was notified on 24th September 2003 in the sum of U$200,000. The time taken to calculate the amount of the deposit was explained in the evidence of Mr Barnes and Mr Forrest. I accept their evidence on this point. I do not find that the time taken to calculate the amount of the deposit was excessive. Considerable care was taken in calculating the figure. A more rough and ready figure could have been calculated in a shorter period but may have given rise to argument as to its accuracy. In any event, I do not criticise C&W Barbados for arriving at a figure as a result of a careful computation.

83. Digicel Barbados also argued that the figure of U$200,000 was excessive. There was considerable investigation in the evidence, and debate at the trial, as to the correct basis for assessing such a figure and the correct result of calculating on such a basis. It does not seem to me to be necessary or appropriate for me to rule on all these matters. The only potentially relevant question would be whether C&W Barbados put forward its figure of U$200,000 in good faith. I find that it did put forward that figure in good faith. In so far as it is material, I find that it was permissible for C&W Barbados to ask for a full figure and to err on the side of caution in its favour.

84. In any event, Digicel Barbados reluctantly agreed to pay this figure and did pay it by cheque on 2nd October 2003. There is no claim in the present case for loss and damage on the basis that Digicel Barbados paid a larger figure than it ought to have done. The complaint is that there was delay between 24th September 2003 and 2nd October 2003 caused by C&W Barbados demanding a figure which was too high. That period is, in any view, a short one and it is likely in any event that some time would have been taken up with a challenge by Digicel Barbados to whatever figure was presented, unless the figure had been a modest figure.

85. The Claimants next complain that C&W Barbados delayed unduly in ordering the equipment. The equipment was either ordered on 14th October 2003 (as C&W Barbados contends) or in the period 14th to 17th October 2003 (as Digicel Barbados contends). Digicel Barbados has two principal points as to the alleged delay in placing the order. It says that by reason of matters which allegedly occurred in June 2003 and, in any event, did occur in August 2003 (the provision of Digicel Barbados' forecast) the question of placing the order did not need to wait until 14th October 2003, or thereabouts. Of course, if C&W Barbados had been under an obligation to order equipment following the request for interconnection on 8th August 2003, the availability of a forecast from Digicel Barbados on 27th August 2003 would have been material. If, however, one is asking a different question as to whether C&W Barbados delayed unduly from 2nd October 2003 (when Digicel Barbados accepted the terms as to pre-ordering contained in the letter of 18th September 2003) to the date of ordering on 14th October 2003, the fact that Digicel Barbados' forecast had been available from, at the latest, 27th August 2003 is of less importance. In relation to the period from 2nd October 2003 to 14th October 2003 I do not have sufficient material to determine that part of that period was unnecessary for the purpose of C&W Barbados placing the order.

86. Digicel Barbados' second principal criticism of the way in which ordering was handled arises from the fact that C&W Barbados ordered other equipment which it wanted, namely, switch expansion and upgrade equipment, at the same time as ordering the equipment directly involved in the interconnection with Digicel Barbados. In the letter of 18th September 2003, Mr Thompson had stated to Digicel Barbados that the equipment needed for interconnection with Digicel Barbados would be ordered at the same time as equipment deemed necessary by C&W Barbados to upgrade C&W Barbados' switch, in order to support the forecast demand upon interconnection. The last paragraph of the letter stated that if Digicel Barbados was in agreement with these terms, the letter should be countersigned. On the 2nd October 2003, Digicel Barbados did countersign the letter. Thus, Digicel Barbados agreed terms on which C&W Barbados should pre-order equipment and those terms permitted C&W Barbados to order the other equipment it wished at the same time. In any event, the Claimants accepted on a number of occasions during the trial that they had not pleaded any allegation of any breach due to the fact that C&W Barbados had placed an order for additional equipment as part of the order it placed on or about 14th October 2003. There was technical evidence as to whether such a course was or was not appropriate but given the absence of a pleading and remembering that I have already decided that these matters of fact do not arise in view of my conclusion that C&W Barbados was under no obligation to order equipment before the finalisation of an interconnection agreement, I do not think it necessary or proportionate to investigate these matters further.

87. The Claimants next complain that C&W Barbados did not act appropriately in terms of managing the period between ordering the equipment from Nortel and the date of delivery of that equipment. The Claimants say that the equipment was ordered in the period 14th to 17th October 2003 whereas C&W Barbados says that it was ordered on 14th October 2003. The Claimants say that the equipment was delivered to Barbados on 19th December 2003 whereas C&W Barbados does not accept that that date has been established. C&W Barbados says that date was a predicted dispatch date rather than a delivery date and, in any event, it was expected that the equipment would remain in customs in Barbados until early January 2004. In the event, the Claimants do not put forward any specific criticism of what C&W Barbados did or failed to do in whatever time it took for delivery to be achieved. In their written closing submissions the Claimants say: "… it is not known whether C&W could have done more to procure an earlier delivery of the equipment, or at least the optical equipment itself such as to allow installation and testing to commence."

88. The written submissions go on to suggest that there was a possibility of Nortel being open to pressure from C&W Barbados and if that pressure had been applied then there was a possibility that delivery could have been expedited. In their oral closing submissions, the Claimants provided schedules which showed the actual time taken for various stages of the interconnection process and compared those with a counterfactual for the same stages. In these schedules, the actual time taken from the ordering of the equipment to the delivery of the equipment is given as 9 weeks. In the counterfactual, that is, on the assumption that C&W Barbados had done everything that it ought to have done, the same period from ordering to delivery of 9 weeks is taken. In view of the way the matter is put in the Claimants' written and oral closing submissions, it does not appear to be necessary for me to speculate, as the Claimants have done, as to the existence of a possibility that the period which the Claimants identify, 9 weeks, might have been shorter if something else had happened.

89. In this section of their closing submissions, the Claimant submit that C&W Barbados failed to manage the process of delivery of the equipment in another way in that it failed to keep Digicel Barbados fully informed at all stages of the progress of Nortel in relation to the delivery of the equipment. However, I have not been able to find any allegation that any step in the interconnection process or in the subsequent launch was thereby delayed. It does not seem at all likely that completion of the C&W Barbados' side of the interconnection could have been delayed by the alleged failure to keep Digicel Barbados informed of Nortel's progress towards delivery of the equipment. As regards Digicel Barbados' side of interconnection, the equipment which Digicel had ordered arrived in Barbados sometime earlier, on 9th October 2003.

90. The Claimants' next complaint concerns the stance taken by C&W Barbados in relation to carrying out civil works such as digging a trench and laying cable to join the Digicel Barbados switch station to the C&W Barbados switch station. In my judgment, there was no obligation on C&W Barbados to carry out the civil works before the parties had agreed the terms of an interconnection agreement which would provide for the carrying out of such works. In the event, C&W Barbados agreed to carry out the civil works and commenced the carrying out of the civil works prior to finalising the terms of the interconnection agreement on 23rd December 2003. Further, if there had been an obligation to carry out civil works prior to the entry into the interconnection agreement, there would only be a breach of that obligation if C&W Barbados started the process at a

time when it should have been foreseen that delay in completing the civil works would hold up interconnection. Further, any such breach would only cause loss if the date on which the civil works were actually completed did in fact hold up interconnection.

91. I have earlier held that C&W Barbados was not in breach of any obligation to Digicel Barbados in relation to the ordering of the equipment needed for the C&W Barbados side of the interconnection. That equipment was ordered by C&W Barbados, duly arrived in Barbados and cleared customs in early January 2004. The civil works were completed by 12th January 2004 so that the potential impact of any delay in completing civil works is a limited one only, if I have correctly held that C&W Barbados was not in breach of duty in relation to the circumstances whereby its equipment cleared customs in Barbados in early January 2004.

92. Notwithstanding these conclusions which dispose of the claim in relation to delay in respect of civil works, I will make my findings of fact on the subject. On 3rd October 2003, Mr Austin, the President of C&W Barbados, together with Mr Loosemore, who was a Director of C&W Barbados, had a meeting with government ministers to discuss interconnection in Barbados. During the course of that meeting, Mr Austin and Mr Loosemore agreed to carry out the necessary civil works to join up the C&W Barbados network with the networks of the various new entrants in Barbados. On 7th October 2003, there was a meeting at the Ministry of Industry and International Business of representatives of C&W Barbados, of Digicel Barbados and of two other proposed new entrants. The representatives of C&W Barbados were Ms Medford, Mr Barnes and Mr Small. In the list of action points contained in a note of that meeting, it was stated that the ministry needed a commitment from C&W Barbados regarding civil works, before the Fair Trading Commission approved the RIO submitted by C&W Barbados. It seems likely that the government officials and the representatives of C&W Barbados present at this meeting were not aware of the commitment given to the government on the 3rd October 2003. On 9th October 2003, C&W Barbados wrote to the ministry, referring to the request made at the meeting on 7th October 2003. C&W Barbados stated that it was willing to make a concession by commencing civil works to facilitate installation of underground optical fibre between the premises of other carriers and C&W Barbados' switch site, in advance of a signed and approved interconnection agreement. C&W Barbados stated that this was not normal practice but it was willing to do this after consideration of the requests from the government and the proposed new entrants. It stated that this was without prejudice to the fact that it was under no obligation to do so. It continued by saying that it would seek to secure a non-refundable cash deposit from each new entrant prior to commencement of the work and that C&W Barbados was in the process of assessing the value of the cash deposit for each of the new entrants. It would submit the appropriate requests for approval to the work to the Ministry of Energy and Public Utilities who would then assume responsibility for securing the approvals from the Ministry of Public Works.

93. There was a meeting between representatives of C&W Barbados and Digicel Barbados on 13th October 2003. Digicel Barbados asked if, following the meeting on 7th October 2003, C&W Barbados had taken the decision to commence civil works. Mr Batchelor of C&W Barbados stated he was unaware of what had been agreed between C&W Barbados and the ministry and would revert to Digicel Barbados that afternoon when he was able to discuss the matter further. It seems odd that the representatives of C&W Barbados were not aware of the letter of 9th October 2003. It also seems odd that if that letter went to the

ministry on 9th October 2003, Digicel Barbados had not become aware of that fact from the ministry. There are clear signs in the documents that Digicel Barbados was putting considerable pressure on the government and the government was keeping Digicel Barbados generally informed. It is possible that the letter in the bundle of 9th October 2003 was a draft and was not sent or that the date is wrongly stated. At any rate, C&W Barbados did not tell Digicel Barbados at the meeting on 13th October 2003 that it would agree to carry out the civil works before entering into an interconnection agreement.

94. On 17th October 2003, C&W Barbados wrote to Digicel Barbados agreeing to carry out the civil works. This was stated to be without prejudice to the fact that C&W Barbados was under no obligation to do so. C&W Barbados then required from Digicel Barbados a non-refundable cash deposit from each of the proposed new entrants. It stated that it was in the process of assessing the value of this cash deposit for each of these new entrants. Upon receipt of the cash deposit from each of the new entrants, and the necessary approvals from the Ministry of Public Works or other government agencies, C&W Barbados would commence the civil works.

95. Also on 17th October 2003, Mr Barnes emailed Mr Small, Mr Forrest and Mr Batstone of C&W with three figures for the three deposits in respect of civil works to be paid by each of the three proposed new entrants. The figure for Digicel Barbados was BDS$ 75,000. Mr Barnes stated that letters needed to be drafted to be sent to the new entrants to seek their acceptance to pay these deposits. I was shown an earlier email to Mr Barnes of 29th August 2003 when Mr Barnes was given an estimate in relation to Digicel Barbados which refers to the subject of the cost of fibre involved in the civil works. The cost at that date was placed at approximately BDS$ 70,000. It is not necessary to explore the difference between the two figures as Digicel Barbados paid the requested figure of BDS$ 75,000. Further, it was not submitted to me in closing submissions that the figure of BDS$ 75,000 had actually been calculated by C&W Barbados prior to 17th October 2003.

96. On 23rd October 2003, C&W Barbados wrote to Digicel Barbados referring to the carrying out of civil works before entering into an interconnection agreement. C&W Barbados stated that the required non-refundable cash deposit would be BDS$ 75,000. The letter also referred to the need to conduct an appropriate site visit and survey of the proposed route for the underground fibre link and the need to obtain government and other approvals. On the same day, Digicel Barbados countersigned this letter agreeing its terms and gave C&W Barbados a cheque for BDS$ 75,000.

97. Digicel Barbados says that this process of agreeing to carry out civil works which started on 3rd October 2003 and resulted in agreed terms and payment of a deposit on 23rd October 2003 all took too long. Although the time involved was only some 20 days and although the C&W Barbados representatives were no doubt doing other things, as the process in relation to the draft RIO was ongoing at this time, there is force in the complaint that extra days were taken up unnecessarily. If the matter arose for a decision, I would be inclined to hold that the period from 7th October 2003 when C&W Barbados were asked what its position was in relation to civil works until 17th October 2003 when C&W Barbados told Digicel Barbados the answer to that question could have been shortened by some days. On balance, I would be inclined to say that the period from 17th October 2003 to 23rd October 2003 when C&W Barbados told Digicel Barbados the amount of the deposit, did not exceed a reasonable period, given that the letter of the 23rd

October 2003 had to be drafted and the draughtsman was involved in other ongoing matters. However, if I shortened the period from 3rd October 2003 to 23rd October 2003 by some days, the extra time taken at that stage would only be a breach of a duty to act in a timely fashion if there was a real risk at that stage that the extra days would ultimately cause delay to the process of interconnection. Conversely, if there was no risk at that stage of the civil works not being completed by the time that the interconnection was ready for testing then it would probably not be right to say that C&W Barbados had failed to act in a timely fashion.

98. Digicel Barbados points to the fact the civil works did not actually commence until around 29th November 2003 and were not complete until 12th January 2004. The steps taken by C&W Barbados to obtain the necessary government approvals and to carry out the civil works are described in detail in paragraph 47 of the witness statement of Mr Barnes. I accept that evidence. Based on that evidence, I find that C&W Barbados did progress the civil works at all times after 23rd October 2003 in a timely fashion.

99. The Claimants next complain about the stance taken by C&W Barbados in relation to the installation and testing of the interconnection. There does not appear to be any dispute that when the interconnection agreement was entered into, it placed on C&W Barbados certain obligations as to the installation and testing of the equipment. The interconnection agreement was entered into on 23rd December 2003. The stage at which installation and testing was to be carried out started on 12th January 2004 and installation and testing started on that date and continued to 9th February 2004. There was a pleaded allegation as to the position in relation to the testing on 7th February 2004 but that allegation was not pursued by the Claimants in closing submissions and, in any event, I find that the allegation fails.

100. Accordingly, there is no case that C&W Barbados broke any obligation on it in relation to installation and testing of the interconnection. Similarly, the legal question whether C&W Barbados was under a duty to carry out installation and testing before entering into an interconnection agreement does not arise. If that question had arisen, I would have held that there was no such obligation. Further, on 16th December 2003, that is before the parties entered into the interconnection agreement on the 23rd December 2003, C&W Barbados informed Minister Mottley that it was willing to install and test the equipment required for interconnection as soon as the equipment cleared customs, even if that was before the parties entered into an interconnection agreement. They stated that following satisfactory testing of the interconnection, the interconnection would be disconnected and only re-connected and commissioned when the interconnection agreement was reached and approved by the regulator.

101. The Claimants' complaint therefore seems to be confined to a complaint that C&W Barbados did not adopt that stance until the 16th December 2003 and, further, that C&W Barbados put forward reasons for its stance prior to 16th December 2003 which were not good reasons. In my judgment, the reason which C&W Barbados had before 16th December 2003 for its refusal to agree to installation and testing before entering into an interconnection agreement is explained by the email from Mr Thompson to Mr Austin of 3rd September 2003 to which I have earlier referred. C&W Barbados did not wish to take action which it was not obliged to take which might speed up the time at which Digicel Barbados could enter the market. C&W Barbados wished to use the fact that installation and testing would follow the making of an interconnection agreement to provide such

leverage as it would provide in favour of C&W Barbados when negotiating the terms of the interconnection agreement. In so far as C&W Barbados put forward other reasons why it was inappropriate for it to commit itself to installation and testing before an interconnection agreement, those reasons were not C&W Barbados' real reasons. C&W Barbados put forward those reasons not because it knew that its stance on installation and testing was unlawful but, instead, because it was coming under considerable political pressure from the government in Barbados and it judged that it was inappropriate for it to make it explicitly clear to the government in Barbados that its stance was for the purpose of improving its negotiating position.

102. I have already dealt with the Claimants' case that C&W Barbados acted in breach of section 28 of the Telecommunications Act 2001 by not negotiating with Digicel Barbados before Digicel Barbados obtained its licence on 8th August 2003. I have held that C&W Barbados was not in breach in the way alleged. I have also dealt with Digicel Barbados' case that C&W Barbados was in breach of its duties to Digicel Barbados in certain respects in relation to physical interconnection. The principal respects referred to were failing to order equipment before 14th to 17th October 2003, failing to agree to carry out civil works until that matter was agreed on 23rd October 2003 and its stance in relation to installation and testing of the interconnection. I have held that C&W Barbados was not in breach in the respects alleged. If I had held that C&W Barbados had been in breach of section 28 of the Telecommunications Act 2001 by not negotiating with Digicel Barbados prior to 8th August 2003 and in addition held that C&W Barbados was in breach of duty in relation to its handling of physical interconnection in Barbados, then Digicel Barbados would wish to argue for a counterfactual time line in Barbados which would have resulted in physical and contractual interconnection being completed by 14th November 2003. If I had held that C&W Barbados was in breach in relation to its handling of physical interconnection (even though it was not in breach by not talking to Digicel Barbados before 8th August 2003), Digicel Barbados would wish to argue for a counterfactual time line whereby physical and contractual interconnection would have been achieved by 5th December 2003.

103. Because the parties only agreed the terms of an interconnection agreement on 23rd December 2003, it can be seen that these counterfactual time lines involve Digicel Barbados arguing that contractual interconnection should have proceeded more speedily than it actually did. Accordingly, if I had found for Digicel Barbados on its case as to negotiations before 8th August 2003 and/or found for Digicel Barbados on its case as to physical interconnection, then it would be necessary for me to consider whether C&W Barbados should have acted differently in relation to contractual interconnection and, in particular, whether any differences in its behaviour, which there should have been, would have resulted in contractual interconnection by 14th November 2003 alternatively by 5th December 2003.

104. As I have explained, I have not accepted the submissions of Digicel Barbados either in relation to negotiations before 8th August 2003 or in relation to the handling of physical interconnection. In those circumstances, because physical interconnection was completed on 9th February 2004 and the parties had earlier entered into an interconnection agreement on 23rd December 2003 and that agreement had been approved by the regulator on 14th January 2004 it is not necessary to consider whether C&W Barbados is open to criticism for the way in which it handled the process of contractual interconnection. Nonetheless,

for the sake of completeness, I will deal with the complaints as to contractual interconnection, albeit much more briefly than would otherwise have been appropriate.

105. The facts in relation to the negotiation on the terms of an interconnection agreement are many and detailed. I can conveniently make my findings of fact by reference to the evidence given by two witnesses on behalf of C&W Barbados, namely, Mr Batstone and Mr Forrest. The relevant part of Mr Batstone's witness statement is in paragraphs 326 to 427, at pages 93 to 121 of that witness statement. Mr Batstone was cross-examined on these matters, in particular, on day 31 at pages 150 to 184 of the transcript and on day 32 at pages 1 to 32 of the transcript. Mr Forrest dealt with these matters in paragraphs 132 to 226, pages 41 to 70, of his witness statement. Mr Forrest was cross-examined, in particular, on these matters on day 54 at pages 1 to 62 of the transcript. The Claimants drew my attention in particular to pages 50 to 62 of the transcript of day 54. At pages 54 and 55 of the transcript for day 54, Mr Forrest gave evidence as to why, at a particular point in the sequence, C&W Barbados did not wish to identify a mobile termination rate in advance of an acceptance by Digicel Barbados that any mobile termination rates would be reciprocal. C&W Barbados did not want to show its hand at that stage and preferred to remain neutral on the amount of any mobile termination rate. With that addition to the written evidence of Mr Batstone and Mr Forrest, I accept the evidence given by those witnesses in their witness statements on the subject of the negotiations in Barbados.

106. The case which is put by Digicel Barbados is that C&W Barbados was not negotiating in good faith as to the rates to be payable in Barbados. It is said that C&W Barbados adopted a series of delaying positions and underhand tactics to ensure that interconnection could not happen until the New Year 2004. It is said that C&W Barbados delayed putting forward any interconnection rates in Barbados until it filed its RIO on 22nd August 2003, a copy of which was supplied to Digicel Barbados on 25th August 2003. I have already dealt with this allegation earlier in my judgment and I have held that C&W Barbados did not act in breach of duty in the alleged respect.

107. The next allegation made by Digicel Barbados as to C&W Barbados' stance in the negotiation on rates is that C&W Barbados used a cynical ploy to slow down negotiations in Barbados. The alleged ploy was to omit from the draft RIO any service description for mobile to mobile calls. C&W Barbados, it is said, later filled this gap in time for a meeting on 6th November 2003 but when it did so it proposed a nil rate for a mobile to mobile call adopting a "sender keeps all" model, which meant that it was not necessary to specify a mobile to mobile rate. Digicel Barbados suggests that more than one explanation has been given for the omission of a termination service for a mobile to mobile call. I am asked to conclude that these explanations are unlikely and indeed false. Digicel Barbados explains that the negotiating position adopted by C&W Barbados was always going to be unacceptable in commercial terms to Digicel Barbados. Digicel Barbados says that C&W Barbados' real intention was to keep its powder dry on mobile termination rates for as long as possible. As I understand it, the submission of Digicel Barbados is that this was the intention of C&W Barbados from as early as August 2003 and not simply from the time when C&W Barbados put forward the "sender keeps all" concept. These various matters alleged by Digicel Barbados are said to be contrary to an obligation to negotiate in good faith.

108. Digicel Barbados also alleges that difficulties were caused by the absence of Mr Forrest from face to face meetings with Digicel Barbados and in particular this occurred at a meeting on 24th September 2003.

109. It is also said that detailed supporting information which ought to have been provided by C&W Barbados was only provided after a delay.

110. As regards the interconnection rates in the RIO of 22nd August 2003, Digicel Barbados alleges that these rates were not cost oriented and this was a breach of section 25(2)(e) of the Telecommunications Act 2001. Digicel Barbados says that the "numbers speak for themselves" in this respect and, further, that C&W Barbados could not have genuinely believed that it could justify its proposed rates as lawful cost oriented rates.

111. In order for Digicel Barbados to establish breach of duty by C&W Barbados, Digicel Barbados must establish that C&W Barbados did not negotiate the terms of interconnection in good faith (contrary to section 28(3) of the Telecommunications Act 2001) or did not allow interconnection to be made available "in a timely fashion" (contrary to section 25 of the Telecommunications Act 2001). Indeed, as I understand its submissions, Digicel Barbados relies on essentially the same matters as being both a failure to negotiate in good faith and a failure to provide interconnection in a timely fashion. The failure to provide interconnection in a timely fashion is said to be because C&W Barbados deliberately and knowingly adopted a negotiating stance for the purpose of slowing down the negotiations and delaying the time when agreement might be reached.

112. Based on the evidence of Mr Batstone and Mr Forrest, which I have described above, I do not accept that the negotiating stance adopted by C&W Barbados was otherwise than in good faith. Similarly, I do not accept the submission that C&W Barbados deliberately and knowingly adopted a negotiating stance for the purpose of delaying the negotiations and the point at which ultimate agreement would be reached. C&W Barbados was a tough negotiator in these negotiations. Digicel Barbados was every bit as tough. Both negotiating parties were endeavouring to get the best deal for themselves. As regards the allegation that C&W Barbados put forward rates which were not cost oriented, there was no adequate material put before the court which would enable me to determine what the permissible range for a cost oriented rate in Barbados would have been and whether the starting positions of C&W Barbados were outside that range, or within it. For the same reason, the absence of any relevant material, I have no basis in which I could find that the rates initially put forward by C&W Barbados were put forward in bad faith.

113. I find that the deficiencies in the draft RIO and in particular the service description were not deliberate but, as Mr Forrest explained, were inadvertent. I have already held that I have no material on which to make a finding that the rates put forward by C&W Barbados were put forward in bad faith. I further comment that this allegation was not put to C&W Barbados' witnesses.

114. As regards Mr Forrest's absence from meetings and in particular the meeting on 24th September 2003, I find that it is possible that C&W Barbados might have wanted Mr Forrest to keep away so as to impede the progress of negotiation but I am not able on the evidence to find on the balance of probabilities that this deliberate ploy was adopted. In any event, having regard to the way in which the negotiation progressed and, in

particular, the way in which they were concluded under considerable pressure from Minister Mottley, I am not able to find that any ploy of this kind, if practised, had an impact on the date on which matters were ultimately agreed. In so far as Digicel Barbados alleges that it was bad faith for C&W Barbados to put forward a rate which reflected an ADC, I do not regard that approach to the negotiations as involving bad faith.

115. When considering the allegations as to the approach adopted by C&W Barbados to these negotiations, I have also considered the lengthy submissions made by C&W Barbados which are critical of the approach adopted by Digicel Barbados to the negotiations. It is submitted that Digicel Barbados adopted an impermissible approach to the negotiations, misunderstood the charging regime in Barbados and knowingly put forward rates which were not cost oriented. It is not necessary to make any findings on these counter allegations. It is sufficient for me to find, as I have done, that each party to the negotiations conducted its negotiation using a tough negotiating style with a view to achieving a good commercial result for itself.

116. In coming to my conclusion that any ploy of keeping Mr Forrest away from meetings did not cause any delay in fact, I have had regard to the negotiations in December which finally produced an agreement on rates. The parties negotiated rates over six days between 8th to 13th December 2003. The precise positions taken by the parties during that period are described in detail in paragraphs 208 to 215 of Mr Forrest's witness statement and I accept that evidence. After the six days of negotiations, no agreement was reached. This led to Minister Mottley convening a final round of negotiations on 18th December 2003. She exerted significant pressure on the parties to reach agreement and the parties bowed to that pressure, made compromises and finally reached agreement. The interconnection agreement was signed on 23rd December 2003 and approved by the regulator on 14th January 2004.

117. The result of the above is that Digicel Barbados has not established that interconnection was delayed by reason of a breach of duty by C&W Barbados. Accordingly, the question whether Digicel Barbados would have been in a position to launch its network earlier than the date on which it actually launched its network, if interconnection had been completed earlier than it was actually completed, does not arise. For essentially the same reasons as I gave when I considered the position in SLU, it is neither necessary nor proportionate for me to consider on a hypothetical basis all of the arguments between the parties as to whether Digicel Barbados could have launched its network any earlier than the actual date of its launch.

ANNEX E – CAYMAN ISLANDS

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THE INFORMATION AND COMMUNICATIONS TECHNOLOGY AUTHORITY LAW 2002

1. The Information and Communications Technology Authority Law 2002 was in force at all material times. The 2002 Law was amended by the Information and Communications Technology Authority (Amendment) Law 2003 and the amended provisions were then consolidated into the Information and Communications Technology Authority Law 2004 . However, the 2003 amendments only came into effect on 1st April 2004, which is after the relevant events in this case. The parties therefore agree that the provisions which apply are those in the unamended 2002 Law and I am not concerned with the provisions of the 2003 Law or the 2004 Law.

2. Section 2 of the 2002 Law contained a number of defined terms, including the following:

> …
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> *"Authority" means the Information and Communications Technology Authority established by section 3;*
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> …
>
> *"Court" means the Grand Court;*
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> …
>
> *"ICT" means information and communications technology;*
>
> *"ICT service" means any information technology service, telecommunications service, electronic media and broadcast service, Internet service, digital library and commercial information service, network-based information service and related specialised professional service provided by electronic means and any other similar service;*

"ICT network" means any network used in connection with the provision of an ICT service;

"interconnection" means the physical or logical connection of public ICT networks of different ICT network providers;

…

"judge" means a judge of the Grand Court;

…

"licence" means a licence granted under the provisions of this Law;

"licensee" means a person to whom a licence is granted by the Authority under this Law;

"reference interconnection offer" means an offer document setting out matters relating to the price and terms and conditions under which an ICT network provider with permit interconnection to its ICT network;

…

3. Part II of the 2002 Law dealt with the establishment of the Information and Communications Authority. The following provisions in Part II are material:

9. (1) Subject to this Law the Authority has power to do all things necessary or convenient to be done for or in connection with the performance of its functions under this Law.
(2) For the purposes of this section, the Authority shall –
(a) allocate the electromagnetic spectrum for facilities and specified services within the Cayman Islands, or between the Cayman Islands and elsewhere;
(b) determine methods for assigning the electromagnetic spectrum;
(c) issue licences authorising the use of specified portions of the electromagnetic spectrum, including those used on any ship, aircraft, vessel, or other floating or airborne contrivance or spacecraft registered in the Islands;
(d) institute procedures for ensuring the compliance by licensees with any obligations regarding the use of the electromagnetic spectrum, imposed by or under the licence, any provisions of this Law or any regulations made hereunder.

(3) Without prejudice to the generality of subsections (1) and (2), the principal functions of the Authority are-
(a) to promote competition in the provision of ICT services and ICT networks where it is reasonable or necessary to do so;
(b) to advise the Minister on ICT matters, including compliance with Government's international obligations, market liberalisation and competitive pricing;
(c) to investigate and resolve complaints from consumers and service providers concerning the provision of ICT services and ICT networks;
(d) to determine the categories of licences to be issued under this Law and the Electronic Transactions Law 2000;

(e) to license and regulate ICT services and ICT networks as specified in this Law and the Electronic Transactions Law 2000;
(f) to collect all fees, including licence fees, and any other charges levied under this Law or the Electronic Transactions Law 2000 or regulations made thereunder;
(g) to resolve disputes concerning the interconnection or sharing of infrastructure between or among ICT service providers or ICT network providers;
(h) to promote and maintain an efficient, economic and harmonised utilisation of ICT infrastructure;
(i) to be the sole person appointed under this Law to be the Administrative Point of Contact and the only person responsible for the management and control of the top level of the global Internet Domain Name System held in trust for the Internet and the Islands;
(j) to act on any matter referred to it by the Minister or the managing director; and
(k) to carry out such other functions as are conferred on the Authority by or under this Law or any other Law.

(4) The Authority may regulate the rate, prices, terms and conditions of any ICT service or ICT network that is required to be licensed where the Authority is of the opinion that it is in the interests of the public to do so.

10. The Authority shall, for the purposes of carrying out its functions under this Law or the regulations made under this Law, have power-

(a) to summon and examine witnesses;
(b) to call for and examine documents including, but not limited to, financial records;
(c) to administer oaths;
(d) to require that any document submitted to the Authority be verified by affidavit;
(e) to do anything which is related or incidental to what is specified in paragraphs (a), (b), (c) and (d); and
(f) to do anything it is authorised to do by, any other provision of this Law or the regulations made under this Law, or any other enactment.

11. (1) The Minister may give to the Authority directions of a general character as to the policy to be followed in the exercise and performance of the functions of the Authority in relation to matters appearing to the Minister to concern the public interest, and the Authority shall give general effect to any such directions.

(2) Any direction given by the Minister shall be published in the Gazette but no such direction shall apply in respect of a matter pending before the Authority on the day on which the directions are published.

4. Part III of the 2002 Law dealt with licensing. The following provisions in Part III are material:

32. (1) Subject to any special conditions concerning suspension in the relevant licence, the Authority may suspend any licence granted under this Law for a period not exceeding one year in any of the following circumstances-

(a) where a licensee breaches any condition attached to his licence;
(b) where a licensee contravenes the provisions of this Law or the regulations made under this Law;
(c) where a licensee is convicted of an offence under this Law;
(d) where a licensee fails to discharge his financial commitments under this Law;
(e) where a licensee is struck from the register of companies;
(f) where a licensee is subject to an order of the Court in respect of liquidation or bankruptcy proceedings; or
(g) where a licensee compounds with his creditors to the detriment of the Authority.

(2) Notwithstanding the provisions of subsection (1) the Authority, on the order of the Governor, shall without notice suspend any licence if the suspension is necessary for reasons of security of the Islands.

(3) The Authority shall, before suspending any licence under subsection (1), give written notice to the licensee, in which notice the Authority shall draw to the attention of the licensee the grounds on which the Authority intends to suspend the licence.

*(3)*sic *The Authority shall, in case of a breach by a licensee of a condition attached to a licence or regulations made under this Law, give an opportunity to the licensee to remedy the breach within a reasonable time.*

33. (1) Subject to any special conditions in the relevant licence concerning Revocation the Authority may revoke any licence granted under this Law on any of the following grounds-
(a) where the licensee is in fundamental breach of any condition attached to the licence;
(b) where the licensee persistently breaches any condition attached to the licence or repeatedly contravenes the provisions of this Law or the regulations made under this Law;
(c) where the licensee is dissolved;
(d) where the licensee is wound up or declared bankrupt;

(e) where a licensee obtained the licence by a fraudulent, false or misleading representation or in some other illegal manner; or

(f) where a licence has been suspended and a licensee has failed to rectify any ground for suspension under section 31 within a period of 364 days following upon the date of any such suspension.

(2) Notwithstanding the provisions of subsection (1) of this section, the Authority, on the order of the Governor, shall, without notice, revoke any licence if the revocation is necessary for reasons of security of the Islands.

(3) The Authority shall, before revoking any licence under subsection (1), give written notice to the licensee, in which notice the Authority shall draw to the attention of the licensee the grounds on which the Authority intends to revoke the licence.

(4) The Authority shall, in the case of a fundamental breach by a licensee of a condition attached to a licence, or regulations made under this Law, give an opportunity to the licensee to remedy the breach, if capable of remedy, within a reasonable time.

5. Part IV of the 2002 Law was headed "Cease and Desist orders. The following provisions in Part IV are material:

35 (1) Where the Authority is Satisfied that there are reasonable grounds for believing that any conduct specified in subsection (2) is being carried out by any person, the Authority may issue a cease and desist order to the person concerned.

(2) The conduct referred to in subsection (1) includes any operations in contravention of this Law or regulations made under this Law.

(3) An order under subsection (1) shall –
(a) state the nature of the alleged conduct and the name of the person against whom the allegation is made; and
(b) be accompanied by documents, if any, in support of the allegation.
(4) Any person aggrieved by, or dissatisfied with, the order of the Authority may, within 21 days of the communication of the order to him, or such longer period as the Authority may, for good cause shown, allow, apply to the Authority in writing for its decision to be reviewed.

(5) On receipt of the appeal, the Authority shall, if the appellant has applied to be heard personally or by a representative, decide whether he shall be so heard and, if it is so decided, fix a time and a date for such hearing and notify the appellant.

(6) At every hearing of an appeal where the appellant or his representative is present, the appellant or his representative shall be given an opportunity to address the Authority.

(7) The decision of the Authority shall be notified to the appellant with the least possible delay.

36. Where the Court is satisfied on an application by the Authority that a licensee –
(a) has failed to comply with any term or conditions of the licence; or
(b) has failed to comply with an order made under section 35; or

(c) has contravened any provision of this Law or any regulations made hereunder,

the Court may exercise any of the powers specified in section 37.

37. (1) The Court may, pursuant to an application under section 36 –

(a) order the offending licensee to pay to the Government such pecuniary penalty not exceeding $500,000 in the case of an individual and not exceeding $3,000,000 in the case of any other person;

(b) grant an injunction restraining the offending licensee from engaging in conduct described in section 36; or

(c) make such other order as the Court thinks fit,

in respect of each contravention or failure specified in that subsection.

(2) In exercising its powers under this section the Court shall have regard to-

(a) the nature and extent of the conduct giving rise to the application;

(b) the nature and extent of any loss suffered by a person as a result of the alleged contravention;

(c) the circumstances of the alleged contravention; and

(d) any previous determination against the licensee concerned.

6. Part V of the 2002 Law dealt with a number of matters including interconnection and infrastructure sharing. The following provisions in Part V are material:

44. (1) Subject to the provisions of this section, a licensee that operates a public ICT network shall not refuse, obstruct, or in any way impede another licensee in the making of any interconnection with its ICT network and shall, in accordance with the provisions of this section, ensure that the interconnection provided is made at technically feasible physical points.

(2) A licensee who wishes to make any interconnection shall make his request for interconnection with another licensee in writing.

(3) A licensee to whom a request is made in accordance with the provisions of this section shall, in writing, respond to the request within a period of one month from the date the request is made to him and, subject to subsection (5), provide the interconnection service in a reasonable time.

(4) A request by a licensee to make any interconnection with another licensee shall be refused only on reasonable grounds and such refusal shall be in writing.

(5) Any interconnection provided by a licensee pursuant to the provisions of this section shall be provided at reasonable rates, terms, and conditions which are not less favourable than those provided to –

(a) any non-affiliated supplier; or

(b) any subsidiary or affiliate of the licensee; or

(c) any other part of the licensee's own business;

(6) Without prejudice to the generality of subsection (5) the Authority shall prescribe the cost and pricing standards and other guidelines on which the reasonableness of the rates, terms, and conditions of the interconnections will be determined.

(7) A public ICT network provider shall not, in respect of any rates charged by him for interconnection services, call set up or call termination services provided by him to

another public ICT network provider, vary the rates on the basis of the class of customers to be served or the type of services that the public ICT network provider requesting the interconnection services intends to provide.

45 (1) Interconnection agreements between licensees shall be in writing, copies of each agreement shall be submitted to the Authority within 7 days of that agreement having been signed.

(2) Copies of Interconnection agreements between licensees shall be kept in a public registry maintained by the Authority for that purpose.

(3) The agreements referred to in subsection (2) shall be open to public inspection during normal working hours.

(4) The Authority shall, after consulting the Governor in Council, prepare, publish, and make available copies of the procedures to be followed by the licensees when negotiating interconnection agreements.

(5) Where parties cannot agree upon interconnection rates, the Governor in Council may, upon the recommendation of the Authority, impose an interconnection rate.

46. (1) Where, during negotiations for the provision of interconnection there is any dispute between the parties (hereinafter in this section referred to as the "pre-contract dispute") as to the terms and conditions of such provision, either of them may refer the dispute to the Authority for resolution.

(2) The Authority may make rules applicable to the resolution of pre-contract disputes by means of arbitration or other dispute resolution mechanisms.

(3) A decision of the Authority in relation to any pre-contract dispute shall be consistent with-

(a) any agreement reached between the parties as to matters that are not in dispute; and

(b) the terms and conditions set out in a reference interconnection offer or any part thereof that is in effect with respect to the interconnection provider.

47. (1) The cost of making any interconnection to the ICT network of another licensee shall be borne by the licensee requesting the interconnection.

(2) For the purposes of this section-

(a) "costs" means the cost of accommodation, mechanical and electrical connection and electronic programming and shall not include compensation for the loss of business which the party providing the interconnection may incur by virtue of providing the interconnection to the requesting party; and

(b) "accommodation" means space within buildings or land adjacent to buildings, belonging to the party providing the interconnection, for use by the requesting party's equipment or personnel.

(3) The cost referred to in subsection (1) shall be based on cost-oriented rates that are reasonable and arrived at in a transparent manner having regard to economic feasibility, and shall be sufficiently unbundled such that the licensee requesting the interconnection service does not have to pay for network components that are not required for the interconnection service to be provided.

48. The provisions of sections 44 to 47 inclusive shall, with necessary amendment, apply to such infrastructure sharing as the Governor in Council may, after consultation with the Authority, prescribe.

7. Part VI of the 2002 Law dealt with service standards and data protection.

8. Part VII of the 2002 Law dealt with the review of administrative decisions and appeals. The following provisions in Part VII are material:

55. (1) This section shall apply to the following decisions of the Authority -

(a) a decision not to grant a licence;

(b) a decision to revoke a licence;

(c) a decision to modify a licence under section 31 (4);

(d) a decision to suspend licence under section 32(1);

(e) a decision in relation to a pre-contract dispute under section 46(3).

(2)A licensee or an applicant for a licence, as the case may be, aggrieved by a decision specified in subsection (1) may, within 14 days of the receipt of the decision and written reasons therefore, apply in the prescribed manner to the Authority for a reconsideration of that decision.

(3) The Authority shall, pursuant to subsection (2), confirm, modify or reverse the decision, or any part thereof, specified in subsection (1), and render its determination within a reasonable period of time not to exceed 28 days.

(4) Where the decision is confirmed, the confirmation shall be deemed to take effect from the date on which the decision was made.

(5) Where an application is made under subsection (2) -

(a) the Authority may, on application by the aggrieved person, order that the decision shall not take effect until a determination is made under subsection (3); and

(b) the Court shall not hear an appeal under section 57 (sic) *in relation to a reconsideration under subsection (3) until*

the Authority has made a determination pursuant to subsection (3).

56.(1) An appeal lies to the Court from any decision of the Authority specified in sections 35 and 55 on one or more of the following grounds that the decision is-

(a) erroneous in law;

(b) unreasonable;

(c) contrary to the principles of natural justice; or

(d) not proportionate.

(2) An appeal against the decision of the Authority shall be to the Court by motion.

(3) The appellant, within 28 days after the day on which the Authority has delivered its decision, shall serve a notice in writing signed by the appellant or his attorney-at-law on the Authority of his intention to appeal and of the grounds of his appeal.

(4) Any person aggrieved by a decision of the Authority may, upon notice to the Authority, apply to the Court for leave to extend the time within which the notice of appeal prescribed by this section may be served and the Court upon the hearing of such application may extend the time prescribed by this section as it considers fit.

(5) The Authority shall, upon receiving the notice of appeal, transmit to the Court without delay a copy of the decision and all papers relating to the appeal provided that the Authority may seek an order from the Court directing the Authority to file under seal any information if it is considered that the public interest would suffer by disclosure of such information.

(6) At the hearing of the appeal the appellant shall, before going into the case, state all the grounds of appeal on which the appellant intends to rely and shall not, unless by leave of the Court, go into any matters not touching upon such grounds of appeal.

(7) The Court may adjourn the hearing of an appeal and may, upon the hearing thereof confirm, reverse, vary or modify the decision of the Authority or remit the matter with the opinion of the Court thereon to the Authority.

(8) The Court may dismiss an appeal if it is of the opinion that the appeal is frivolous or vexatious or not made in good

faith.

(9) An appeal to the Court against a decision of the Authority shall not have the effect of suspending the execution of the decision unless the Court so orders.

9. Part VIII of the 2002 Law identified a number of criminal offences under the 2002 Law. The following provisions in Part VIII are material:

> *67. (1) Where an offence under this Law, which has been committed by a body corporate, is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he, as well as the body corporate, shall be guilty of that offence and be liable to be proceeded against and punished accordingly.*
>
> *(2) Where the affairs of a body corporate are managed by its members, subsection (1) shall apply in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate.*
>
> *…*
>
> *69 (1) Where a person is convicted of an offence under this Law, the Court may make an order for the payment of compensation to any person for any damage caused by the offence.*
> *(2) Any claim by a person for damages sustained by reason of the offence shall be deemed to have been satisfied to the extent of any amount which has been paid to him under an order for compensation, but the order shall not prejudice any right to a civil remedy for the recovery of damages beyond the amount of compensation paid under the order.*

10. Part IX of the 2002 Law contained general provisions of which the following are material:

70. (1) Without derogating from the powers to make regulations conferred Power to make regulations elsewhere in this Law, the Governor m Council may make regulations-

(a) prescribing matters required or permitted by this Law to be prescribed;

(b) facilitating-

(i) the investigation of; or

(ii) the bringing of, criminal proceedings in respect of, the operation of an ICT network or provision of ICT services or use of the frequency spectrum that may be,

or is, an offence under this or any other Law;

(c) on the recommendation of the Authority, prescribing matters for the better carrying out of the duties and powers of the Authority or

(d) for carrying the purpose and provisions of this Law into effect.

(2) Regulations made under this Law may provide that the contravention of any provision constitutes an offence and may prescribe penalties for any such offence not exceeding the maximum fine and term of imprisonment prescribed in this Law for any offence under this Law.

(3) The Authority may, in accordance with this Law, make regulations relating to-

(a) licence fees;

(b) infrastructure sharing;

(c) the numbering system; and

(d) quality standards under section 50 (3),

and the Authority shall consult with the Minister before making such regulations.

THE INFORMATION AND COMMUNICATIONS TECHNOLOGY AUTHORITY (INTERCONNECTION AND INFRASTRUCTURE SHARING) REGULATIONS 2003

11. The Information and Communications Technology Authority (Interconneciton and Infrastructure Sharing) Regulations 2003 ("the Interconnection Regulations") were made pursuant to section 70 of the 2002 Law and came into force on 1st December 2003.

12. Regulation 2 of the Interconnection Regulations contained a number of defined terms including the following:

…

"Dispute Resolution Regulations" means the Information and Communications Technology Authority (Dispute Resolution) Regulations, 2003;

"ICT network licence" means a licence issued by the Authority for the right to own and obligation to operate an ICT network for which a licence is required pursuant to section 23 of the Law;

"ICT service licence" means a licence issued by the Authority for the right and obligation to operate an ICT service for which a licence is required pursuant to section 23 of the Law;

"ICTA regulations" means any regulations made under the Law either by the Governor in Cabinet or by the Authority;

"infrastructure sharing" means the provision to licensees of access to tangibles used in connection with a public ICT network or intangibles facilitating the utilisation of a public ICT network; and for the avoidance of doubt-

(a) tangibles include lines, cables or wires (whether fibre optic or other), equipment, apparatus, towers, masts, tunnels, ducts, risers, holes, pits, poles, landing stations, huts, lands, buildings or facilities; and

(b) intangibles include agreements, arrangements, licences, franchises, rights of way, easements and other such interests.

"interconnection" means the physical or logical connection of public ICT networks of different ICT network providers;

"legal framework document" means a document containing the non-technically specific portion of a proposed draft interconnection agreement;

"licensee" has the same meaning as in the Law subject to the limitation in regulation 3;

"request" means a formal application for interconnection or infrastructure sharing;

"requestor" means a licensee who makes a request for interconnection or infrastructure sharing from another licensee;

"responder" means a licensee to whom a request for interconnection or infrastructure sharing has been made; and

"the Law" means the Information and Communications Technology Authority Law, 2002;

13. Regulation 3 of the Interconnection Regulations provided that the word "licensee" referred only to a licensees under the Law that hold licences for major public ICT

networks as prescribed in the notice gazetted pursuant to section 23(2) of the Law. C&W Cayman was such a licensee; so too was Digicel Cayman.

14. The following regulations are material:

4. (1) In accordance with the provisions of section 44 of the Law, a licensee shall not refuse, obstruct or in any way impede another licensee in the making of any interconnection or infrastructure sharing arrangement.

(2) A requestor or responder shall not negotiate or propose to enter into an interconnection or infrastructure sharing agreement where the Authority determines that-

(a) interconnection or infrastructure sharing would endanger life or safety, or irreparably damage property or threaten the integrity, security or interoperability of a public ICT service or public ICT network;

(b) the licence issued to the responder exempts it from the obligation to provide interconnection or infrastructure sharing;

(c) the licence issued to the requestor does not authorise it to operate the public ICT network or to provide the public ICT service for which infrastructure sharing or interconnection is sought; or

(d) the requested interconnection or infrastructure sharing is contrary to the laws of the Islands or the public interest.

(3) A responder shall not refuse to provide infrastructure sharing services, except where-

(a) there is insufficient capacity, taking into account its reasonably anticipated requirements; or

(b) such provision would create a technical or engineering difficulty that could not be reasonably addressed.

(4) Where a requestor disagrees with the basis for any refusal, it may refer the matter to the Authority in accordance with the Dispute Resolution Regulations.

5. Interconnection and infrastructure sharing arrangements shall be concluded as quickly as possible and in any event, no later than the time limits set out in these regulations, unless otherwise agreed between the parties.

6. The following general principles and guidelines shall apply to the provision of interconnection and infrastructure sharing services-

(a) each licensee has an obligation to treat requests, to negotiate interconnection and infrastructure sharing agreements and to provide interconnection and infrastructure sharing services in good faith;

(b) consistent with sections 44 to 46 of the Law, licensees shall, in the first instance, attempt to reach agreement on interconnection and infrastructure sharing by negotiation; where there is a dispute, the parties may refer the matter to the Authority for resolution in accordance with the Dispute Resolution Regulations;

(c) interconnection and infrastructure sharing services shall be provided by the responder to the requestor at reasonable rates, on terms and conditions which are no less favourable than those provided by the responder to itself, any non-affiliated licensee or any subsidiary or affiliate of the responder and shall be of no less favourable quality than that provided by the responder to itself, any non-affiliated licensee or any subsidiary or affiliate of the responder;

(d) interconnection and infrastructure sharing rates shall be determined in a transparent manner;

(e) in the event the Authority is satisfied that a licensee incurs an access deficit, the Authority shall determine a mechanism for recovering the access deficit that is consistent with competitor equity principles;

(f) costs and tariffs shall be sufficiently unbundled so that the requestor shall be obliged to pay the responder only for the network elements or infrastructure sharing services that it requires;

(g) costs shall be borne either by the requestor or the responder or both based on whether their respective requests and compliance with those requests cause those costs to be incurred; and in accordance with an interconnection or infrastructure sharing agreement between the two parties;

(h) interconnection and infrastructure sharing rates shall be cost-oriented and shall be set to allow the responder to recover a reasonable rate of return on its capital appropriately employed, all attributable operating expenditures, depreciation and a proportionate contribution towards the responder's fixed and common costs;

(i) interconnection rates shall not include compensation for loss of business as a result of providing interconnection or infrastructure sharing services to the requestor;

(j) interconnection and infrastructure sharing services shall be provided in a manner that-

(i) maximises the use of public ICT networks and infrastructure;

(ii) minimises the potential for negative environmental impacts; and

(iii) enables the development of competition in the provision of public ICT networks and public ICT services in a timely and economic manner;

(k) interconnection and infrastructure sharing services shall be provided by the responder to the requestor at any technically feasible point on terms and conditions that are just, reasonable and non-discriminatory and in accordance with an interconnection or infrastructure sharing agreement between the two parties;

(1) any disputes relating to interconnection and infrastructure sharing shall be referred to the Authority under the Dispute Resolution Regulations; and

(m) failure to comply with any provision of these regulations shall be, among other remedies available under the Law or the licensee's licence, subject to the penalty provisions in regulation 30.

7. (1) Each licensee shall file an indicative non-binding legal framework document with the Authority within the time period specified in its licence and, if not so specified, upon receipt of a request by a requestor to obtain interconnection or infrastructure sharing services.

(2) The Authority may, in its discretion, direct a licensee to amend the legal framework document to reflect the terms of its licence, relevant rules, regulations, decisions, directives or standards and other guidelines that the Authority may prescribe; and the Authority may also require the licensee to publish and use the legal framework document and other documents, in negotiation with requestors.

(3) Interconnection and infrastructure sharing agreements shall be based upon the Law and the terms of the responder's legal framework document.

(4) A legal framework document shall set out, at a minimum, the interconnection or infrastructure sharing services and the commercial terms and conditions under which such services shall be provided by a responder.

(5) The interconnection or infrastructure sharing services detailed in the legal framework document shall be sufficiently unbundled to ensure that a requestor is not required by a responder to acquire network elements or infrastructure sharing services that are either not required or have not been requested.

(6) Information contained in a legal framework document shall not be designated as confidential.

(7) The Authority may require a responder to make available the entire legal framework document in electronic format to any person without any restriction.

8. (1) Licensees shall have a right and, when requested by other licensees, an obligation to negotiate interconnection and infrastructure sharing services in order to ensure the provision and interoperability of services throughout the Islands.

(2) A request for a quotation to provide interconnection or infrastructure sharing services shall contain at least the following information-

(a) the reference number of the requestor's ICT licence;

(b) a technical description of the requested services;

(c) locations;

(d) dates required; and

(e) projected quantities to be ordered with a period of 3 years forecast.

(3) A requestor shall be responsible for the reasonable costs incurred by the responder in processing the request, and shall include with the request a non-refundable deposit of $2000 or such other amount as specified from time to time by the Authority.

(4) Requests may be cancelled at any time by the requestor.

(5) The responder shall acknowledge receipt of each request no later than 3 days following receipt of the request; and the responder shall provide the Authority, with a copy of the original request and the acknowledgement receipt.

(6) The responder shall consider and analyse each request and advise the requestor within 14 days of the acknowledgement of receipt of the request, or such other time period as agreed between the parties of-

(a) the need for any further information for purposes of having a sufficiently complete and accurate request; or

(b) that the request is sufficiently complete and accurate to provide a quotation.

(7) The responder shall provide a quotation as quickly as possible and in any event no later than 30 days, or within such other time period as agreed between the parties, after receipt of a complete and accurate request.

(8) Where the responder denies a request, the responder shall provide detailed written reasons for such denial to the requestor within 20 days of the receipt of a complete and accurate request.

(9) A quotation shall contain all information required by the requestor to fully consider the rates, terms and conditions for obtaining the requested services, including the following minimum information-

(a) date of availability;

(b) installation intervals;

(c) applicable rates;

(d) request development and processing costs; and

(e) other such necessary terms and conditions required to effect interconnection or infrastructure sharing.

(10) Within 20 days of the receipt of the quotation, or such other time period as agreed between the parties, the requestor and responder shall undertake good faith negotiations to resolve any outstanding matters for purposes of producing an interconnection or infrastructure sharing agreement.

(11) For the purposes of paragraph (10), the following actions or practices violate the obligation to act in good faith-

(a) refusing to include in an interconnection or infrastructure sharing agreement a provision that permits the agreement to be amended in the future to take into account applicable changes to the laws rules and regulations of the Islands and to the determinations and court decisions of the Authority;

(b) intentionally misleading or coercing another party into reaching an agreement that it would not otherwise have made;

(c) intentionally refusing to provide or delaying the provision of information necessary to reach an agreement;

(d) obstructing or delaying negotiations, the provision of services according to a final interconnection or infrastructure agreement, or the resolution of pre-contract disputes; and

(e) refusing to designate a representative with the Authority to make binding representations, if such refusal significantly delays the resolution of issues.

(12) At any stage of negotiations, either party may declare a dispute and refer the matter to the Authority under the Dispute Resolution Regulations; and the Authority may consider such requests under an expedited process in accordance with the Dispute Resolution Regulations.

(13) An agreement between the responder and the requestor shall be concluded within 30 days of the commencement of negotiations or such other time period as they have agreed.

9. The rates offered by the responder to the requestor shall clearly identify all charges for interconnection or infrastructure sharing.

10. (1) A responder's charges for interconnection or infrastructure sharing shall be-

(a) determined in a transparent manner, subject to any confidentiality claims under the Confidentiality Regulations to which the Authority may agree;

(b) non-discriminatory in order to ensure that a responder applies equivalent conditions in equivalent circumstances in providing equivalent services, as the responder provides for itself, any non-affiliated licensee or any subsidiary or affiliate of the responder;

(c) reciprocal for the same service in order that the responder and requestor pay the same rate for providing each other the same services, except for any applicable contribution towards an access deficit that may be approved by the Authority;

(d) preferably such that non-recurring costs shall be recovered through non-recurring charges and recurring costs shall be recovered through recurring charges;

(e) such that charges that do not vary with usage shall be recovered through flat charges and costs that vary with usage shall be recovered through usage-sensitive charges; and

(f) based on a forward-looking long-run incremental cost methodology once it is established by the Authority following a public consultative process.

(2) In accordance with section 53 of Annex 5 to Cable & Wireless' licence, until the development of an approved FLLRIC model, Cable & Wireless shall use its fully allocated cost model with the following adjustments (adjusted FAC model)-

(a) inclusion of the 2002/2003 financial data and traffic data;

(b) treatment of the licence fee as an expense;

(c) inclusion of the rebalanced tariffs;

(d) revision of the allocation of cellular antenna and tower costs to: 80% cellular, 10% distribution, and 10% switching;

(e) inclusion of the planned charges to directory assistance, reconnection and installation; and

(f) reduction to the weighted average cost of capital to 13.5%,

all of which are subject to verification by the Authority.

(3) In accordance with section 54 of Annex 5 to Cable & Wireless' licence, in lieu of updating its adjusted FAC model annually, Cable & Wireless shall apply-

(a) a productivity improvement assumption of 4.8% to the total per minute rate for terminating calls on its fixed line network, excluding the call set up component; and

(b) a productivity improvement assumption of 25% to the total per minute rate for transiting calls on its fixed line network, excluding the call set up component; and

after the adjustments in (a) and (b) are made, further adjustments to the above rates shall not be required until a FLLRIC model is approved.

(4) In accordance with section 56 of Annex 5 to Cable & Wireless' licence, where Cable & Wireless makes an application to the Authority requesting that interconnecting licensees pay a contribution towards its access deficit, the Authority shall first be satisfied, through a public consultative process, that an access deficit exists.

(5) Any mechanism to recover the access deficit referred to under paragraph (4) shall be arrived at following a consultative process and be consistent with competitive equity.

(6) The Authority, if it considers it appropriate and where it is satisfied that an access deficit exists, may use a recovery mechanism which is a deficit contribution to be paid by interconnecting licensees.

(7) The burden of proof that charges are derived from costs shall lie with the responder in all cases.

(8) In accordance with section 47(1) of the Law, the requestor shall pay the cost of establishing interconnection.

(9) Interconnection and infrastructure sharing charges shall be recovered over such period of time as negotiated between the parties.

(10) The requestor and responder shall agree as to which set of costs as between the two parties are to be used for setting the charges for interconnection and infrastructure sharing.

(11) In the absence of an agreement, the Authority shall make a determination with regard to which party has produced a detailed cost model that conforms with the requirements of paragraph (1) (f).

11. (1) In accordance with section 60 of Annex 5 to Cable & Wireless' licence, where the international settlement payment on a carrier route basis received by Cable & Wireless is less than the mobile termination rate to deliver that traffic in addition to the Cable & Wireless' cost of transiting and delivering the call to a mobile licence holder, Cable & Wireless shall first attempt to negotiate or otherwise obtain a higher international settlement payment.

(2) Where Cable & Wireless is unsuccessful in obtaining a higher settlement payment in accordance with paragraph (1), then Cable & Wireless and the mobile licence holder shall negotiate an arrangement for the splitting of the international settlement payment; and where the parties are not able to reach an agreement-

(a) the mobile licence holder may refuse the use of Cable & Wireless' facilities to terminate the international mobile traffic, without penalty, provided it receives a higher international settlement payment itself (or through a third party) and therefore is able to terminate international mobile traffic itself; or

(b) either party may refer the dispute to the Authority for determination.

(3) Where the mobile licence holder has exercised its option to refuse the traffic under paragraph (2) (a), the need for the dispute to be resolved by the Authority is negated.

(4) This regulation shall also apply, with the necessary changes, when Cable & Wireless is the mobile licensee and the other licence holder is the transiting international carrier seeking to terminate the call on Cable & Wireless' mobile network.

12. A responder shall offer interconnection services at any technically feasible point of its public ICT network, upon request by a requestor.

13. (1) A responder shall provide, on request, information reasonably required by requestors in order to facilitate any agreements for interconnection or infrastructure sharing including any information required to give effect to any agreement.

(2) Further to paragraph (1), a responder shall provide, at all appropriate times, information as to any planned changes to the responder's network which may affect interconnection or infrastructure sharing, unless otherwise agreed by the Authority.

14. (1) Information received by either party for the provision of interconnection or infrastructure sharing service where such information received is of a competitive nature, such as-

(a) customer orders;

(b) market forecasts;

(c) plans for the development of new services;

(d) network plans;

(e) new customers; and

(f) current or proposed business plans,

shall be treated in confidence and shall be shared only among those persons who require to know in order to provide services to the requestor, unless expressly agreed to by the affected party.

(2) Neither party shall provide such information to any personnel involved in the provision of ICT services offered in competition and each party shall use such information solely for the purpose for which such information is received.

15. Every responder and requestor shall offer calling line identification and all necessary signalling data, in accordance with accepted international standards and any codes which may be issued by the Authority.

16. (1) Responders shall make available to interested parties such network information, technical standards and specifications as may be required to enable a requestor to make interconnection or to obtain infrastructure sharing services.

(2) The Authority may issue a direction as to the information that shall be provided under this rule.

17. (1) A responder shall provide detailed written reasons to the requestor and shall provide a copy thereof to the Authority where the responder cannot provide the following services sought by a requestor-

(a) operator services;

(b) directory assistance services;

(c) directory listings in the directory assistance database;

(d) interconnection to the 911 system;

(e) termination services; and

(f) transit services.

(2) Where the requestor disagrees with a refusal of a request for services, it may refer the matter to the Authority for a ruling in accordance with the Dispute Resolution Regulations.

18. (1) As defined in Schedule 1 to the Agreement between Cable & Wireless, the Governor in Cabinet and the Authority, dated 10 July 2003, indirect access is the method whereby a subscriber is able to access international ICT services provided by another licence holder, through the ICT network and ICT services of the licence holder with whom the subscriber is directly and physically connected.

(2) Indirect access shall be mandated to be provided by the Authority after it has determined through a public consultation process that the benefits to the general public from such mandate will outweigh the costs to all parties and that the mandate will not impose an unfair burden on any licence holder.

19. All interconnection and infrastructure sharing agreements shall be in writing and the following minimum matters shall be specified in those agreements except where a particular matter is irrelevant to the specific form of service requested-

(a) capacity and service levels agreed between the parties including the remedies for any failure to meet those service levels;

(b) a provision that deals with regulatory change, including determinations by the Authority;

(c) duration and renegotiation of agreements;

(d) forecasting, ordering, provisioning and testing procedures;

(e) dispute resolution procedures, which shall be consistent with the provisions of the Law and the Dispute Resolution Regulations;

(f) geographical and technical characteristics and location of each point of interconnection;

(g) information handling and confidentiality provisions;

(h) intellectual property rights;

(i) measures anticipated for avoiding interference with or damage to the networks of the parties involved or those of third parties;

(j) methods for measuring service quality, which shall generally be derived from appropriate national and international methods and indices;

(k) procedures in the event of alterations being proposed to the network or service offerings of one of the parties;

(1) provision of infrastructure sharing and identification of co-location and their terms;

(m) provision of network information;

(n) technical specifications and standards;

(o) terms of payment, including billing and settlement procedures;

(p) the maintenance of end-to-end quality of service;

(q) the procedures to detect and repair faults, as well as an estimate of acceptable average indexes for detection and repair times;

(r) the scope and description of the services to be provided;

(s) the technical characteristics of all the main and auxiliary signals to be transmitted by the system and the technical conditions of the interfaces;

(t) transmission of calling line identification, where available to be transmitted;

(u) the obligations and responsibilities of both the requestor and the responder in the event that inadequate or defective equipment is connected to their respective networks;

(v) rates from time to time agreed for the provision of each service;

(w) provision for the suspension, termination or amendment of the agreement in the event of-

(i) conduct that is illegal or interferes with the obligations of the licensee, under the relevant licence, the Law or ICTA regulations;

(ii) requirements that are not technically feasible;

(iii) safety problems;

(iv) requirements for space that is unavailable; or

(v) circumstances that pose an unreasonable risk to the integrity or security of the ICT networks or ICT services of the responder;

(x) a provision to allow for the suspension of services where it is necessary to deal with a material degradation of the public ICT network or public ICT services; and

(y) any other relevant issue;

20. An interconnection or infrastructure sharing agreement shall not contain any provision which has the effect of-

(a) imposing any unfair or discriminatory penalty or disadvantage upon a requestor in the exercise of the requestor's right to be provided with interconnection or infrastructure sharing;

(b) precluding or frustrating the exercise of a licensee's right or privileges afforded under the Law, ICTA regulations, rules, decisions or directives; or

(c) preventing a licensee from lawfully providing interconnection or infrastructure sharing services to another licensee.

21. (1) In the event that sufficient space is not available at a responder's facilities and the responder and requestor are unable to arrive at an alternative solution expeditiously, either party may refer the matter to the Authority for a ruling in accordance with the Dispute Resolution Regulations.

(2) The Authority, in considering an issue under this regulations, may direct the responder to show cause why it should not, as an alternative, be required to transport the requestor's signal from an external interconnection facility to the responder's central office with zero mileage charges.

22. (1) The parties shall file a copy of an interconnection or infrastructure sharing agreement, as the case may be, with the Authority within 7 days of the signing of the agreement.

(2) The Authority may reject any interconnection or infrastructure sharing agreement, or any portion thereof, if it determines that the agreement does not comply with the Law, conditions of the licence, relevant regulations, regulations, decisions, directives or standards and other guidelines that the Authority may prescribe.

23. The parties to an interconnection or infrastructure sharing agreement may amend or modify an agreement which has been filed with the Authority by-

(a) submitting a copy to the Authority within 7 days following agreement to the proposed amendment or modification; and

(b) giving not less than 90 days written notice to the other party prior to the effective date of the amendment or modification, unless otherwise agreed by both parties.

24. The responder shall promptly provide services in accordance with final interconnection or infrastructure sharing agreements.

25. Interconnection and infrastructure sharing agreements and the procedures for arriving at such agreements shall be based upon the terms of the Law, conditions of the licence, relevant regulations, regulations, decisions, directives or standards and other guidelines that the Authority may prescribe.

26. Where either the requestor or responder believes that the other party is not requesting, negotiating, or processing a request in good faith, or if there is a dispute between the parties as to the terms and conditions for the provision of interconnection or infrastructure sharing, either party may submit the matter to the Authority for resolution in accordance with the Dispute Resolution Regulations.

27. (1) The Authority may, in accordance with the Confidentiality Regulations, direct that any part of an interconnection or infrastructure sharing agreement shall be kept confidential.

(2) Any request to keep part of an interconnection or infrastructure sharing agreement confidential shall be accompanied by a non-confidential description of the relevant portion of the agreement.

28. In promoting the efficient, economic and harmonised utilisation of infrastructure, the Authority may inquire into and require modification of any agreement or arrangements entered into between a responder or requestor and another licensee which has the effect of limiting either efficient and harmonised utilisation of infrastructure or the promotion of competition in the provision of public ICT services or public ICT networks.

29. The Authority may, from time to time, require information to be filed by responders for purposes of evaluating the provision of interconnection and infrastructure sharing services to requestors on a non-discriminatory basis.

30. In accordance with section 70(2) of the Law, the contravention of any provision of these regulations constitutes an offence and any person contravening any provision of these regulations shall be liable, on summary conviction, to a fine not exceeding $20,000 or to imprisonment for a period not exceeding one year.

THE INFORMATION AND COMMUNICATIONS TECHNOLOGY AUTHORITY (DISPUTE RESOLUTION) REGULATIONS 2003

15. The Information and Communications Technology Authority (Dispute Resolution) Regulations 2003 ("the Dispute Resolution Regulations") were made pursuant to section 70 of the 2002 Law and came into force on 1st December 2003.

16. The following regulations are material:

2. In these regulations-

"dispute" means any dispute which is the subject of a determination request;

"determination request" means a written and signed submission made to the Authority by a person including a licensee and an interested party and containing the information set out in regulation 5;

"interested party" includes an individual, a corporation or a potential licensee;

"referring party" means an interested party or licensee referring a dispute to the Authority for determination; and

"respondent" means a licensee which has received a notice of a dispute issued by a referring party.

3. (1) A licensee which is aggrieved by any matter relating to another licensee may, by written notice, inform that other licensee of the grievance and the notice shall specify -

(a) the nature and circumstances relating to the grievance; and

(b) the nature of any action which the complainant requires the other licensee to perform or refrain from performing.

(2) Where, pursuant to paragraph (1), a licensee receives a notice of grievance it shall, no later than 5 business days

after receiving the notice, provide a written response to the notice.

(3) Where a licensee has issued a notice of grievance and it has received a written response to such notice in accordance with paragraph (2) it shall, in good faith, attempt to resolve such grievance within 30 days following the date of receipt of the notice by the licensee.

(4) Where any grievance as set out in paragraph (1) has not been resolved between the relevant licensees within a period of 30 days following the receipt of the relevant notice of grievance, any of the aggrieved or the notified licensees may submit a determination request to the Authority.

(5) In circumstances other than that referred to in paragraph (1) where an interested party which is not a licensee wishes to submit a matter to the Authority for resolution it shall do so by means of a determination request; and the Authority shall not proceed with such a determination request unless it satisfied that the interested party and the licensee have made a prior attempt to resolve the I matter which is the subject of the request.

4. Where a dispute relates to a notice submitted under a regulation 3(1), the referring party shall not submit a determination request to the Authority unless it has first made good faith and reasonable efforts to settle such dispute directly with the respondent.

5. A determination request-

(a) shall include the identity and address of the respondent;

(b) shall include the details of all ICT networks or ICT services, if applicable, to which the issue relates;

(c) shall set out the issues in dispute and any associated issues that have been agreed by the parties;

(d) shall be accompanied by a written account which includes-

(i) dates and copies of any correspondence, setting out any efforts that have been taken by either the referring party or the respondent to settle the dispute;

(ii) the matters which the referring party wishes the Authority to determine; and

(iii) a clear and concise statement of the relief sought by

the referring party;

(e) where the determination request relates to a grievance under regulation 3 (1) it shall be accompanied by-

(i) an affidavit, unless otherwise directed by the Authority, signed by a person authorised by the referring party attesting to the fact that the matters set out are to that person's knowledge and belief true and accurate;

(ii) a non-refundable processing fee in the amount S750 and an undertaking in respect of any and all costs arising from any process or procedure initiated by the Authority in respect of the determination request in the event that it is determined that the referring party should pay any part of such costs; and

(iii) where the referring party is a person who is not an individual or is an individual acting on behalf of a person who is not an individual, a processing fee in the amount of $ 100, a part of which may be refunded by the Authority.

(2) Where a referring party is an individual acting on his own behalf there shall be no processing fee.

6. (1) The referring party shall provide a copy of the determination request to the respondent on the same date on which it has submitted the determination request to the Authority.

(2) The respondent shall file with the Authority and provide the referring party with a written response within 20 days of receiving the determination request.

(3) The Authority may, if the circumstances so require, notify the respondent that the respondent should file a written response within a shorter period of time than that specified under paragraph (2).

7. The Information and Communications Technology Authority (Confidentiality) Regulations, 2003 shall apply to all dispute resolution submissions made to the Authority.

8. Upon receipt of a determination request, the Authority may take one or more of the following actions-

(a) request such other information from any person as may be affected by the dispute as it may deem necessary;

(b) direct the parties to commence or continue reasonable efforts to resolve the dispute;

(c) decline to determine the dispute on the basis of one or more of the grounds set out in regulation 10;

(d) issue a notice for a public hearing pursuant to regulation 12 setting out procedures and issues to be addressed; and the Authority may issue a notice to other licensees, interested parties and the general public advising of the public hearing and inviting submissions on the issues to be addressed;

(e) require, if the Authority considers it appropriate and reasonable in the circumstances, parties to proceed on an expedited basis with respect to all matters provided for in these regulations;

(f) appoint a mediator or arbitrator to deal with the dispute and in such event may establish the terms of reference of any mediator or arbitrator which shall include -

(i) whether the outcome of any such mediation or arbitration will be binding;

(ii) the procedures for such mediation or arbitration;

(iii) any dates by which the mediation or arbitration process will be concluded; and

(iv) guidelines for the allocation of costs among the parties;

(g) act as adjudicator of the dispute and, where it decides to do so, it shall establish its own terms of reference and procedures for such adjudication which shall include-

(i) whether the outcome of any such mediation or arbitration will be binding;

(ii) the procedures for such mediation or arbitration;

(iii) any dates by which the mediation or arbitration process will be concluded; and

(iv) guidelines for the allocation of costs among the parties; or

(h) such other course of action as it considers necessary to resolve the dispute.

9. Where the Authority has received 2 or more determination requests of a similar nature involving one or more of the same parties it may, for reasons of efficiency and consistency, elect to deal with such determination

requests as if they were a single dispute.

10. The Authority may decline at any time to deal with a determination request if it determines that-

(a) the matter is not within the Authority's jurisdiction;

(b) the subject matter of the dispute does not sufficiently concern any obligation under the Information and Communications Technology Authority Law 2002, the Electronic Transactions Law (2003 Revision), any other law in effect in the Islands or any agreement entered into by a licensee or any order of the Authority which deals with or relates to ICT networks, ICT services or interconnection and infrastructure sharing;

(c) the determination request is vexatious;

(d) the determination request is an abuse of process;

(e) the referring party has not made reasonable efforts to settle the dispute with the respondent;

(f) the subject matter of the determination request is trivial, misconceived, defective or lacking in substance;

(g) the determination is unlikely to significantly advance competition in the market;

(h) the subject matter of the dispute is not of significant social or economic importance;

(i) the subject matter of the dispute should continue to be governed by the terms and conditions of an existing contract between the referring party and respondent;

(j) the subject matter of the dispute is also the subject of current court litigation as between the parties; or

(k) it is not in the best interests of the Islands for the determination request to be granted.

11. In determining a dispute, the Authority shall act expeditiously, and in doing so may have regard to-

(a) the subject matter of the dispute;

(b) the need to inquire into and investigate the dispute;

(e) the objectives and functions of the Authority; and

(d) all matters affecting the merits, and fair settlement of

the dispute.

12. (1) The Authority may elect to conduct a hearing to assist it in its determination of a dispute.

(2) In conducting a hearing, the Authority shall not be bound by the rules of evidence governing the admissibility of evidence in judicial proceedings.

(3) A hearing shall be held in public unless the Authority determines that information to be disclosed in a hearing is "confidential" as defined in the Information and Communications Technology Authority (Confidentiality) Regulations, 2003 in which case the Authority may direct that any hearing, or part of a hearing, shall be conducted in private.

(4) The Authority may require that any submission by any party or any witness to the hearing be verified by affidavit and shall identify the person from whom such verification is required.

(5) The Authority shall notify parties in advance of the date and subject matter of any proposed hearing and shall afford the parties and its witnesses, if any, a reasonable opportunity to be heard at the hearing.

(6) The parties to the dispute may elect to be represented at a hearing in whole or in part by a third party, including a legal representative.

(7) The parties to the dispute shall file a written brief no later than 15 days prior to the hearing outlining their position and shall include any materials in support of such position.

13. (1) The Authority may hear submissions or allow participation in a proceeding, public or otherwise, from interested parties, other licensees or members of the public to assist in making a determination concerning a dispute.

(2) Where the Authority proceeds as in accordance with paragraph (1) the Authority shall send copies to such persons of the determination request and, if received, a copy of the response of the respondent and thereafter such persons shall file their written submissions within 20 days of receipt of notice with the Authority and copy the other parties to the dispute.

(3) The Authority may request further written submissions

from some or all parties as it considers appropriate.

14. A referring party may withdraw a dispute from determination by the Authority before the Authority makes its final determination, provided that it agrees and settles any costs occasioned by the determination request or any matter arising from such request as determined by the Authority.

15. The Authority may, in its discretion, appoint an independent third party expert to assist it in the resolution of a dispute and any costs arising from such appointment may be allocated to either party by the Authority as part of any determination or dispute withdrawal.

16. (1) In any proceeding pursuant to these regulations, the Authority may elect to receive submissions as to costs and the Authority may, having regard to the circumstances of the dispute, award costs to be paid by any party to a dispute.

(2) An award of costs may include-

(a) any or all of the costs of the Authority;

(b) any or all the costs of any referring party; or

(c) any respondent and any or all costs of any interested party or licensee.

(3) An award of costs may also include the cost of an expert retained by the Authority or any party for assistance on a specific dispute.

(4) In determining costs the Authority may request relevant information from parties such as their legal, consulting and other professional fees and the Authority may take into account prevailing market rates for professional services, the reasonableness of any costs incurred and any other relevant matter.

17. (1) The determinations of the Authority, whether preliminary or final, shall be in writing and state the reasons upon which they are based.

(2) The Authority shall make its written determinations available to the public.

18. (1) Subject to paragraph (2), a determination of the Authority shall be binding upon the parties.

(2) Nothing in these regulations precludes a party to a

dispute from appealing a determination of the Authority.

THE AGREEMENT WITH THE GOVERNMENT

17. On 10th July 2003, C&W Cayman, the Government of the Cayman Islands, and the Information and Communications Technology Authority ("ICTA") entered into an agreement for the stated purpose of facilitating the liberalisation of national and international telecommunications in the Cayman Islands.

18. By clause 3.1 of this agreement, the Government and ICTA agreed to make and bring into effect Regulations which gave effect to the Regulatory principles set out in schedule 1 to the agreement.

19. Paragraph 21 of schedule 1 to the agreement set out the principles which were to govern charges for interconnection. Paragraph 22 of that schedule provided for cost oriented interconnection service. Paragraph 23 provided for the circumstances in which a licensee was entitled to charge an access defecit contribution. Paragraph 24 concerned the cost of establishing interconnection.

20. By clause 3.3 of the agreement, C&W Cayman agreed that it would be subject to and comply with the Information and Communications Technology Authority Law 2002 and the Regulations to be made pursuant to section 70 of that Law.

21. By clause 4.1 of the agreement, the parties agreed to give effect to the various matters set out in schedule 4 to the agreement. Schedule 4 dealt with tariff regulation and other matters. Part 4 of schedule 4 to the agreement dealt with the FLLRIC Model, that is, a model which reflected a forward looking long run incremental cost basis. Part 5 of schedule 4 to the agreement dealt with various matters under the heading "Interconnection". These included the future development of the FLLRIC Model and the use of C&W's Fully Allocated Costs Model, with adjustments, until the FLLRIC Model was developed: see paragraphs 52 to 63.

22. The agreement provided for a timetable in relation to the grant of licences to new entrants. It was agreed that a new entrant who was granted a licence in relation to a mobile network would not be able to operate such a network prior to 1st February 2004.

THE LICENCES

23. On 10th July 2003, ICTA granted to C&W Cayman a non-exclusive licence to operate a fixed network and a mobile network for 15 years from 10th July 2003. However, in the period up to 1st February 2004, the licence in relation to the mobile network would effectively be exclusive as the agreement of 10th July 2003, referred to above, provided that no new entrant would be licensed to operate a mobile network with effect from a date prior to 1st February 2004.

24. By clause 5.1 of the Licence, the licensee was obliged to comply with any relevant law or regulation of the Cayman Islands. Clause 14 prohibited certain anti-competitive

agreements or concerted practices. Clause 15 prohibited certain abuses of a dominant position.

25. Clause 17.1 of the Licence provided that interconnection charges should be reciprocal as between the licensee and all other interconnecting licensees. Clause 18 of the Licence gave effect to Annex 5 to the Licence; this was in essentially the same terms as Schedule 5 to the agreement of 10th July 2003, referred to above.

26. On 17th October 2003, ICTA granted to Digicel Cayman a non-exclusive licence to operate various networks for 15 years from 17th October 2003.

27. By clause 2.1 of this Licence and by the definition in the Licence of "Maturation Date", the licensee was not authorised to operate a mobile network prior to 1st February 2004. Also by clause 2.1, the licensee was obliged to comply with a detailed plan for the roll out of its network; the detailed provisions were set out in annex 1A to the Licence. By clause 17.1 of the Licence, it was provided that interconnection charges should be cost oriented and reciprocal as between licensee and all other interconnecting licensees.

THE FACTS

28. Before turning to the detailed allegations made by the Claimants in relation to Cayman, it may be helpful to make some general remarks about the nature of the case put forward in Cayman. It will be remembered that I have held that on the true construction of the 2002 Law and the 2003 regulations (in force from 1st December 2003) there was no obligation on C&W Cayman to order the equipment it needed for its side of the interconnection before the parties had concluded an interconnection agreement. Similarly, if such equipment had been ordered and delivered to Cayman before the parties had concluded an interconnection agreement, there was no obligation on C&W Cayman under the 2002 Law and the 2003 regulations to install that equipment and test the interconnection. Similarly, there was no obligation on C&W Cayman to carry out the civil works necessary to join the switch sites of C&W Cayman and Digicel Cayman before the parties had concluded an interconnection agreement.

29. There is one other point that should be mentioned at this stage. I have described the position under the 2002 Law and the 2003 regulations as to the intended process whereby the parties would negotiate and agree an interconnection agreement. There was no obligation on either party under those provisions to make an agreement in stages so as to produce an interim agreement in relation to some of the matters that needed to be agreed leaving over other matters to be negotiated and agreed later. Further, there was no obligation on C&W Cayman to negotiate an interim agreement which allowed the interconnection to go live before the parties had agreed on the rates which would be payable for traffic passing through the point of interconnection.

30. Against the background of these legal obligations, I will refer in summary to the basic steps that were in fact taken by the parties in Cayman. Digicel Cayman obtained its licence on 17th October 2003. Prior to that date, C&W Cayman did not owe Digicel Cayman an obligation under the 2002 Law and the 2003 regulations (which in fact only came into force on 1st December 2003 in any event). Following the grant of the licence, C&W Cayman did decide that it would order the equipment needed for its side of the interconnection. It made that decision on 30th October 2003. On 12th November 2003,

C&W Cayman notified Digicel Cayman of the amount of the deposit that it would require before it ordered this equipment. On 2nd December 2003, C&W Cayman ordered equipment for its side of the interconnection. This equipment arrived in due course. C&W Cayman began to install the equipment on 13th January 2004 and testing then followed. C&W Cayman began the civil works to join the two switch sites. There is a dispute as to when C&W Cayman completed its civil works; C&W Cayman contend that it completed its civil works by 21st January 2004 and Digicel Cayman contend that the works were completed by 28th January 2004. The parties entered into an interim agreement on 29th January 2004. The interim agreement specified the rates which were to be payable save that the mobile termination rate was an interim figure pending determination of a permanent mobile termination rate by the regulator. Testing of the interconnection was completed on 24th February 2004.

31. Digicel Cayman complains of the time which C&W Cayman took, after 17th October 2003, to make the decision which it made on 30th October 2003 to order its side of the interconnection equipment. Digicel Cayman complains of the time which C&W Cayman took to notify Digicel Cayman of the amount of the deposit to be paid by Digicel Cayman. Digicel Cayman criticises C&W Cayman for the time it took to order equipment on 2nd December 2003. Although Digicel Cayman contends that the parties should have entered into an interim interconnection agreement by mid to late December 2003, it does not contend that C&W Cayman should have entered into an interconnection agreement, of any kind, by the earlier dates in October and November or the date of 2nd December 2003 referred to above. If as a matter of law C&W Cayman was not under any obligation to order equipment before the making of an interconnection agreement, it must follow that C&W Cayman's conduct in ordering equipment by 2nd December 2003 went beyond its obligations and it cannot be said to be in a breach of an obligation to order equipment, which I have held it did not owe. Thus even if, on the facts, it would have been possible for C&W Cayman to have made its decision about ordering equipment at an earlier date or it could have notified the amount of the deposit earlier or even placed the order earlier, these cannot be said to be a breach of any obligation owed to Digicel Cayman. Just because C&W Cayman, acting under no obligation, is prepared to take these steps, it does not follow that the way in which it takes these steps becomes a matter of obligation on its part permitting Digicel Cayman to make criticisms, on the facts, of how it proceeded.

32. The position is somewhat similar, albeit not identical, in the case of commencing the civil works and commencing installation of the equipment (followed by testing of the interconnection). If C&W Cayman was not at fault by reason of the fact that the interim interconnection agreement was entered into on 29th January 2004, rather than at some earlier date, then it follows that the civil works were begun before that date, as was the start of installation (to be followed by testing of the interconnection). If I have correctly held that C&W Cayman was not under an obligation to commence civil works or to commence installation, before the parties had concluded an interconnection agreement, then it follows that it is not open to Digicel Cayman to allege a breach of obligation in relation to the date when C&W Cayman commenced the civil works or commenced installation of its equipment. Conversely, if Digicel Cayman were to establish that C&W Cayman was in breach of its obligations by delaying the time when the parties had entered into an interconnection agreement so that there was a period of delay between the notional date when such an interconnection agreement should have been reached and the later date of commencing civil works and installation of equipment, then it would be open to Digicel Cayman to put forward a case as to the rate of progress in commencing civil

works and in commencing the installation of equipment in the period from the notional date of an interconnection agreement until the date when those things actually began. However, it must be remembered, that the notional date of an interconnection agreement will have to be the notional date for a full interconnection agreement, given that C&W Cayman was under no obligation to enter into a partial or interim interconnection agreement, although in fact it did so on 29th January 2004.

33. Based on these considerations, it follows that it is not strictly necessary for me to examine the case put forward by Digicel Cayman in relation to the decision by C&W Cayman, made on 30th October 2003, to order equipment, or the time which C&W Cayman took to notify Digicel Cayman of the amount of the deposit required or the time which it took before placing its order on 2nd December 2003. However, for the sake of completeness, I will deal with these matters, albeit more briefly than might otherwise have been appropriate.

34. It should also be remembered that because the 2003 regulations only took effect on 1st December 2003, they had no application as regards the decision to order equipment or the date of notifying Digicel Cayman of the amount of the deposit and they had de minimis application as regards placing the order on 2nd December 2003.

35. I have not so far mentioned a separate part of the case put forward by Digicel Cayman. Digicel Cayman says that it was seriously misled by C&W Cayman about the fact that C&W Cayman had available to it a spare TN-1X MUX and did not need to order another one in this period, although Digicel Cayman believed that time was needed to enable such a MUX to be ordered and delivered to Cayman. Digicel Cayman also alleges that it was misled in a certain respect in relation to the installation of the MUX needed for C&W Cayman's side of the interconnection. I will examine these allegations in detail in any event.

36. It is convenient at this stage to state that the case put forward by Digicel Cayman is that the provision of wrong information by C&W Cayman amounted to a breach by C&W Cayman of its duty not to obstruct or impede interconnection. As will be seen, the matters which are urged by Digicel Cayman involved allegations that C&W Cayman made false representations, which it knew to be false and Digicel Cayman relied on those representations, causing it loss and damage. It might be thought that a case of the kind I have just described is a classic example of an allegation of the tort of deceit. Although the Claimants amended their pleaded case in Cayman to make these allegations of misleading conduct by C&W Cayman, the Claimants did not allege that C&W Cayman or anyone else had committed the tort of deceit. I raised this matter with the Claimants in the course of their closing submissions and I was told that Digicel Cayman was deliberately not alleging the tort of deceit. I find that the way in which Digicel Cayman has chosen to put its case on this subject somewhat curious. After all, the tort of deceit, if committed, is actionable whereas at the trial, C&W Cayman were contending that a breach of the 2002 Law or a breach of the 2003 regulations was not actionable. As matters have turned out, I have held that C&W Cayman's submissions on that point are correct. Further, the tort of deceit would amount to unlawful means, for the purpose of the tort of conspiracy to injure by unlawful means, whereas C&W Cayman argued at the trial that the other breaches alleged by Digicel Cayman were not unlawful means. In the event, I have held that a breach of the 2002 Law does not amount to unlawful means for the tort of conspiracy and, in relation to the 2003 regulations, a breach of a regulation which is a crime under

regulation 30 will be unlawful means but the regulations only came into effect on 1st December 2003. Having made these comments, in view of the Claimants' deliberate decision not to allege the tort of deceit, when I consider the facts relied upon by the Claimants, I will not consider whether those facts do or do not amount to the tort of deceit.

37. The first of the detailed allegations with which I will deal is the allegation that C&W Cayman delayed unduly before making its decision, and informing Digicel Cayman of that decision, that it would order the equipment needed for its side of interconnection before entering into an interconnection agreement. I can begin the history with a letter dated 23rd September 2003 from Digicel Cayman to C&W Cayman. This stated that Digicel Cayman had been successful in its bid for a mobile licence in Cayman. The letter requested a meeting with C&W Cayman to discuss the physical and commercial aspects of interconnection. This letter was written before Digicel Cayman received its licence on 17th October 2003. In fact, there were two meetings between the parties before 17th October 2003. These took place on 14th and 15th October 2003. It seems likely that the first of these meetings concerned tower sharing and the meeting on 15th October 2003 discussed interconnection at a fairly high level of generality. I was not shown a note of the meeting of 15th October 2003. The meeting is however referred to in an internal Digicel document prepared on 17th October 2003. That document also refers to a meeting which Digicel held with the regulator on 16th October 2003. C&W Cayman were not present at the meeting on 16th October 2003. The internal Digicel document to which I have referred states that Digicel told the regulator that it would order the equipment needed for the C&W Cayman side of the interconnection. There was an issue at the trial as to whether Digicel Cayman had also made the same point to C&W Cayman on 15th October 2003. The evidence on that question was not satisfactory. Mr Merriman on behalf of Digicel Cayman says that he thinks that he made this suggestion to C&W Cayman. It is possible that something of this kind was said at the meeting on 15th October 2003. It is equally possible that Mr Merriman thinks that he said it because having read the documents some time after the event he saw the reference to this point, albeit a reference to a meeting on 16th October 2003 when C&W Cayman was not present. In the event, I do not think it is necessary to wrestle any further with the question whether this statement was made at the meeting on 15th October 2003. If the statement had been made on 15th October 2003, it is probable that C&W Cayman would have rejected that suggestion. Further, Digicel Cayman did not press the suggestion at any time after 15th October 2003 and the matter was quickly overtaken by the agreement from C&W Cayman to order equipment pursuant to its letter of 30th October 2003.

38. Having obtained its licence in Cayman on 17th October 2003, Digicel Cayman wrote to C&W Cayman requesting interconnection. The letter requested information on various matters including a request to be told the tariffs and terms and conditions under which C&W Cayman would be willing to provide interconnection services to Digicel Cayman. On 28th October 2003, Digicel Cayman wrote to C&W Cayman referring to the request for interconnection. Digicel Cayman stated that they would be most obliged if C&W Cayman could confirm by 30th October 2003 whether C&W Cayman would be willing to undertake certain matters prior to an interconnection agreement being signed and approved by the regulator. The three matters referred to were: (1) ordering the interconnection equipment necessary to link the networks; (2) undertaking the civil works and testing the underground optical fibre link necessary to install the joining service between the two switch sites; and (3) installing, commissioning and testing the

interconnection equipment. Digicel Cayman stated that it would be willing to provide C&W Cayman with a reasonable deposit towards the cost of the equipment and the civil works, to be credited against amounts owed by Digicel Cayman to C&W Cayman under the interconnection agreement, once it was signed and approved by the regulator.

39. The parties met on 28th October 2003. I was not shown a note of what was discussed at that meeting. On 30th October 2003, C&W Cayman replied to the letter from Digicel Cayman of 28th October 2003. The letter states that this reply had been promised at the meeting on 28th October 2003. C&W Cayman stated that as a demonstration of its commitment to facilitate competition in the newly liberalised market, C&W Cayman was prepared to: (1) commence ordering of the interconnection equipment; and (2) to commence planning and pursuit of the necessary approvals for the civil works ahead of an approved interconnection agreement. It will be seen that the response from C&W Cayman gave Digicel Cayman part only of what it had asked for in its letter of 28th October 2003. C&W Cayman in its letter of 30th October 2003 then identified certain conditions to be complied with by Digicel Cayman. These were that Digicel Cayman provided the location of its switch site, confirmation of adherence to the main technical principles in the joint working manual, a forecast of network links for two years completed as in the joint working manual and a statement of the technical requirement needed for day one of the interconnection. C&W Cayman also required Digicel Cayman to provide a cash deposit to cover approximately 60 to 70% of the estimated cost of the equipment and the civil works. The letter stated that the parties should develop and agree a project plan for the expeditious installation and testing of the joining service working towards a ready for service date. Additionally, C&W Cayman requested that both parties commit to the pursuit of the signing of an interconnection agreement by 30th November 2003. C&W Cayman stated that it committed itself in good faith to making available the necessary legal, commercial & technical resources to achieve this date. C&W Cayman also committed itself to commence the civil works immediately after the signing of an interconnection agreement (subject to having the necessary approvals) and to expedite the project plan towards the earliest ready for service date subject to constraints beyond the control of the parties. C&W Cayman looked forward to a continued professional and cordial relationship which, it said, had evolved over the past weeks.

40. Digicel Cayman says that C&W Cayman was in breach of duty by taking the time which it took to write the letter of 30th October 2003. If, which is not the legal position, the 2002 Law had stated that C&W Cayman was under an immediate binding obligation to order the equipment it needed as soon as a request for interconnection was made then one might have had to examine the period from 17th October 2003 to 30th October 2003 to see whether the passage of thirteen days amounted to a breach of such an obligation. However, the 2002 Law says no such thing. Even if the 2002 Law had placed an obligation on C&W Cayman to order equipment at some time before the entry into an interconnection agreement, I would not have held that C&W Cayman had broken that obligation by 30th October 2003. The discussion, if there had been one, about equipment on 15th October 2003 was before Digicel Cayman had its licence and before C&W Cayman had any obligation under the 2002 Law to Digicel Cayman. Following the request for interconnection on 17th October 2003, the parties had a meeting on 28th October 2003. On 28th October 2003, Digicel Cayman wrote its letter requesting the ordering of equipment, amongst other things. Digicel Cayman asked for a response by 30th October 2003. At the meeting of 28th October 2003, C&W Cayman agreed to give its response by that date. By 30th October 2003, C&W Cayman gave a favourable response

to the request for ordering equipment. In my judgment, there is nothing in that history which can form a proper basis for criticism of C&W Cayman even if it was under some obligation to order equipment before entry into an interconnection agreement.

41. The next complaint made by the Claimant is that there was delay on the part of C&W Cayman in providing the figure which it required Digicel Cayman to pay by way of a deposit for the equipment which C&W Cayman would order and for the civil works. More particularly, Digicel Cayman says that C&W Cayman delayed in providing the figure for that part of the deposit which related to the equipment to be ordered. C&W Cayman provided final figures for the deposit for the equipment and the civil works on the 12th November 2003. Digicel Cayman says there was unreasonable delay in that these figures, alternatively, the figure for the equipment alone, should have been provided on 6th November 2003. In their closing submissions, the Claimants make detailed submissions to the effect that the figures which were provided by C&W Cayman were too high. There is no allegation in the pleaded case that an excessive figure was put forward by C&W Cayman. Indeed, as will be seen, Digicel Cayman paid "thesum" requested by C&W Cayman and there was no delay involved in any argument between the parties as to the amount of the figure. Nonetheless, the Claimants allege that the amount of the deposit appears to have been significantly inflated or exaggerated. I was asked to conclude that I should draw certain conclusions from the alleged deliberate exaggeration, in particular, the conclusion that C&W Cayman had a propensity to mislead Digicel Cayman.

42. I will in due course refer to the way in which C&W Cayman internally worked out the figures to be given to Digicel Cayman for the deposit. I can express my conclusion on the allegation that this part of the history shows a propensity on the part of C&W Cayman to misled Digicel Cayman. There is no sign in the C&W Cayman internal documents of any intention of that kind. Instead, the documents fairly clearly indicate an intention on the part of C&W Cayman to co-operate with the process and with a view to avoiding delay.

43. Returning to the question of whether C&W Cayman delayed the production of the deposit figure in circumstances where the figure ought to have been communicated by the 6th November 2003, Digicel Cayman put forward a somewhat brief submission that "there was no justification for that delay". In these circumstances, it becomes necessary to consider the period from 30th October 2003 to 12th November 2003 to see what transpired during that period. I have already referred to the letter dated 30th October 2003 from C&W Cayman stating that it would order the equipment it needed for interconnection on certain conditions. Some of those conditions related to Digicel Cayman providing further information; another condition required a deposit to cover both the estimated costs of the equipment and the civil works. On 3rd November 2003, Digicel Cayman replied to C&W Cayman. Digicel Cayman thanked C&W Cayman "for your timely response". Digicel Cayman gave some of the information requested. It was unable to state definitively the location of its switch site. However, it stated that it had made an offer to purchase a switch site and as soon as that was finalised, C&W Cayman would be informed. The letter from Digicel Cayman then stated that it was requesting a cost estimate for the equipment to be provided by November 6th 2003. This was so the parties could "discuss" the amount of the deposit. A careful reading of this letter shows that Digicel Cayman was distinguishing between the deposit for the equipment and the deposit for the civil works. Because Digicel's switch site was not settled by that date and because the amount of the civil works, and therefore the cost of them, would depend on the precise location of the switch site, I can see the sense of Digicel Cayman endeavouring to separate the cost of

the equipment from the cost of the civil work. However, Digicel Cayman did not emphasise this point and it can be seen from the later documents that C&W Cayman did not think that there was any need to deviate from the proposal it had made in the letter of 30th October 2003, to the effect that there should be a single deposit for the equipment and civil works.

44. There were then a number of internal C&W emails discussing the detailed calculations of the cost of the equipment and of the civil works. These emails suggest that C&W Cayman was genuinely attempting to calculate an appropriate figure rather than a figure which would be "significantly inflated" to mislead Digicel Cayman, as the latter suggested in closing submissions.

45. On 4th November 2003, Mr Batstone of the carrier services team sent an email to Mr McNaughton, also of carrier services. Mr Batstone advised that C&W Cayman should be careful about creating expectations on the part of Digicel by responding too quickly. He recognised that the carrier services team had "got off on the wrong foot" with the Digicel company in SLU and that C&W Cayman was trying not to repeat that in Cayman. Mr Batstone went on to say that Digicel was good at setting very high expectations which required C&W to drop everything to meet those expectations. This was said to be unfair to C&W and to the other carriers. In my judgment, on a fair reading of this email, this is not a case of Mr Batstone seeking to introduce delay in the process for the sake of delay but is a genuine comment that there would be real difficulties in practice with C&W Cayman and the carrier services team if they allowed Digicel Cayman to insist that its requirements for a very speedy process had to be complied with.

46. On 5th November 2003, there was an internal meeting at Digicel Cayman. It had obtained a costing from Nortel for, I presume, its equipment, in the sum of U$141,000. 70% of that figure, by way of deposit, was U$98,000. It will be seen that the deposit for the equipment later requested by C&W Cayman was less than these figures. Nonetheless, the Claimants submitted in their closing submissions that C&W Cayman's figures were significantly inflated. The note also records that Digicel Cayman's costs estimate of the civil works was U$60,000. Again, the figure ultimately requested by C&W Cayman was very much less than this figure.

47. On 5th November 2003, Digicel Cayman wrote to C&W Cayman confirming the location of its switch site and requesting a cost estimate for the civil works. It asked for this estimate to be provided by November 7th. Thus, as at 5th November 2003, Digicel Cayman had requested the deposit figure for equipment by 6th November 2003 and the deposit figure for civil works by 7th November 2003. Also on 5th November 2003, Mr Merriman of Digicel Cayman emailed C&W Cayman referring to the proposed Digicel switch site. Mr Merriman asked for a price for the joining service at this site. He specified two bases on which he wished a price to be provided. This email was forwarded to Mr McNaughton of the carrier services team. He emailed Mr Anderson of C&W Cayman stating that he would really like to get the figures out to Digicel that day. There were a number of internal C&W emails on 6th November 2003 when different people within C&W Cayman and the carrier services team were liaising in an attempt to identify the appropriate figure by way of deposit to be stated to Digicel Cayman.

48. Towards the end of the day on 6th November 2003, Mr McNaughton of the carrier services team sent an email to Digicel Cayman stating that the deposit for the equipment,

but not the civil works, appeared to be in the region of U$70,000 and Mr McNaughton stated that he should be able to send something formal and more definitive on the following day. The recipient at Digicel Cayman replied later on 6th November 2003 expressing very considerable appreciation for Mr McNaughton's efforts in giving her this information. She even went so far as to say that C&W Cayman were "eating out of [her] hand". Mr McNaughton returned the compliment by stating that he was looking forward to making the relationship work and he thought that a lack of trust in other countries had only led to numerous and totally unnecessary discussions and negotiations which were a waste of everybody's time.

49. On 7th November 2003, there is an internal email in C&W Cayman which identifies the costs of the civil works for Digicel Cayman at approximately CI $23,000, which I am told is approximately U$27,000. The email has a redacted section from which one can infer that C&W Cayman was working on an assessment for the costs of the civil work for another potential new entrant at the same time. The email stated that there were certain approximations in the calculations and a detailed site analysis was required to provide an accurate cost and a 20% contingency should be added to cover unknowns; a more detailed study providing more accurate costs would take until 14th November 2003. Mr McNaughton did not wait for a more detailed study to be done and on the same day sent an email to Miss Lewis of Digicel Cayman quoting the figure of some CI $23,000 and he did not mention the question of a contingency. Later on 7th November 2003, C&W Cayman was in contact with Nortel with a view to assessing an accurate price for a TN-1X MUX.

50. 7th November 2003 was a Friday. On Monday 10th November 2003, Mr Merriman of C&W Cayman thanked Mr McNaughton for the estimate for the civil works and asked for further information as to the price of various other matters. On 10th November 2003, there were further internal C&W emails as to the cost of the joining service. On 10th November 2003, there is an internal Digicel email from J D Buckley to Oliver Chatten which refers to the progress on interconnection in Cayman. Mr Buckley stated that the interconnection discussions were moving exceedingly quickly. Also on 10th November 2003 there are internal emails within C&W Cayman as to what should be added to the figure of some CI $23,000 for the civil works. Mr McNaughton revealed that he had already communicated the figure of some CI $23,000 to Digicel Cayman but stated that there might not be a problem if Digicel Cayman regarded the figure as 60-70% of the estimated costs.

51. On 11th November 2003, Mr Merriman emailed Mr McNaughton asking for the costs of the MUX to be used by C&W Cayman as Digicel Cayman wished to pay the deposit for the equipment. On 12th November 2003, Mr McNaughton replied stating that the deposit requested was U$60,000 for equipment and U$20,000 for the civil works. On 13th November 2003, Digicel Cayman sent a cheque for the sum requested but the cheque was incorrectly made out and this was corrected by Digicel Cayman on Friday 17th November 2003.

52. Having reviewed the detailed steps taken between 30th October 2003 and 12th November 2003, I hold that there was no culpable delay on the part of C&W Cayman in relation to providing a figure for the deposit for the equipment and the civil works. Indeed, a review of this period and, in particular, the internal communications within C&W Cayman do nothing to support the case put forward by the Claimants that C&W Cayman was determined to cause delay for the sake of holding up Digicel Cayman. The

internal communications at this stage show that C&W Cayman was actively co-operating with a view to advancing interconnection at least within a reasonable time, if not more quickly than that.

53. The Claimants' next complaint is that C&W Cayman delayed in ordering equipment for its side of the interconnection until 2nd December 2003. The steps which were taken by C&W Cayman in the period from13th November 2003 to 2nd December 2003 are revealed by the documents in the Cayman supplemental bundle. It is not necessary to narrate the many detailed steps taken during this period by reference to these documents, as the matter is described in the witness statement of Mr Anderson of C&W Cayman. He describes the internal communications within C&W Cayman on 13th November 2003, the same day as C&W Cayman received the cheque from Digicel Cayman for the deposit for the equipment and the civil works. It will be remembered that the cheque had to be corrected and this was in due course done. Mr Anderson also describes the procedures within C&W Cayman for obtaining capital expenditure approval. These procedures included, as a first step, obtaining a quotation from a supplier for the equipment. A second step was to prepare a business case, based on the quotation, although such a business case could be prepared in parallel with obtaining a quotation, if there had been a preliminary cost estimate. If the business case were approved, a purchase order would be prepared and submitted for approval within C&W Cayman. If the purchase order were approved, the expenditure was thereby authorised and the purchase order could be sent to the supplier.

54. On 13th November 2003, Mr Barnes of the carrier services team asked Mr Anderson to seek a quotation from Nortel for the equipment it needed, not only for Digicel Cayman but also for another carrier or carriers. Mr Barnes offered to use his influence with Nortel to ensure that the equipment was provided as quickly as possible.

55. Mr Anderson's project manager, Mr Callow, sought a quote from Nortel on 14th November 2003. Mr Callow revised the request for a quotation on 18th November 2003. Nortel provided a quotation on 24th November 2003. Mr Anderson explained in his witness statement why Nortel would have taken the time it took from 14th November 2003 to 24th November 2003 to produce its quotation. Mr Anderson then stated that his team prepared a purchase requisition "extremely quickly" after receiving the quotation from Nortel and submitted this to Mr Adam, the Chief Executive of C&W Cayman, on 25th November 2003. Mr Anderson commentated that this was "a fast turn around" and it was unusual to take this step before the business case was approved. On 25th November 2003, Mr Callow asked Nortel to make a minor amendment to its quotation and a revised quote was provided the same day. Again the matter was referred to the Chief Executive who approved it on the 25th November 2003. The draft purchase order was then submitted to Mr Adam on 26th November 2003. Mr Anderson comments that this was "a remarkably fast progression".

56. Then there was a new development. A Mr Anderson White of C&W Cayman became aware that C&W Cayman had in stock two TN-1C MUXs that were surplus to its immediate requirements. These could not be directly used to form an interconnection between C&W Cayman and Digicel Cayman because a larger MUX, a TN-1X, was needed for that purpose. However, C&W Cayman had in its system TN-1Xs that were not fully utilised and which could be replaced by TN-1Cs. Thus, it was possible to use a surplus TN-1C to replace an existing TN-1X thereby making the TN-1X available for

interconnection with Digicel. The discovery that there were two TN-1Cs in stock in Cayman and the realisation that a TN-1C could be substituted for a TN-1X appears to have occurred for the first time on the 27th November 2003. Digicel Cayman suggested in closing submissions that this discovery and realisation would have happened earlier if C&W Cayman had proceeded more expeditiously with its placing of an order to Nortel. In my judgment, there is no connection between the time when the TN-1Cs were discovered and anything which C&W Cayman did, or did not do, as regards the ordering process with Nortel. I proceed on the basis that the TN-1Cs were discovered on 27th November 2003 and there is no reason to find that this event should have happened at an earlier date. The consequence was that although C&W Cayman had ordered equipment (or was about to place an order for equipment) including MUXs from Nortel, there was now the possibility that these MUXs were not needed from Nortel. Mr Anderson White obviously told Mr Callow of the discovery and the first thing which Mr Callow did was to inform Nortel that C&W Cayman wished to place a hold on its order.

57. The parties differed as to whether Mr Anderson was aware on 27th November 2003 of this turn of events. Mr Anderson stated that it was more likely than not that Mr Callow had placed a hold on the order without seeking prior authorisation from Mr Anderson. On 28th November 2003, Mr Callow told Nortel that C&W Cayman did not now need to order the MUXs which had been in the earlier order. Nortel responded to this on 2nd December 2003. The 28th November 2003 was a Friday and the 2nd December 2003 was a Tuesday so there was one complete working day between these two communications. A purchase order was approved within C&W Cayman on 2nd December 2003 and sent to Nortel on the same day.

58. Although Digicel Cayman is critical of the fact that the final form of the order which was placed with Nortel was not sent to Nortel until 2nd December 2003, the criticism is essentially that Nortel should have been asked to provide a quotation before C&W Cayman had received the deposit cheque from Digicel Cayman and, further, that C&W Cayman should have obtained internal approval to the capital expenditure before the Digicel deposit cheque was received. I will deal with those criticisms but before I do so, I make the finding that so far as the individual steps taken by C&W Cayman in the period 13th November 2003 to 2nd December 2003 are concerned, C&W Cayman was not guilty of delay. On the contrary, C&W Cayman acted with considerable speed. I have also paid close attention to the internal communications within C&W Cayman at this time to see if those communications reveal anything as to the attitude of C&W Cayman as to the need for expedition or, conversely, any desire to slow matters down. In my judgment, the internal communications within C&W Cayman reveal that C&W Cayman and the carrier services team, acting on its behalf, were not motivated by a desire to cause delay but were motivated by a desire to use all proper speed in obtaining the necessary equipment. In particular, the decision to use a spare TN-1C in place of a TN-1X, which was in use, so as to release the TN-1X, so that it would be available for interconnection with Digicel Cayman was motivated principally because such a move would help speed things up. I do not think that the decision to use a spare TN-1C in this way was motivated by any real need or desire to improve C&W Cayman's cash flow at that particular time.

59. I now return to the two criticisms made by Digicel Cayman that a request for a quotation should have been sent to Nortel before C&W Cayman received Digicel Cayman's deposit and, similarly, there should have been an earlier request for capital expenditure approval within C&W Cayman. Whether there should have been an earlier

request for a quotation from Nortel is debatable. From the documents I have seen, the reason why C&W Cayman waited for the deposit cheque from Digicel Cayman was to have the certainty that interconnection was indeed proceeding with Digicel Cayman. I can see the force of the argument that C&W Cayman should have been convinced of that in any event and that no harm would have been done by asking Nortel to provide a quotation at an earlier date. However, in the event, I do not see that the passage of what may have been only a few days between the time when a quotation could have been requested, and the time when a quotation was actually requested, affected anything subsequently. The order which C&W Cayman ultimately placed on the 2nd December 2003 was for interconnection equipment excluding a MUX. The relevant request for a quotation was the request which was made following the discovery that C&W Cayman had a spare TN-1C. That request for a quotation could only be made following that discovery on 27th November 2003. As regards the internal request for capital expenditure approval, C&W Cayman was justified in seeking that approval when it was actually sought because, up until that time or around that time, the relevant costs were still being assessed. Further, as with the request for a quotation from Nortel, earlier matters were overtaken by the discovery on 27th November 2003 that there was a spare TN-1C which led to a different request for capital expenditure approval and a different order to Nortel. I have already held that the discovery of the spare TN-1C on 27th November 2003 was unaffected by what C&W Cayman had done or not done in these respects prior to 27th November 2003. It should be noted that I have so far proceeded on the basis that C&W Cayman placed an order with Nortel on 2nd December 2003. There is a separate question which I will discuss in due course as to whether there had been an earlier order on or about 27th November 2003.

60. I next turn to consider complaints made by Digicel Cayman that C&W Cayman and the carrier services team, on its behalf, made false representations to Digicel Cayman in November 2003 and again in January 2004 and/or were guilty of non-disclosure, in particular in the period from November 2003 to January 2004. It is said that these false representations and this non-disclosure amounted to a breach of a duty owed by C&W Cayman to Digicel Cayman under the 2002 Law and the 2003 regulations. The allegations which I am considering are those put forward by Digicel Cayman in a Re-Re-Amended pleading in relation to Cayman. I will describe how matters are pleaded and also how matters were put in closing submissions for Digicel Cayman.

61. The duty which is alleged to be relevant at all times during the period November 2003 to January 2004 is the duty not to refuse, obstruct or in any way impede interconnection. Digicel Cayman relies on section 44(1) of the 2002 Law. Digicel Cayman's legal submission as to the content of that duty is that section 44(1) obliged C&W Cayman to take positive steps to bring about interconnection, without delay. I have held that section 44(1), properly construed, is a negative obligation not to do anything which would obstruct or impede C&W Cayman in making interconnection between the two networks. However, I have also held that section 44(3) of the 2002 Law does place a positive obligation on C&W Cayman to provide an interconnection service within a reasonable time. C&W Cayman has not taken any pleading point to the effect that Digicel Cayman has relied only on section 44(1) rather than section 44(3). Indeed, C&W Cayman did not itself submit that section 44(1) is restricted to a negative prohibition on obstructing or impeding the making of a interconnection. In these circumstances, I will not dwell on the difference between section 44(1) and section 44(3), nor will I confine Digicel Cayman to a case within section 44(1), that is, a case of C&W Cayman taking positive steps in

breach of a negative prohibition in section 44(1). Staying with the question of the duties which Digicel Cayman alleges were broken in relation to the representations or non-disclosure referred to above, Digicel Cayman also alleges that from 1st December 2003, when the 2003 regulations came into force C&W Cayman's conduct was a breach of an obligation not to obstruct or impede interconnection (relying on regulation 4(1)), an obligation to consider requests and provide interconnection and infrastructure sharing in good faith (relying on regulation 6), and an obligation to negotiate interconnection and infrastructure sharing in order to ensure the provision of service throughout the Cayman Islands (relying on regulation 8). Digicel Cayman's pleading misdescribes the obligation in regulation 4(1) which refers to a licensee obstructing or impeding the making of an "interconnection… arrangement".

62. I now consider the way in which Digicel Cayman has pleaded the breach of the obligations relied upon. The first allegation is in relation to a representation made at a meeting or meetings on 28th November 2003. It is said that C&W Cayman represented to Digicel Cayman that C&W Cayman had ordered a TN-1X MUX from Nortel on 27th November 2003 and that the same was due to arrive in Cayman on or about 14th January 2004. It is then said that C&W Cayman had not ordered that piece of equipment on 27th November 2003 or at all and did not subsequently order such equipment. Instead it located and used a spare TN-1X already in Cayman. It is then alleged that C&W Cayman concealed the true position in this respect knowing the importance of the matter to Digicel Cayman. It is said that Mr Barnes of C&W Cayman, in particular, concealed the truth because of his concern as to the reaction of Digicel Cayman if it had been told the truth. It is next pleaded that Digicel Cayman was misled by the misinformation, as it relied upon the information as being true and it failed to take steps it would otherwise have taken to progress physical and technical interconnection and make preparations for its own network launch.

63. Digicel Cayman makes a further set of allegations in relation to certain things that were said in January 2004. It is pleaded that on 14th January 2004, C&W Cayman informed Digicel Cayman that the equipment needed for C&W Cayman's side of the interconnection including a TN-1X MUX would not be installed or tested until the parties had signed an interconnection agreement. This was said to involve an implied statement that the TN-1X MUX needed for C&W Cayman's side of the interconnection had not been installed by 14th January 2004. It is then alleged that on the true facts that C&W Cayman's MUX had been installed on the 13th January 2004. It is said that this misinformation occurred on 14th January 2004 and was repeated or perpetuated by concealment during the following two weeks. When arrangements were made for installation, commissioning and testing following the interim interconnection agreement on 29th January 2004 this was on the mistaken assumption on the part of Digicel Cayman that C&W Cayman's MUX had yet to be installed. It is then said that Digicel Cayman relied on this information by diverting resources in Cayman away from the completion of its own civil works for the purposes of interconnection and/or refraining from securing additional resources in Cayman to ensure that interconnection and network completion would continue at full pace and/or failing to ensure that a Nortel engineer came to Cayman to install, commission and test both sides equipment prior to 29th January 2004. It is then pleaded that Digicel Cayman relied upon these matters in January 2004 as a breach by C&W Cayman of its obligation not to obstruct or impede interconnection. By reason of an earlier statement in its pleading, this last averment is, I understand, to be read

as a reference to the obligation in section 44(1) of the 2002 law and the obligations in regulation 4(1), regulation 6 and regulation 8 of the 2003 regulations.

64. In its closing submissions, Digicel Cayman repeated its case that it was misled by reason of deliberate false representations on the part of C&W Cayman or nondisclosure by C&W Cayman. Digicel Cayman made clear in its written and its oral closing submissions that it did not seek to put forward the case that C&W Cayman committed the tort of deceit. Digicel Cayman relies upon the 2002 Law and the 2003 regulations and in particular what it says is the obligation in section 44(1) of the 2002 Law that C&W Cayman was not to obstruct or impede the making of an interconnection. Digicel Cayman says that a number of representations were made on behalf of C&W Cayman on 28th November 2003, to the effect that C&W Cayman had ordered a TN1-X MUX on 27th November 2003, which was due to be delivered on 14th January 2004. It is said that those representations were knowingly false. In particular, it is said that Mr Barnes and Mr McNaughton of the carrier services team knew the representations to be false, as did Mr Anderson of C&W Cayman. It is said that Mr Adam, the Chief Executive of C&W Cayman knew that a TN-1X had not been ordered by C&W Cayman although I am not clear whether it is said that Mr Adam knew that Digicel Cayman had been misled. The allegation continues to the affect that C&W Cayman and those acting on its behalf participated in deliberate and coordinated concealment of the relevant facts after 28th November 2003. It is said that Digicel Cayman was misled by the false statements made to it. The case that Digicel Cayman would have acted differently if it had been given different information on or after 28th November 2003 is said to be supported by the evidence of Mr Merriman of Digicel Cayman. Digicel Cayman deals separately with the misrepresentation said to have been made in January 2004 that C&W Cayman's MUX had been installed prior to 14th January 2004. However, the Claimants make clear in their written closing submissions that any wrong doing by C&W Cayman in mid January 2004 is unlikely to have any independent causative impact in its own right. However, it points to these events as corroboration of its case that there was deliberate misinformation in and after November 2003.

65. I will now set out my findings of fact in relation to this case of misrepresentation and non-disclosure. At 8:47am, local time, on Friday 28th November 2003, Mr Barnes of the carrier services team sent an email to Mr Merriman of Digicel Cayman, attaching a project plan for interconnection in Cayman. The start of the period in the plan was 20th November 2003 and the predicted end date was 4th February 2004, just after the date of 1st February 2004 referred to in the licence to Digicel Cayman. On a fair reading of the second line of the project plan, the plan contained the statement that a purchase order had been placed for a TN-1X on the 27th November 2003. The third line of the project plan stated that the period from placing the purchase order to the delivery of the TN1-X was eight weeks, although the start of the eight week period was 20th November 2003 and the eight week period ended on 14th January 2004. To reconcile lines two and three, one would have to say that the order was placed on 27th November 2003 i.e. a week late but nonetheless the plan still predicted that the MUX would be delivered in seven weeks, that is, by 14th January 2004. The project plan then showed later stages in the period up to the completion of interconnection. A number of these stages were timed to occur after 14th January 2004. This was revealed by a Gantt chart, attached to the project plan, which showed the delivery period for the MUX ending on 14th January 2004 and thereafter a number of steps being available to be taken.

66. Mr Barnes met Mr Merriman on 28th November 2003. I find that the meeting began at or around 9:30 on that day. I also find that either Mr Barnes said to Mr Merriman at this meeting that the C&W Cayman MUX had been ordered on 27th November 2003 or, having given to Mr Merriman a project plan which stated that fact, Mr Barnes did not say anything to contradict what was said in the project plan. There was a later meeting between the parties on 28th November 2003. I do not have a note of the meeting referred to. However, on 2nd December 2003, Mr McNaughton sent an email to Miss Agard copied to Mr Ebanks and Mr Barnes which referred to three meetings in the period 24th to 28th November 2003. Mr Merriman was not said to be at any of those meetings. Mr Barnes was not described as attending any of those meetings. The persons said to be representing C&W Cayman at the meetings were Mr Ebanks and Mr McNaughton. The email of 2nd December 2003 briefly describes what happened at the three meetings and, in particular, it states that the draft project plan for the ordering and installation of the interconnection equipment service was presented with a ready for service date scheduled for mid-February 2004. It is said that Digicel Cayman expressed disappointment with this timeline and C&W Cayman offered to do what it could to improve the delivery time from Nortel. C&W Cayman reminded Digicel Cayman that pursuant to an earlier agreement for early ordering of equipment, installation would not commence ahead of a signed interconnection agreement. I interpret that as referring back to the arrangements described in C&W Cayman's letter of 30th October 2003 when C&W Cayman stated that it would order equipment before the parties entered into an interconnection agreement.

67. Based on this note, I find that at the second meeting on 28th November 2003, at which Mr Ebanks and Mr McNaughton were present, C&W Cayman put forward the project plan to which I have referred as an accurate project plan. I have already held that on a fair reading of the project plan, it contained a statement that C&W Cayman had ordered its TN-1X MUX on 27th November 2003 with an expected delivery date of 14th January 2004. I also find, based on the evidence of the witnesses, that it was probably Mr McNaughton on behalf of C&W Cayman who offered to do what he could to improve the delivery time from Nortel.

68. Digicel Cayman also relies on an email sent by Mr Anderson to Mr Merriman on 28th November 2003. This email, as printed states a time of "14:39". In its closing submissions, C&W Cayman drew attention to some emails in the bundle having a time which was the local time at which the email was sent whilst others had a GMT time, five hours ahead of the local time. If this email stated the GMT time, it should be read as having been sent at the local time of 9:39am.

69. I did not have specific evidence about this point on the timing of the emails. However, it was put to me that where an email had the word "unknown" at the top, that indicated that it was printed in London and the time was GMT. Conversely, if the email had, instead of the word "unknown", the name of the originator of the email then that showed the time stated to have been a local time. This explanation is consistent with the many emails in the supplemental bundle prepared for Cayman. For example, Mr Callow sent an email to Mr Seaman of Nortel on 28th November 2003. One copy of this email, where the heading is "Callow, Ian" shows the time 16:03. Another copy of this email, where the heading is "unknown", has the time "21:03". The two copies are of an otherwise identical email. The explanation put forward by C&W Cayman is therefore borne out by this pair of copies and by other emails that I have considered. On the balance of probabilities, I

hold that the email from Mr Anderson to Mr Merriman of 28th November 2003 was sent at 9:39am local time.

70. The email of 28th November 2003 from Mr Anderson at 9:39am local time told Mr Merriman that "the order" had been submitted and there was a quoted delivery timeframe of eight weeks plus shipping time from Nortel. Mr Anderson stated that C&W Cayman had asked Nortel to improve on that and would continue to press for improvements. "The order" as referred to in the email is plainly a reference to an order for the TN-1X. The reference to C&W Cayman pressing Nortel for an improvement on the delivery date is also consistent with what was said at the meeting attended by Mr Ebanks and Mr McNaughton, which I find to have happened later that day.

71. Having identified the relevant statements made on 28th November 2003 by C&W Cayman to Digicel Cayman, it is now necessary to determine whether those statements were factually correct when they were made. The position is disclosed by a number of internal C&W emails in the period 26th November 2003 to 2nd December 2003. By 26th November 2003, C&W Cayman had prepared a purchase order to be sent to Nortel and that step had been approved for expenditure purposes by C&W Cayman. This purchase order was for equipment needed to effect C&W Cayman's side of interconnection with both Digicel and another intended entrant into the market. This equipment therefore included two TN-1Xs. At some time on 27th November 2003, Mr Barnes prepared his project plan and sent a copy of it to a number of addressees including Mr Anderson, Mr Callow, Mr McNaughton and Mr Ebanks. The time shown on the copy email is 16:14. There is in fact another copy of that email where the time is shown as 12:14pm. It seems to me that the time the email was sent was either 11:14am or 12:14pm. One arrives at 11:14am by subtracting five hours from 16:14, and treating the latter time as GMT. The fact that another copy of the email is timed at 12:14pm is possibly explained by the fact that the clock on the email had not been properly adjusted. In any case, Mr Barnes' email, referring to his draft project plan, made an assumption that the TN-1X purchase order "goes off to Nortel today (November 27th)". That indicated that Mr Barnes believed that the purchase order for the MUX was about to be sent to Nortel. Mr Barnes' email went on to refer to the fact that he had heard that C&W Cayman had an unused "TN-1X chassis available". What Mr Barnes must have heard appears to be a version of something which became clearer later, which was that C&W Cayman had two TN-1Cs available which could be swapped for two TN-1Xs in use in Cayman. Mr Barnes was not proceeding on the basis that what he called the TN-1X chassis would definitely be used. He was proceeding on the basis that C&W Cayman would order a TN-1X (or in fact two of them) from Nortel and the question of pressing the chassis into service was something that could be looked at in due course.

72. Mr Barnes followed up this email with a further email on 27th November 2003. The time shown is 23:03; if that was GMT, the email would have been sent at 18:03 local time. The email was sent to Mr Anderson, Mr Callow, Mr McNaughton, Mr Ebanks and others. Mr Barnes refered to having had discussions with three other people at C&W Cayman that afternoon. Mr Barnes said that the purchase order for the TN-1X equipment had been faxed to Nortel "today". Mr Barnes said he would talk to Mr Seaman (of Nortel) to put some pressure on him to deliver. This email is consistent with Mr Barnes believing that a purchase order for the MUX was sent to Nortel on 27th November 2003. Mr Barnes told Mr Anderson, Mr Callow, Mr McNaughton and Mr Ebanks that that was what had happened.

73. Later on 27th November 2003, Mr Callow sent an email to Mr Seaman of Nortel. The email was timed 18:58 but as the heading has the name "Callow, Ian", this does indeed appear to have been sent at 18:58 local time. Mr Callow asked Mr Seaman of Nortel to "put a hold on the MUX order". This email is consistent with there having been an order to Nortel for, amongst other things, a MUX to be used for interconnection with Digicel. Mr Callow explained to Mr Seaman that it seemed that C&W Cayman was about to make some major changes to the order. This suggests that Mr Callow fully expected the order to be changed but it is also consistent with his email that a decision to that effect had not yet been taken.

74. In his evidence in chief, Mr Anderson of C&W Cayman stated that he had probably not been consulted by Mr Callow before he sent this holding email to Nortel. On the 28th November 2003, Mr Anderson sent to Mr Merriman the email to which I have already referred. The time is given as 14:39 but I proceed on the basis that this was sent at 9:39am local time. As already described, Mr Anderson told Mr Merriman that the order for the MUX had been submitted. The sending of this email is consistent with Mr Anderson's evidence to me that he had not been consulted by Mr Callow before Mr Callow sent his email to Nortel asking it to put a hold on the MUX order. If I accept Mr Anderson's evidence, then his email on 28th November 2003 was a genuine attempt to describe the situation to Mr Merriman. If I reject Mr Anderson's evidence about being consulted by Mr Callow, then it would follow that Mr Anderson had knowingly said something very misleading, if not downright wrong, to Mr Merriman. Having considered the internal communications within C&W which included Mr Anderson and having considered the entirety of Mr Anderson's evidence I accept that he was not consulted by Mr Callow before Mr Callow sent his email at 18:58 on 27th November 2003.

75. As I have already described, Mr Barnes met Mr Merriman at or around 9:30am on 28th November 2003. Later that day, Mr Barnes sent an email to Mr Callow. The email is timed 19:03 but I proceed on the basis that it was sent 14:03 local time. Mr Barnes asked Mr Callow for further information about the possibility of taking TN-1X s out of service to use them for interconnection with Digicel and the other new entrant. It is plain that Mr Barnes needed to know more at that stage about the proposal.

76. Later on 28th November 2003, at 16:03, Mr Callow sent a further email to Mr Seaman of Nortel. It explained that C&W Cayman had found the MUXs it needed and wished to change the order to remove the MUXs previously ordered, or intended to be ordered. Mr Callow's email was copied to Mr Anderson and others. The email refers to order number FO4017. That order number was not explained to me and the fact that the email quotes an order number suggests that an order had been placed with Nortel before the time of this email.

77. Mr Callow next sent an email to Mr Barnes. The time on the email is 21:07 which I take to be 16:07 local time. Mr Callow told Mr Barnes that C&W Cayman would be able to recover the MUXs from the existing network. The timescale for this would depend on when C&W Cayman could arrange "outages" with the customers whose MUXs were being replaced, together with the timescales Nortel had for delivering the mounting kits, needed for the MUXs to be used for interconnection. Mr Callow also referred to the remaining items to be ordered from Nortel as "bits and pieces". I have another copy of

this email from Mr Callow to Mr Barnes this time timed at 5:07pm. Again, a possible explanation is that the clock had not been properly set.

78. Mr Barnes replied to Mr Callow on 28th November 2003 in an emailed timed 21:18 which was 16:18 local time or (possibly) 17:18. He asked Mr Callow to let him know the schedule of times for swapping over the MUXs when Mr Callow had a better idea.

79. On 2nd December 2003, C&W Cayman placed a formal purchase order with Nortel for the equipment needed to effect interconnection with Digicel and the other operator; this order did not include TN-1Xs or any other MUXs. The order number was FO4021 which was different from the order number quoted in Mr Callow's email to Nortel of 28th November 2003.

80. The question which now needs to be addressed is whether C&W Cayman did place an order with Nortel on 27th November 2003 for interconnection equipment including two TN-1Xs. No copy of a purchase order has been disclosed by C&W Cayman to Digicel Cayman. However, apart from the missing purchase order, the documents tend to support a finding that an order was placed with Nortel on 27th November 2003. It is clear that in the morning of 27th November 2003, it was intended that an order should be placed that day. By 6:03pm on 27th November 2003, Mr Barnes told a number of people at C&W Cayman that the purchase order had been faxed to Nortel on that day. When Mr Callow asked Nortel to put a hold on the order, he referred to it as an "order" and not simply a request for a quotation or a proposed order. When Mr Anderson emailed Mr Merriman at 9:39am on the 28th November 2003, Mr Anderson said that an order had been submitted; however, it is entirely possible he was simply relying on Mr Barnes' email of 18:03 the previous day. Mr Callow's email of 28th November 2003 to Nortel quotes an order number which is different from the number later used on 2nd December 2003. Further, Mr Callow's email of 28th November 2003 to Nortel refers to C&W Cayman changing "the order". In addition, there are several later documents passing between C&W Cayman and Nortel which refer to there being two orders in existence from C&W Cayman to Nortel. The orders have the numbers FO4017 and FO4021. The first of these seems likely to have been an order placed on 27th November 2002 and the second the order placed on 2nd December 2003. It is to be inferred from Mr Callow's email of 28th November 2003 that the original form of the order FO4017 included an order for the supply of two MUXs. On all this evidence, I find on the balance of probabilities that an order was sent to Nortel on 27th November 2003 and that order included two TN-1Xs.

81. The finding that C&W Cayman did place an order with Nortel on 27th November 2003 means that the statements in the project plan as communicated on the 28th November 2003 to Digicel Cayman were accurate as at 28th November 2003. An order had been placed for the MUX on 27th November 2003 and there is no suggestion that the expected delivery date was different from 14th January 2004. When Mr Barnes met Mr Merriman at around 9:30am on 28th November 2003, Mr Barnes had had some wind of the possibility that it might not be necessary to wait until the TN-1X was delivered in January 2004 but he did not mention that possibility to Mr Merriman. In view of what appears to have been the uncertainty in Mr Barnes' mind about that possibility, it does not seem to me to be fair to criticise him for not raising it with Mr Merriman. When Mr Anderson sent his email to Mr Merriman at 9:39am on 28th November 2003, Mr Anderson was passing on what he had been told by Mr Barnes the previous evening to the effect that the TN-1X had been ordered. I have already accepted Mr Anderson's evidence

that he had not been told by Mr Callow the previous evening that a hold had been placed on the order. At the meeting on 28th November 2003 which involved Mr Ebanks and Mr McNaughton, the statements they made that the TN-1X had been ordered on 27th November 2003 were consistent with what they had been told by Mr Barnes at the end of 27th November 2003.

82. I will consider what the situation would be if I were wrong in my finding that an order had been sent to Nortel on 27th November 2003. In that event, it would follow that the statements made on 28th November 2003, to the effect that such an order had been placed, would also be wrong. For the sake of completeness, in view of the seriousness of the allegation made by Digicel Cayman as to deliberate misleading conduct by C&W Cayman, I will go on to consider what the relevant persons at C&W Cayman believed the position was on 28th November 2003. When Mr Barnes sent his project plan to Mr Merriman on 28th November 2003 and met Mr Merriman at around 9:30 that day, I find that Mr Barnes genuinely believed what he told Mr Merriman about the order having been placed and the expected delivery date. When Mr Anderson sent his email at 9:39am on 28th November 2003, I find that Mr Anderson believed what he wrote. When Mr Ebanks and Mr McNaughton attended a meeting with Digicel Cayman on 28th November 2003, I find that they believed that an order had been placed on 27th November 2003.

83. The next matter I ought to consider is the allegation of non-disclosure from 28th November 2003 onwards. It is clear that C&W Cayman did not disclose to Digicel Cayman what happened in the period November 2003 onwards as regards the swapping over of a spare TN-1C MUX for an in-service TN-1X MUX. No-one on behalf of Digicel Cayman was aware of this happening until the matter was put in cross-examination to Mr Merriman on the 20th day of this trial. It is clear that various persons acting on behalf of C&W Cayman became aware at the end of November 2003 or the beginning of December 2003 that the way in which C&W Cayman would obtain the necessary MUX was by means of taking an existing TN-1X out of service rather than by ordering a new MUX from Nortel. Mr Anderson and Mr Barnes accepted that they knew that matter at around that time. Mr McNaughton said that he was not aware of that fact at the time and I accept his evidence. If the case was being put on the basis of the tort of deceit, then it would be relevant to consider whether the failure to correct, on and after 2nd December 2003, the statement made on 28th November 2003, that a MUX had been ordered and was awaited from Nortel, amounted to a continuing false representation. However, the case is not put on that basis. What is principally said is that the non-disclosure after 28th November 2003 obstructed or impeded interconnection. As the case is put that way, the principal matter to be considered is whether the non-disclosure had any causative effect on what happened later.

84. I will first comment on the reasons I was given as to why C&W Cayman did not tell Digicel Cayman of what was happening in relation to the TN-1X MUX. Mr McNaughton said he did not know what was happening in this respect at the relevant time and I accept his evidence.

85. Mr Barnes accepted that he knew in late November 2003 or early December 2003 that the MUX had not been ordered from Nortel. He also knew that his project plan showed the MUX being delivered on 14th January 2004. He also knew that Mr Merriman was keen to know when delivery of the MUX was expected.

86. Mr Barnes was cross-examined about his reasons for not telling Mr Merriman. It was put to him that he believed that if he told Mr Merriman, Digicel Cayman would put pressure on C&W Cayman to interconnect more quickly. The Claimants submitted to me in closing submissions that this was indeed the reason why Mr Barnes did not disclose what had happened in relation to the TN-1X. However, Mr Barnes did not agree with that suggestion. His evidence was that he probably did not tell Mr Merriman because he was concerned about his reaction when he realised that C&W Cayman had not actually ordered the equipment but had used equipment already available. The cross-examination did not explore in any more detail precisely what Mr Barnes feared the reaction of Digicel Cayman would be, nor at what point in the history he was concerned in this way. Nor was Mr Barnes further pressed to agree that he feared that Digicel Cayman would be able to bring about interconnection more quickly if it had known that a TN-1X was available, without having to wait on a delivery from Nortel.

87. In my judgment, it might have been part of Mr Barnes' thinking that if C&W Cayman told Digicel Cayman that a MUX was available on a different timescale from that shown in the project plan, Digicel Cayman would require a different project plan and possibly a faster progress to interconnection. It is possible that Mr Barnes wanted to avoid assisting Digicel Cayman. But it is also possible that Mr Barnes did not have any particular wish to delay Digicel Cayman. At the beginning of December 2003, Mr Barnes may have wanted to wait and see how matters transpired with the re-use of an existing TN-1X. It is also the case that in December 2003 and January 2004, Mr Barnes seems to have had comparatively little contact with C&W Cayman and he was busy in dealing with interconnection in Barbados. As the weeks went by and C&W Cayman had continued to fail to tell Digicel Cayman of the source of the TN-1X, it might have seemed to Mr Barnes that it would be embarrassing to have to disclose that C&W Cayman had not after all ordered the MUX but had one already available. I can see that it would have been embarrassing to reveal this some time after the event and in that sense Mr Barnes would have been concerned about the reaction of Digicel Cayman. This possibility is consistent with the evidence Mr Barnes gave although, as I have said, the matter was not really investigated. I found Mr Barnes to be a helpful and generally reliable witness. I can also add that I found that the internal C&W documents in relation to Cayman did not support the suggestions made to me by the Claimants that C&W Cayman was guilty of deliberately misleading Digicel Cayman with a view to delaying interconnection.

88. Mr Anderson accepted that he knew what was happening about the TN-1X MUX, but he left it to carrier services to tell Digicel Cayman. I do not regard that as a satisfactory answer. Mr Anderson knew that Mr Merriman was particularly keen to have as much information as possible about the expected delivery times for C&W Cayman's equipment. It is difficult to be sure why Mr Anderson did not tell Digicel Cayman about the TN-1X. There may have been some adversarial spirit on Mr Anderson's part so that he saw no reason to tell Digicel Cayman things which he did not have to reveal. It is possible that he withheld the information about the TN-1X not being ordered from Nortel for similar reasons to those given by Mr Barnes, as described above.

89. I will next describe the events which took place after 2nd December 2003, leading up to the completion of installation and testing of the interconnection equipment on 24th February 2004. When the order to Nortel for TN-1X MUXs was cancelled, it was envisaged that C&W Cayman would remove two existing TN-1X MUXs from its existing network. It had been predicted on 28th November 2003 that the timescale for the removal

of the existing MUXs would depend on when C&W Cayman could arrange "outages" with the customers whose MUXs were being replaced. The outages had originally been planned for the weekend of 13th and 14th December 2003 but had to be rescheduled and the removal of the existing TN-1X MUXs occurred on 16th and 17th December 2003.

90. As explained above, some necessary equipment was ordered from Nortel, under order numbers FO4017 and FO4021. There were difficulties with Nortel delivering the right equipment to C&W Cayman. By 5th January 2004, Mr Callow was asking Nortel if it had shipped the coax cables. At the same time he told Nortel that forty cables that had already arrived only had connectors on one end. On 13th January 2004, Nortel sent to Mr Callow a shipment advice which probably referred to all the outstanding equipment which had ordered from Nortel.

91. On 13th January 2004, Mr Anderson sent an email to Mr McNaughton, Mr Barnes and Mr Ebanks stating that C&W Cayman had "the terminal equipment physically installed". This seems to be a reference to the TN-1X MUX having been "installed" for the purpose of the interconnection with Digicel. The evidence was not very precise as to how much work of installation had been done by the date of this email. There were references in the evidence to the TN-1X MUX having been placed on a rack and having been "bolted down" and having been plugged into a power source. C&W Cayman submitted that more needed to be done before one could describe a MUX as having been "installed". I was not given any evidence as to installation beyond that described above. I was also told that C&W Cayman installed some further equipment, ordered from Ericsson, needed to upgrade its switch. This work was done in mid-January 2004.

92. The evidence did not clearly establish when the equipment ordered by Digicel on 13th November 2003, for its side of the interconnection, was delivered. Digicel Cayman submits that this equipment was delivered in the period 12th to 16th January 2004. C&W Cayman points out that on the 14th January 2004, the equipment was still expected but by 23rd January 2004 the equipment had arrived.

93. Around this time, Mr Merriman of Digicel Cayman wanted to know from C&W Cayman when the latter would be in a position to start testing the interconnection equipment. Mr Merriman had sent an email asking that question on 6th January 2004and re-sent his email on 12th January 2004. There were internal communications within C&W Cayman to the effect that C&W Cayman's position was that "installation and testing" would not be effected until there was an interconnection agreement. On 14th January 2004, Mr Anderson asked Mr McNaughton how he should respond to Mr Merriman's question. On 14th January 2004, Mr Anderson replied to Mr Merriman stating: "as agreed between C&W and Digicel installation and testing of terminal equipment will not commence until after the signing of a formal interconnect agreement between the two parties."

94. On 19th January 2004, Mr Merriman sent to Mr Barnes the project plan that had been prepared in November 2003. Mr Merriman asked Mr Barnes to update the project plan to reflect the prospect of the interconnection agreement being signed shortly and the work that had already been completed. On 20th January 2004, Mr Barnes replied enclosing a revised project plan. The revised project plan contained revisions as to matters outstanding. There was no revision to the entries in lines to 2 to 3 which referred to a purchase order having been placed with Nortel for a TN-1X on 27th November 2003 with

an expected delivery date of 14th January 2004. On 27th January 2004, Mr Ebanks sent an email to Digicel Cayman stating that if Digicel Cayman wanted to stay on schedule for "installation and testing" on 29th January 2004 the interconnection agreement needed to be finalised.

95. At some point, C&W Cayman commenced the civil work of digging a trench and laying fibre to connect the two switch sites. There was further civil work to be done by Digicel Cayman which involved connecting the manhole into which C&W Cayman ran its fibre to the Digicel switch site. C&W Cayman completed its part of the civil works on 21st January 2004 and Digicel Cayman completed its part of the civil works on 28th January 2004.

96. As regards the interconnection agreement, the parties had agreed terms for an interim interconnection agreement on 16th January 2004. Thereafter, Mr Buckley of Digicel Cayman sought to renegotiate one of those terms but his attempt failed. This caused some delay to the parties entering into an interim interconnection agreement which they finally did on 29th January 2004.

97. Whatever remained to be done in terms of installing the C&W Cayman interconnection equipment was done to permit testing of the interconnection to begin on 3rd February 2004. Testing was completed on 24th February 2004.

98. Digicel Cayman did not immediately launch its service in Cayman; that service was launched on 3rd March 2004. I received detailed submissions from each side as to why Digicel did not launch within a day or so of 24th February 2004 and whether Digicel would have been in a position to launch its service prior to 24th February 2004 if the interconnection had been complete earlier.

99. Before considering in more detail what might have happened if C&W Cayman had disclosed on or after 2nd December 2003 that it had cancelled the order to Nortel for a TN-1X to be used for interconnection with Digicel, I ought to deal with a separate submission made by Digicel Cayman that C&W Cayman was in breach of duty by declining to install and test, or test as the case may be, the interconnection until the parties had entered into an interconnection agreement. I have already held that C&W Cayman was not under an obligation to install and test the equipment needed for its side of the interconnection until the parties had agreed an interconnection agreement. Accordingly, C&W Cayman was not in breach of duty by insisting upon the parties entering into an interconnection agreement which provided for the testing to be done and then implementing that agreement by carrying out the testing. It should also be remembered that C&W Cayman was not obliged to enter into an interim interconnection agreement leaving outstanding a question relating to rates.

100. Digicel Cayman has put forward a counterfactual timetable contending that a number of steps on the way towards interconnection could have been taken at earlier dates, allowing Digicel Cayman to launch at an earlier time. I have already dealt with the parts of the counterfactual timetable based upon allegations that C&W Cayman was in breach of duty in that it delayed its decision to order equipment from Nortel, delayed in notifying Digicel Cayman of the amount of the equipment deposit and delayed in placing its order to Nortel.

101. I now need to consider the parts of the counterfactual to the extent that they are based on what I have found to be non-disclosure by C&W Cayman of the fact that it could, at some point, recover a TN-1X from its existing network for re-use for the interconnection with Digicel. There was some, albeit limited, evidence on that subject. It is necessary to explain how this allegation of non-disclosure by C&W Cayman came into the case. At all times in 2003 and 2004 and indeed until C&W Cayman served its Re-Amended Defence during the trial, on 2nd/3rd June 2009, Digicel Cayman (basing itself on the project plan prepared by Mr Barnes) believed that C&W Cayman ordered the TN-1X MUX on 27th November 2003 and that it was delivered to Cayman on or about 14th January 2004. Mr Merriman's witness statement referred to these events as if they were matters of fact. When Mr Merriman was cross-examined on the 20th day of the trial, 9th June 2009, it was explained to Mr Merriman that his facts were wrong because C&W Cayman had cancelled the order, or the intended order, to Nortel as it had found it had two TN-1X MUXs which it could recover from its existing network to be used to interconnect with Digicel and another entrant. As I have explained, the facts put to Mr Merriman in cross-examination were correct, but they came as a complete revelation to Mr Merriman. He appears only to have realised the true position at that point even though the matter had been pleaded by C&W Cayman in its amended Defence a few days before he gave evidence. In the course of Mr Merriman's cross-examination and re-examination, he referred in different ways to the significance to him of the new revelation. In considering his evidence, I must take into account the fact that Mr Merriman had not heard of the new revelation until it was put to him in cross-examination and he had no real opportunity to reflect on the position before he answered questions in cross-examination and, indeed, in re-examination on the same day. Further, it was plain that Mr Merriman was shocked by the discovery that C&W Cayman did not tell him at the time in December 2003 and January 2004 of what had really happened.

102. Mr Merriman's first response in cross-examination, at page 95 of the transcript for day 20, was that it was irrelevant to him whether C&W Cayman ordered a TN-1X, or did not order one, so long as they had one ready for service in line with Digicel Cayman's requirements. It was put to him that his concern was that there was a MUX available and that it worked. He agreed with that suggestion. He stated that the difference between a MUX being ordered or a MUX lying in a warehouse somewhere in Cayman was irrelevant to him so long as C&W Cayman had its MUX in line sometime around the 14th January 2004 to start the work. It was then put to him that the difference between ordering a MUX and re-using a MUX was irrelevant and he agreed but he then added that if he had known that C&W Cayman had a MUX earlier "the whole thing could have moved along a lot faster". Mr Merriman was re-examined about the project plans sent to him on 20th January 2004. He said that if he had been told that C&W Cayman had discovered two MUXs lying in a warehouse somewhere he would have done everything possible to ensure that Digicel Cayman would have a MUX in place in the first week in January 2004. I note that Mr Merriman referred to a TN-1X MUX being available in a warehouse in Cayman. That was not exactly the situation. A TN-1X MUX would have to be taken out of service and replaced with a TN-1C MUX, at a convenient time to the customer whose service depended on that MUX.

103. Against this background, I now have to address the question whether the non-disclosure by C&W Cayman, between 2nd December 2003 and the end of the process of interconnection, that C&W Cayman had cancelled the order to Nortel for a TN-1X and was proposing to remove a TN-1X from its existing network to be used for the

interconnection with Digicel, caused delay to the interconnection. It is not suggested that the recovery of the two TN-1Xs from the existing network on the 16th and 17th December 2003 could have happened any earlier or that the date on which they were recovered had any consequence for Digicel Cayman. I have earlier referred to the date when the equipment ordered by Digicel became available for use in the interconnection. Without being more precise, I find that the equipment became available in the middle part of January 2004.

104. Digicel Cayman contends that I should proceed on the basis that the Digicel equipment would have been available on 19th December 2003. Digicel Cayman puts forward two reasons for the suggested change in the date.

105. The first reason put forward by Digicel Cayman is that if it had been notified of the amount of the equipment deposit on 6th November 2003 (rather than 12th November 2003) then it would have ordered its equipment on 7th November 2003 (rather than 13th November 2003). I have already held that C&W Cayman were in not of breach of duty by notifying the amount of the deposit on 12th November 2003. It follows that I do not accept that Digicel Cayman would have ordered its equipment earlier than 13th November 2003. In any event, non-disclosure beginning on 2nd December 2003 can not have affected the events earlier in November 2003.

106. The second reason put forward by Digicel Cayman for changing the date when the Digicel equipment became available for interconnection is that Digicel Cayman submitted that if it had known that C&W Cayman could recover a TN-1X MUX from its existing network then Digicel Cayman would have pressed Nortel to deliver a TN-1X MUX to Digicel for its side of the interconnection at an earlier date. I can see the possibility that Digicel Cayman might have pressed Nortel to deliver earlier. Whether Digicel Cayman would or would not have done that would depend on some extent on all the many other things which Digicel Cayman had to do to launch its network. Even if Digicel Cayman had pressed Nortel to bring forward the delivery date of the equipment ordered by Digicel, I have no evidence on which I could make a finding as to what would have happened. I have no material on which I can judge whether Nortel could have brought forward the delivery date and whether they would have done so. Given that the bringing forward of the delivery date was not under the control of Digicel Cayman or C&W Cayman for that matter but was under the control of a third party, Nortel, Digicel Cayman's case that Nortel might have brought forward the delivery date must be a case that Digicel Cayman lost a chance of the delivery date being brought forward. However, on the evidence, whether such a chance existed is a matter of pure speculation and I am not able to find that Digicel Cayman did lose any worthwhile chance of that kind.

107. Digicel Cayman also has the difficulty that the other equipment which C&W Cayman did order from Nortel did not arrive until around 13th January 2004. Digicel Cayman's counterfactual is based upon this equipment arriving not later than 19th December 2003. Digicel Cayman did not call any evidence which would allow me to find that the equipment could have arrived earlier. Mr Anderson of C&W Cayman was cross-examined about different sources for some of the equipment. If C&W Cayman had explored different sources, that would have involved it cancelling the order with Nortel at some point and trying to find an alternative supplier. Mr Anderson did not in fact accept any of these suggestions put to him in cross-examination. Further, the suggestions were general ones and not of a specific character which would enable me to identify a

timescale different from that which actually occurred. Whilst I can see that difficulties arose with the delivery of the equipment from Nortel and those difficulties caused delay so that the overall time for delivery was longer than it should have been, I am not able to make a finding that C&W Cayman was under an obligation to take some other course to secure the delivery of that equipment at an earlier date.

108. Digicel Cayman also says that the civil works should have been completed earlier than they were. C&W Cayman completed its part of the civil works on 21st January 2004 and Digicel Cayman completed its part on 28th January 2004. So far as the part of the works carried out by C&W Cayman is concerned, it should be remembered that C&W Cayman was not under an obligation to carry out these works in advance of the parties entering into an interconnection agreement. On that basis, C&W Cayman did the works voluntarily and not under an obligation. Further, there is no allegation that C&W Cayman delayed the carrying out of the works. There was a particular difficulty, referred to in the evidence, about the provision of manhole covers which caused delay in the completion of the civil works. In its submissions, Digicel Cayman was dismissive of the significance of the missing manhole covers and suggested that the problem could and should have been solved by laying a metal sheet over the relevant hole in the ground. Digicel Cayman did not itself give evidence to enable me to make that finding and when the matter was put to Mr Anderson, he did not agree that that was an appropriate thing to do. In my judgment, I ought not to substitute a counterfactual for completion of the C&W side of the civil works substituting a different date for the actual date of 21st January 2004. As regards the Digicel Cayman part of the civil works, Mr Merriman stated that he would have sent round a mechanical digger to complete the works in next to no time. I am prepared to accept if that item had been the only thing outstanding in the way of completing interconnection, Mr Merriman would have been able to get the outstanding work done in a short period, somewhat less than the seven days it actually took.

109. C&W Cayman was not under an obligation to complete the installation of its equipment and to test the interconnection before the parties had entered into an interconnection agreement. That happened on 29th January 2004. Much if not all of the delay between 16th January 2004 and 29th January 2004 was attributable to a late attempt by Digicel Cayman to renegotiate terms which had been previously provisionally agreed.

110. As regards the period of testing from 3rd February to 24th February 2004, certain questions were put to Mr Fisher about the way in which testing could have been done but I am not persuaded that the time taken for testing the interconnection in Cayman involved any breach by C&W Cayman. Mr Fisher made it clear that he regarded three weeks as the appropriate period for the requisite tests.

111. My conclusion, based on the evidence with which I was provided, is that Digicel Cayman has not demonstrated that the non-disclosure of which it complains caused any delay to the completion of interconnection. I have borne in mind in considering the evidence that Digicel Cayman came to court at the beginning of the trial wholly unaware of the true facts as to where C&W Cayman obtained the TN-1X. Those facts were only revealed in the Re-Amended Defence on the 2nd/3rd June 2009 and were only highlighted when Mr Merriman was cross-examined on the 20th day of the trial (9th June 2009). It is therefore not surprising that Digicel Cayman had not thought through the evidence which it would need if it were to show that the non-disclosure of which it complained had caused delay to the completion of interconnection. As against that, C&W Cayman

amended its Defence in relation to Cayman to plead the real facts about the source of the TN-1X and Digicel Cayman amended its pleading to allege a false representation and non-disclosure. There were, altogether, some 77 days of court hearing. The trial was adjourned over the long vacation and concluded on 30th November 2009. Digicel Cayman did not apply at any stage to recall Mr Merriman or to call other witnesses on the question as to the effect of the non-disclosure. In these circumstances, I am obliged to make my findings of fact based on the evidence I have and that is what I have now done.

112. It is not necessary separately to discuss the impact of Mr Anderson's statement on 14th January 2004 (and similar indications later in January 2004) to the effect that "installation" would only commence on the parties' entry into an interconnection agreement. Digicel Cayman say that this was a deliberately misleading statement given that installation had commenced by 14th January 2004. However, Digicel Cayman accepts that statements in January 2004 about whether installation had or had not commenced had no consequence so far as the timetable for completing interconnection was concerned.

113. I wish to add one further comment in relation to the case against C&W Cayman that it did not disclose the true facts about the source of the TN-1X from 2nd December 2003 onwards. The effect of regulation 6(a) of the 2003 regulations was C&W Cayman had an obligation to negotiate an interconnection agreement in good faith. Those regulations came into effect on 1st December 2003 but the relevant non-disclosure continued during the period after the regulations took effect. It has occurred to me that it could be argued that the non-disclosure, which I have found in this case, was a breach of an obligation to negotiate in good faith. Even if C&W Cayman had thought that the source of the TN-1X would not matter to Digicel Cayman, it could be argued that C&W Cayman should have told Digicel Cayman to allow Digicel Cayman to decide what to do in response. Indeed, Mr Barnes' explanation for his non-disclosure was that, at some stage, he was concerned about the reaction from Digicel Cayman. Having made those remarks, I will not make any finding one way or the other as to whether there was breach of regulation 6(a) by reason of the non-disclosure. It is not wholly clear from Digicel Cayman's pleading whether such an allegation was there put forward; the pleading does refer to regulation 6(a) but in a way which suggests it only relates to the non-disclosure in January 2004 and not the non-disclosure from 2nd December 2003. More importantly, the Claimants did not put forward any such case in their closing submissions. The parties agreed with the court that in their closing submissions, they would identify every finding which they invited the court to make. The Claimants have not invited the court to find that there was a breach of regulation 6(a) by reason of the non-disclosure. A breach of the regulations is a criminal offence: see regulation 30. C&W Cayman has not put forward its submissions as to why I should hold that it did not break regulation 6(a). Finally, even if there were a breach of regulation 6(a) no loss has resulted. Even if a breach of regulation 6(a), being a criminal offence, would constitute unlawful means for the tort of conspiracy, no such tort was committed because no loss resulted.

114. I have now dealt with all of the complaints made by Digicel Cayman about the progress of physical interconnection in Cayman. Digicel Cayman makes two other complaints, both of which relate to the progress of contractual interconnection in Cayman. The first complaint about contractual interconnection is that C&W Cayman delayed the provision of draft documents to be used to negotiate the interconnection agreement and, in particular, delayed the production of C&W Cayman's tariff schedule.

The second allegation concerns the approach which C&W Cayman adopted to the negotiation of the rates payable for interconnection in Cayman.

115. Before considering the detail of these allegations, I ought to consider whether it is possible that these allegations, if sustained, would lead to the conclusion that interconnection was delayed in Cayman. In their closing written submissions, the Claimants say that it is not necessary for them to establish any causative, let alone actionable, delay to the conclusion of the interconnection agreement. The principal reason given for this is that the parties entered into an interim interconnection agreement on 29th January 2004 and the earliest date on which Digicel Cayman was entitled to launch its service was 1st February 2004. However, the Claimants point out in their written submissions that if I should find that there was no obligation on C&W Cayman to install (or complete the installation of) its equipment before entering into an interconnection agreement and no obligation to test interconnection before such an agreement, then the Claimants would wish to argue that the alleged breaches by C&W Cayman in relation to contractual interconnection did hold up the time when an interconnection agreement was reached. The Claimants contend that an interconnection agreement ought to have been reached sometime in mid/late December 2003. Thus, it might be necessary to consider these allegations as to contractual interconnection if I held that the delay in reaching an interconnection agreement resulted in a delay in completing installation of C&W Cayman's equipment and delay in testing the interconnection.

116. I have already made findings as to the state of play in relation to a number of features of the interconnection in January 2004. I have made findings about the dates when the C&W Cayman equipment was ready to be installed and/or was installed, when the Digicel Cayman equipment was ready to be installed and when the civil works were completed. Unless I substituted a different date for completion of the Digicel Cayman civil works on 28th January 2004 or accepted that it ought to have been possible to do some tests, but not all tests, on interconnection before the civil works were completed, it would not seem to matter that the interconnection agreement was entered into on 29th January 2004, rather than an earlier date. Further, since I have held that I ought not to substitute a counterfactual date for the actual dates in relation to the availability of the Digicel Cayman interconnection equipment and the C&W interconnection equipment, there is really no prospect of testing having begun before mid January 2004. As it happens, on 16th January 2004, the parties had reached a provisional agreement on the rates payable, save for the rate to be later settled by the regulator. Accordingly, even if C&W Cayman had been in breach of its obligation at an earlier point in time in relation to the way in which it conducted negotiations as to rates, any such breach was spent by 16th January 2004. Indeed, part of the explanation for the passage of time between 16th January 2004 and 29th January 2004 was that Digicel Cayman sought to renegotiate rates which had been provisionally agreed on 16th January 2004 and that attempt ultimately was unsuccessful.

117. As regards the allegation that C&W Cayman delivered documents late following the request for interconnection in Cayman, the documents had all been provided by 31st October 2003 and any delay between 17th October 2003 and 31st October 2003 had long ceased to have any causative effect on the pace of the negotiations. In particular, this is demonstrated by the fact that on 5th December 2003, Mr Adam of C&W Cayman wrote to Mr Buckley of Digicel Cayman explaining the reasons for C&W Cayman's stance in relation to rates and further stating that he encouraged the two teams of negotiators to

continue to meet to resolve the outstanding questions. Mr Buckley did not reply to that letter until 23rd December 2003 when he described the previous situation as one where the interconnection negotiations had stalled and that agreement could not be reached without outside intervention. On 23rd December 2003, Mr Buckley suggested that the agreement which had been reached in Barbados around that time meant that it was worth the parties trying again to negotiate the rates payable in Cayman and negotiations resumed in January 2004. My conclusion therefore is that even if Digicel Cayman could demonstrate a breach by C&W Cayman in relation to the progress of contractual interconnection, any such breach would have no causative effect on the time at which interconnection ultimately occurred. In these circumstances, although I will consider the two matters alleged by Digicel Cayman, I will do so more briefly than might otherwise have been appropriate.

118. Digicel Cayman obtained its licence in Cayman on 17th October 2003. On the same day, Digicel Cayman requested interconnection from C&W Cayman. Under section 44(3) of the 2002 Law, C&W Cayman was obliged to respond to this request within a period of one month from the date of the request and to provide an interconnection service in a reasonable time. In my judgment, C&W Cayman would not be in breach of section 44(3) nor section 44(1) (containing a negative obligation not to obstruct or impede interconnection) if it took one month to respond to the request for interconnection. In fact, C&W Cayman responded more quickly than the one month permitted by the statute. C&W Cayman sent the legal framework agreement to Digicel Cayman on 24th October 2003. It sent all the other parts of the draft interconnection agreement (bar the tariff schedule) to Digicel Cayman on 30th October 2003. It sent the tariff schedule on 31st October 2003. On the evidence, I am not persuaded that C&W Cayman delayed the time at which it delivered these documents to Digicel Cayman and, as I have said, they were all served within the statutory time limit. Further, having regard to the pace of the negotiations after 31st October 2003 and, in particular, the gap in the negotiations between 5th December 2003 and 23rd December 2003 and the way in which the negotiations then progressed in January 2004, the dates at which these documents were sent to Digicel Cayman had no impact on the date on which interconnection was ultimately agreed.

119. The second allegation made by Digicel Cayman in relation to contractual interconnection concerns the approach which C&W Cayman adopted to the negotiations as to the rates payable in Cayman and the particular rates which were put forward by C&W Cayman. Digicel Cayman accepts that C&W Cayman was obliged to, or at least entitled to, put forward rates which were in accordance with the detailed provisions of annex 5 to the licence granted to C&W Cayman on 10th July 2003. Digicel Cayman also accepts that, for this purpose, C&W Cayman was entitled to use its cost model as originally approved by the regulator in Cayman and as later adjusted by C&W Cayman, whether or not the adjustments were specifically approved by the regulator.

120. Digicel Cayman makes the bold submission that C&W Cayman "manipulated" the model to produce figures for the rates it quoted to Digicel Cayman. The suggestion is, as I understand it, that the rates proposed were outside any permissible method of using the costs model. I was not given evidence as to how the cost model was designed to operate. I was not given evidence as to the range of figures which could permissibly be produced by the cost model. I was not given any expert evidence as to the range of figures within which C&W Cayman could put forward a permissible rate.

121. During the negotiations, Digicel Cayman objected that the rates being sought by C&W Cayman were different from the rates agreed in the OECS. Digicel Cayman submitted to me that I should find that the rates quoted by C&W Cayman were impermissible because they were different from the rates agreed in the OECS. Similarly it was submitted to me that the rates originally quoted by C&W Cayman were impermissible because they were different from the rates later agreed or the rate fixed by the regulator. In my judgment, the fact that the rates in the different countries differed is not particularly surprising and certainly is no foundation for a finding that the rates quoted in Cayman were impermissible in Cayman. Similarly, the fact that parties started with a negotiating position and ended up with a different agreed position is not surprising and is no foundation for a finding that the original position was impermissible. The same submission applies to a comparison between the rates used in negotiations and the rate fixed by the regulator.

122. In my judgment, there is simply no basis on which I could make a finding that C&W Cayman went outside the permitted range of figures when negotiating its position in Cayman. Further, there is no basis on which I could find that C&W Cayman knowingly went outside a permissible range with a view to dragging out the process of negotiation. Finally, as stated above any criticism that could be made of C&W Cayman in the period up to 16th January 2004 was spent by that date and the equipment needed for interconnection was not ready for testing by that date so that any criticism applicable before 16th January 2004 did not have an impact on the date on which interconnection was tested and became available for use.

123. For these reasons, I hold that interconnection was not delayed by reason of the alleged delays in respect of contractual interconnection. The result of the above is that the Claimants have not established that C&W Cayman delayed interconnection or otherwise acted in breach of a duty owed to Digicel Cayman. In these circumstances, for similar reasons to those given in SLU, I will not deal with the wholly separate question, hotly disputed between the parties, as to whether any delay in achieving interconnection caused a delay to the date when Digicel Cayman was ready to launch its service in Cayman. An investigation of those matters is in my judgment unnecessary and not a proportionate use of time.

ANNEX F – TRINIDAD & TOBAGO

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THE TELECOMMUNICATIONS ACT 2001

1. The Telecommunications Act 2001 was in force at all material times. The 2001 Act was amended by the Telecommunications (Amendment) Act 2004, which was assented to on 14th June 2004. All of the provisions of the 2001 Act which are set out below are set out as amended (where relevant) by the 2004 Act.

2. Section 2 of the 2001 Act contained definitions which included the following:

> *"access" means the ability of a user or provider to utilize the available network of another provider or user;*
>
> …
>
> *"concession" means an authorization to operate a public telecommunications network or provide a public telecommunications service or broadcasting service, issued pursuant to section 21;*
>
> …
>
> *"interconnection" means the linking of public telecommunications networks and public telecommunications services, to allow the users of one provider of a public telecommunications service to communicate with the users of another provider of a public telecommunications service, and to access the services provided by such other provider;*
>
> …

3. The objects of the 2001 Act were stated in section 3 in the following terms:

> ***3. Objects of the Act***
> *The objects of the Act are to establish conditions for—*
>
> *(a) an open market for telecommunications services, including conditions for fair competition, at the national and international levels;*

(b) the facilitation of the orderly development of a telecommunications system that serves to safeguard, enrich and strengthen the national, social, cultural and economic wellbeing of the society;

(c) promoting and protecting the interests of the public by—

(i) promoting access to telecommunications services;

(ii) ensuring that services are provided to persons able to meet the financial and technical obligations in relation to those services;

(iii) providing for the protection of customers;

(iv) promoting the interests of customers, purchasers and other users in respect of the quality and variety of telecommunications services and equipment supplied;

(d) promoting universal access to telecommunications services for all persons in Trinidad and Tobago, to the extent that is reasonably practicable to provide such access;

(e) facilitating the achievement of the objects referred to in paragraphs (a) and (b) in a manner consistent with Trinidad and Tobago's international commitments in relation to the liberalization of telecommunications;

(f) promoting the telecommunications industry in Trinidad and Tobago by encouraging investment in, and the use of, infrastructure to provide telecommunications services; and

(g) to regulate broadcasting services consistently with the existing constitutional rights and freedoms contained in section 4 and 5 of the Constitution.

4. Part II of the 2001 Act established the Telecommunications Authority. The more relevant provisions are:

4. Establishment of the Authority
There is hereby established a body corporate to be known as the Telecommunications Authority of Trinidad and Tobago (hereinafter referred to as "The Authority").

18. Functions and powers of the Authority
(1) Subject to the provisions of this Act, the Authority may exercise such functions and powers as are imposed on it by this Act and in particular—

(a) make recommendations to the Minister on the granting of concessions and licences and monitor and ensure compliance with the conditions set out therein;

(b) classify telecommunications networks and services as public telecommunications networks, public telecommunications services, closed user group services, private telecommunications services, value added services, broadcasting services or any other type of telecommunication service;

(c) determine universal service obligations throughout Trinidad and Tobago, pursuant to section 28, and ensure that such obligations are realised;

(d) establish national telecommunications industry standards and technical standards;

(e) advise the Minister on policies governing the telecommunications industry and issues arising at international, regional and national levels;

(f) advise the Minister on technical standards;

(g) ensure compliance with the Convention;

(h) implement and enforce the provisions of this Act and the policies and regulations made hereunder;

(i) plan, supervise, regulate and manage the use of the radio frequency spectrum, including—

(i) the licensing and registration of radio frequencies and call signs to be used by all stations operating in Trinidad and Tobago or on any ship, aircraft, or other vessel or satellite registered in Trinidad and Tobago;

(ii) the allocation, assignment and reallocation or reassignment of frequency bands where necessary;

(j) plan, administer, manage and assign telecommunications numbering for telecommunications services;

(k) collect all fees, including concession and licence fees, and any other charges levied under this Act;

(l) investigate and resolve all allegations of harmful interference;

(m) investigate complaints by users, operators of telecommunications networks, providers of telecommunications and broadcasting services or other persons arising out of the operation of a public telecommunications network, or the provision of a telecommunications service or broadcasting service, in respect of rates, billings and services provided generally and to facilitate relief where necessary;

(n) train and certify its personnel in accordance with the Convention;

(o) test and certify telecommunications equipment, subject to section 48(3), to ensure compliance with—

(i) international standards; and

(ii) environmental health and safety standards, including electromagnetic radiation and emissions;

(p) ensure the orderly and systematic development of telecommunications throughout Trinidad and Tobago;

(q) establish a consumer complaints committee to collect decide on and report on consumer complaints, such reports to be included in the Authority's annual report; and

(r) carry out such other functions imposed by or under this Act and do anything incidental or conducive to the performance of any of its functions.

(2) In the performance of its functions under subsection (1)(b), the Authority shall require that all persons operating or intending to operate any of the services listed in subsection (1)(b) notify the Authority accordingly and the Authority shall establish a Register of all such persons and services.

(3) In the performance of its functions, the Authority shall have regard to the interests of consumers and in particular—

(a) to the quality and reliability of service provided at the lowest possible cost;

(b) to fair treatment of consumers and service providers similarly situated;

(c) in respect of consumers similarly placed, to non-discrimination in relation to access, pricing and quality of service; and

(d) current national environmental policy.

(4) In the performance of its functions under subsection (1)(c), (d), (e), (m) and (p), sections 28, 78 and 79 and any other provisions of the Act as the Authority deems appropriate, the Authority shall adopt procedures by which it will—

(a) afford interested parties and the public opportunities for consultation;

(b) permit affected persons and the public to make appropriate submissions to the Authority.

(5) At all times the Authority shall, in the performance of its functions and exercise of its powers, act in an objective transparent and non-discriminatory manner.

19. Directions by the Minister
Subject to the provisions of this Act or any other written law, the Minister may give written directions to the Authority on matters of general public policy and the Authority shall give effect to that policy.

5. Part III of the 2001 Act was concerned with the grant of concessions . The more relevant provisions are:

21. Requirement for a concession
(1) No person shall operate a public telecommunications network, provide a public telecommunications service or broadcasting service, without a concession granted by the Minister.

(2) A person who wishes to operate a network or provide a service described in subsection (1), shall apply to the Authority in the manner prescribed.

(3) On its receipt of an application, the Authority shall cause to be published in the Gazette and in at least one daily newspaper circulating in Trinidad and Tobago, a notice to the effect that it has received and is reviewing the application.

(4) A notice published pursuant to subsection (3) shall state the time, which shall not be less than twenty-eight days from the date of publication of the notice, within which any

comment on or objection to the application may be submitted to the Authority and the Authority shall consider the comments and objections prior to making its recommendations to the Minister.

(5) The Authority shall forward its recommendations to the Minister within ninety days of receiving all relevant information pertinent to the application and the Minister shall indicate his approval, modification or rejection of the recommendation within sixty days of receipt of the Authority's recommendation.

(6) Where the Minister approves the recommendation of the Authority or modifies or rejects it, he shall give his reasons in writing for so doing and the Authority shall publish both the recommendations and the Minister's position in respect thereof in the Gazette and at least one daily newspaper circulating in Trinidad and Tobago.

(7) On the granting of a concession by the Minister, the Authority shall cause to be published in the Gazette and at least one daily newspaper circulating in Trinidad and Tobago, a notice to that effect.

(8) The terms of a concession shall be available for public scrutiny in the manner prescribed by the Authority.

(9) If on the expiration of the period referred to in subsection (5), the Minister has not indicted to the Authority, in writing, his approval, modification or rejection of the recommendation, it shall be deemed to have been approved.

(10) The Authority may conduct public hearings in respect of applications for concessions for public telecommunications services and broadcasting services, when such applications are made in the first instance or subsequently at five years intervals when such services are in existence.

22. Conditions applicable to all concessions

(1) Every concession for a public telecommunications network, a public telecommunications service or a broadcasting service shall—

(a) require the concessionaire to pay fees annually to the Authority;

(b) prohibit anti-competitive pricing and other related practices;

(c) prohibit the transfer of control of the concessionaire without the prior written approval of the Authority;

(d) prohibit the assignment of the concession without the prior written approval of theAuthority;

(e) require the concessionaire, upon request made by the Minister of National Security and subject to any written law, to collaborate with the Ministry in matters of national security; and

(f) require the observance of regulations made pursuant to this Act.

(2) The approval of the Authority as required under subsection (1)(c) and (d), shall not be unreasonably withheld.

(3) Every concession for a public telecommunications network, a public telecommunications service or a broadcasting service shall contain conditions regarding—

(a) the expiration of the concession and the time required for an application for renewal;

(b) the circumstances under which the concession may be amended, e.g., force majeure, national security, changes in national legislation, implementation of international obligations;

(c) the provision of information and reports to the Authority;

(d) the overall performance of the concessionaire;

(e) the provision of information to users and procedures for handling and responding to user complaints and disputes;

(f) the submission to the Authority of disputes with other concessionaires, users and any person, where such disputes arise out of the concessionaire's exercise of his rights and obligations under the concession, subject to section 82; and

(g) any other matter as may be agreed between the Minister and the concessionaire.

24. Conditions applicable to a concession for a public telecommunications network or service

(1) In addition to the conditions stipulated in section 22, a concession for a public telecommunications network or a public telecommunications service shall require the concessionaire to adhere, where applicable, to conditions requiring the concessionaire to—

(a) submit to the Authority plans for its approval respecting—

(i) the development of its network or service;

(ii) quality of service; and

(iii) any other related matter as the Authority may require,

and in the event that the concessionaire and Authority fail to agree with respect to the plans required under this paragraph, the Minister may be asked to commission a dispute arbitration procedure to resolve the dispute in the context of the concession;

(b) provide users, under conditions which are published or are otherwise filed with the Authority, with access to and the opportunity to use such network or service on a fair and reasonable basis, and without discrimination among similarly situated users;

(c) refrain from using revenues or resources, from a telecommunications network or service, to cross subsidise any other telecommunications network or service, without the prior written approval of the Authority;

(d) meet prescribed standards of quality;

(e) file annually with the Authority forms of user agreements with users for the provision of public telecommunications services for approval by the Authority;

(f) permit the resale of its telecommunications service by not imposing unreasonable or discriminatory conditions or limitations on such resale;

(g) provide and contribute to universal service in accordance with section 28;

(h) account for costs and keep such books of accounts and where the Authority prescribes by regulation the manner in which such books are to be kept, to keep such books of accounts in accordance with such regulations;

(i) refrain from impairing or terminating the telecommunications service to a user or other provider of a telecommunications service during a dispute, without first having undertaken to resolve the dispute in accordance with established procedures approved by the Authority and where such dispute cannot be resolved, to see written approval from the Authority; but in respect of a billing dispute the concessionaire shall collect amounts that are not in dispute from such user or other provider; and

(j) refrain from using, and maintain the confidentiality of any confidential, personal and proprietary information of any user, other operator of a public telecommunications network or other provider of a telecommunications service originating from—

(i) any such user, operator or provider; or

(ii) any information regarding usage of the service or information received or obtained in connection with the operation of the concessionaire's network or service,

for any purpose other than to—

(iii) operate such network or service;

(iv) bill and collect charges;

(v) protect the rights or property of the concessionaire;

(vi) protect users or other providers from the fraudulent use of the concessionaire's network or service,

or as otherwise permitted by the concessionaire, user or other provider, as the case may be; and

(k) make available on a timely basis, to other providers of telecommunications services, such technical information as the Authority may prescribe regarding the concessionaire's network, including planned deployment of equipment, and other relevant information necessary for the provision of such services.

(2) The requirement of subsection (1)(k) shall, in respect of a concessionaire of a public telecommunications network or a public telecommunications service, apply in respect of a dominant operator of such network or provider of such service only, such dominance to be determined in accordance with the criteria set out in section 25(4).

25. Interconnection

(1) In addition to the requirements of sections 22 and 24, a concession for a public telecommunications network or a public telecommunications service shall include conditions obliging the concessionaire to provide for—

(a) direct interconnection with the public telecommunications network or public telecommunications service of another concessionaire;

(b) indirect interconnection with such network or service referred to in paragraph (a), through the public telecommunications networks or public telecommunications services of other concessionaires; and

(c) the transmission and routing of the services of other concessionaires, at any technically feasible point in the concessionaire's network.

(2) In respect of a concessionaire's obligations pursuant to subsection (1), the Authority shall require a concessionaire to—

(a) comply with guidelines and standards established by the Authority to facilitate interconnection;

(b) provide, upon request, points of interconnection in addition to those offered generally to other concessionaires, subject to rates that reflect the concessionaire's total economic cost of constructing additional facilities necessary to satisfy such request;

(c) publish, in such manner as the Authority may prescribe, the prices and the technical and other terms and conditions pertaining to its offer for the elements of interconnection;

(d) provide the elements of interconnection, to other concessionaires of public telecommunications networks and public telecommunications services, in a manner that is at least equal in both quality and rates to that provided by the concessionaire to a subsidiary, affiliate or any other party to which the concessionaire provides interconnection;

(e) promptly negotiate, upon the request of another concessionaire of a public telecommunications network or a public telecommunications service, and endeavour to conclude, subject to paragraph (h), an agreement with regard to the prices and the technical and other terms and conditions for the elements of interconnection;

(f) deposit with the Authority a copy of any agreement concluded pursuant to paragraph (e) within twenty-eight days of its making;

(g) offer the terms and conditions of an agreement concluded pursuant to paragraph (e) to any other concessionaire of a public telecommunications network or public telecommunications service on a nondiscriminatory basis;

(h) submit to the Authority for prompt resolution, in accordance with such procedures as the Authority may adopt, any disputes that may arise between concessionaires relating to any aspect of interconnection, including the failure to conclude an agreement made pursuant to paragraph (e), or disputes as to price and any technical or other term and condition for any element of interconnection;

(i) submit to any decision rendered by the Authority made pursuant to paragraph (h);

(j) provide, to the extent technically feasible, number portability when required to do so and in accordance with the requirements prescribed, by the Authority;

(k) provide dialing parity to other concessionaires of public telecommunications networks and public telecommunications services in accordance with requirements prescribed by the Authority;

(l) permit other concessionaires of public telecommunications networks and public telecommunications services to have equal access to telephone numbers, operator services, directory assistance and directory listing at a cost efficient rate without unreasonable delay, in accordance with requirements prescribed by the Authority; and

(m) disaggregate the network and on a cost basis, in such manner as the Authority may prescribe, establish prices for its individual elements and offer the elements at the established prices to other concessionaires of public telecommunications networks and public telecommunications services.

(3) [deleted].

(4) [deleted].

(5) [deleted].

26. Access to facilities

(1) Subject to the provisions of this section, it shall be a further condition of a concession for a public telecommunications network and broadcasting service that the concessionaire be required to provide other concessionaires with access to the facilities that it owns or controls, such access not to be unreasonably withheld.

(2) Access to facilities shall be negotiated between concessionaires on a nondiscriminatory and equitable basis and, at the request of either party, the Authority may assist in negotiating a settlement between such parties.

(3) A concessionaire may deny access only where it demonstrates that there is insufficient capacity in the facility, taking into account its reasonably anticipated requirements and its obligations pursuant to section 27, or, for reasons of safety, security, reliability or difficulty of a technical or engineering nature.

(4) The Authority may regulate the rates, terms and conditions for access to any facility, such rates, terms and conditions to be just and reasonable and it may adopt procedures necessary and appropriate to facilitate, by such means as the Authority deems appropriate, the determination of complaints concerning such rates, terms and conditions.

(5) For purposes of this section, access to facilities does not include interconnection.

29. Prices

(1) Prices for telecommunications services, except those regulated by the Authority in accordance with this section, shall be determined by providers in accordance with the principles of supply and demand in the market.

(2) The Authority may establish price regulation regimes, which may include setting, reviewing and approving prices, in any case where—

(a) there is only one concessionaire operating a public telecommunications network or providing a public telecommunications service, or where one concessionaire has a dominant position in the relevant market;

(b) a concessionaire operating a public telecommunications network or providing a public telecommunications service cross-subsidises another telecommunications service provided by such concessionaire; or

(c) the Authority detects anti-competitive pricing or acts of unfair competition.

(3) The Authority shall regulate prices for public telecommunications services and international incoming and outgoing settlement tariffs by publishing pricing rules and principles.

(4) Such rules and principles, made pursuant to subsection (3), shall require rates to be fair and reasonable and shall prohibit unreasonable discrimination among similarly situated persons, including the concessionaire.

(5) In respect of any telecommunications services provided on an exclusive basis by a concessionaire, the Authority shall establish the maximum rate-of-return that the concessionaire may receive on its investment or shall prescribe the use of any other measures for determining the concessionaires profitability, as it deems appropriate.

(6) For any public telecommunications service provided on a non-exclusive basis, the Authority may introduce a method for regulating the prices of a dominant provider of such telecommunications service by establishing caps and floors on such prices, or by such other methods as it may deem appropriate.

(7) Prices, terms and conditions for public telecommunications services shall be published by the concessionaire at such times and in such manner as the Authority shall prescribe and shall thereafter, subject to this Act and the conditions of any concession, be the lawful prices, terms and conditions for such services.

(8) For the purposes of this Part and wherever the issue of dominance otherwise arises in the Act, the Authority may determine that an operator or provider is dominant where, individually or jointly with others, it enjoys a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers and, for such determination, the Authority shall take into account the following factors:
(a) the relevant market;
(b) technology and market trends;
(c) the market share of the provider;
(d) the power of the provider to set prices;
(e) the degree of differentiation among services in the market;
(f) any other matters that the Authority deems relevant.

(9) Where a concessionaire, deemed dominant by the Authority pursuant to subsection (8), considers that it has lost its dominance, it may apply to the Authority to be classified as non-dominant and should the Authority so classify, the relevant concession shall be amended to reflect such classification.".

30. Termination, suspension or amendment of concession
(1) Subject to this section, the Minister, on the recommendation of the Authority, may suspend or terminate a concession where—

(a) the concessionaire has failed to comply materially with any of the provisions of this Act, regulations made hereunder or the terms and conditions of the concession; or

(b) the concessionaire has failed to comply materially with any lawful direction of the Authority.

(2) A concession may be amended by the Minister, where force majeure, national security considerations, changes in national legislation or the implementation of international obligations requires amendment to a concession.

(3) Where a concession is amended pursuant to subsection (2), on grounds of national security, the rights of the concessionaire to compensation shall not be prejudiced.

(4) The Minister shall, before exercising the power of termination or suspension conferred by this section—

(a) serve on the concessionaire, a written notice to the effect that—

(i) he is considering exercising the power and setting out the ground on which it may be exercised; and
(ii) the concessionaire may within thirty days of the notice being served, make written representation to the Authority;

(b) take into consideration any representation made to the Authority under paragraph (a)(ii).

(5) During the period that the Minister is considering exercising his power to suspend or terminate the concession, the concessionaire shall continue to operate until such time as the Minister makes a determination and in the event that the period of the concession comes to an end before the determination by the Minister is made, an interim renewal of the concession on the same terms shall be granted.

(6) Before amending a concession, the Minister shall serve on the concessionaire written notice of the proposed amendment, giving reasons for the amendment and the date by which the amendment shall take effect.

(7) A decision of the Minister pursuant to this section may be reviewed by the High Court.

6. Part IV of the 2001 Act dealt with testing and inspection. In particular, section 46 provided:

46. Inspectors
The Authority may, for the purpose of this Act, appoint suitably qualified and experienced officers to be telecommunications inspectors, (hereinafter referred to as "inspectors").

7. Part IX of the 2001 Act identified various offences. In particular, section 65 materially provided:

65. Offences
A person who—

(a) …

(b) commits a material breach of any condition contained in a concession or licence issued under this Act;

…

commits an offence and is liable on summary conviction to a fine of two hundred and fifty thousand dollars and to imprisonment for five years, and, in the case of a continuing offence, to a further fine of ten thousand dollars for each day that the offence continues after conviction.

8. Part X of the 2001 contained a number of general provisions which included the following:

78. Regulations
(1) The Minister, on the recommendation of the Authority, shall make such regulations, subject to negative resolution of Parliament, as may be required for the purposes of this Act, including regulations prescribing—

(a) application procedures in relation to concessions and licences;

(b) fees payable to the Authority for or in relation to applications, concessions, licences or the provision of services provided by the Authority to any person;

(c) procedures for the management of the spectrum;

(d) approvals and certification of terminal equipment;

(e) price regulation;

(f) interconnection;

(g) universal service;

(h) numbering;

(i) quality of service standards;

(j) procedures for investigating and resolving complaints by users with regard to public telecommunications services; and

(k) procedures for investigating alleged breaches of any term or condition of a concession or licence or alleged violations of any provision of this Act or regulations made pursuant thereto.

(2) Regulations made pursuant to this Act may prescribe penalties, not exceeding fifty thousand dollars for offences committed thereunder.

(3) Regulations made pursuant to this Act shall apply equally to all similarly situated persons.

82. Dispute resolution
(1) The Authority shall establish a dispute resolution process to be utilized in the event of a complaint or dispute arising between parties in respect of any matter to which section 18(1)(m) or 25(2)(h) applies, or where a negotiated settlement, as required

under section 26, cannot be achieved, or in respect of any other matter that the Authority considers appropriate for dispute resolution.

(2) The Authority shall not be a party to any dispute resolution process.

(3) Such dispute resolution process shall be funded by the parties to the dispute and shall be conducted in an open, non-discriminatory and unbiased fashion, within thirty days after the filing of the dispute.

(4) The Authority may establish penalties for referral of frivolous disputes to the dispute resolution process.

83. Reconsideration and appeal
A person aggrieved by a decision of the Minister or Authority may request that such decision be reconsidered based upon information not previously considered, and the Minister or the Authority, as the case may be, shall consider the new information submitted and decide accordingly.

THE PROTECTION AGAINST UNFAIR COMPETITION ACT 1996

9. The Protection Against Unfair Competition Act, 1996 ("PAUCA") was in force at all material times. It was amended by the Intellectual Property (Miscellaneous Amendments) Act 2000 and the relevant amendments were in force at all material times.

10. The Claimants only rely on one section of PAUCA, that is, section 4. Section 4 was subject to the amendments in 2000. In view of some of the submissions as to the meaning of section 4 as amended, it is necessary to set out the entirety of the Act before section 4 was amended and then to set out the amended section 4.

11. The long title of PAUCA stated that the Act was "to provide for protection against unfair competition".

12. The unamended PAUCA was in these terms:

Short title

1. This Act may be cited as the Protection Against Unfair Competition Act, 1996.

Commencement

2. This Act shall come into force on a date to be fixed by the President by Proclamation.

Interpretation

3. In this Act --

"appearance of a product" includes the packaging, shape, colour or other nonfunctional characteristic features of the product in question;

"business identifier" includes business symbols, emblems, logos and slogans used by an enterprise to convey in the course of industrial or commercial activities, a certain identity, with respect to the enterprise and the products produced or the services rendered by that enterprise;

"dilution of goodwill or reputation" means lessening of the distinctive character or advertising value of a trademark, trade name or other business identifier, the appearance of a product or the presentation of products or services or of a celebrity. or well-know[n] fictional character;

"industrial or commercial activities" includes the activities of professionals and other such persons;

"practice" includes an omission to act;

"presentation of products or services" includes advertising;

“trademark" includes marks relating to goods, marks relating to services and marks relating to both goods and services.

General principles

4. (1) In addition to the acts and practices referred to in sections 5 to 9, any act or practice, in the course of industrial or commercial activities, that is contrary to honest practices shall constitute an act of unfair competition.

(2) Any person who is a competitor or customer of another person or is a consumer or a user of the goods and services of another person and who is damaged or likely to be damaged by an act of unfair competition committed by that other person or a person connected with them shall be entitled to the remedies obtainable under the civil law of Trinidad and Tobago.

(3) This section and sections 5 to 9 shall apply independently of, and in addition to, any legislative provisions protecting inventions, industrial designs, trademarks, literary and artistic works and other intellectual property subject matter.

Causing confusion with respect to another’s enterprise or its activities

5. (1) Any act or practice, in the course of industrial or commercial activities, that causes, or is likely to cause, confusion with respect to another's enterprise or its activities, in particular, the products or services offered by such enterprise shall constitute an act of unfair competition.

(2) Confusion may, in particular, be caused with respect to any of the following:

(a) a trademark, whether registered or not;
(b) a trade name;
(c) a business identifier, other than a trademark or trade name;
(d) the appearance of the product;
(e) the presentation of products or services;

(f) a celebrity or a well-known fictional character.

Damaging another's goodwill or reputation

6. (1) Any act or practice, in the course of industrial or commercial activities, that damages, or is likely to damage, the goodwill or reputation of another's enterprise shall constitute an act of unfair competition, regardless of whether such act or practice causes confusion.

(2) Damaging another's goodwill or reputation may, in particular, result from the dilution of the goodwill or reputation attached to any of the following:

(a) a trademark, whether registered or not;
(b) a trade name;
(c) a business identifier, other than a trademark or trade name;
(d) the appearance of the product;
(e) the presentation of products or services;
(f) a celebrity or a well-known fictional character.

Misleading the public

7. (1) Any act or practice, in the course of industrial or commercial activities, that misleads, or is likely to mislead, the public, with respect to an enterprise or its activities, in particular, the products or services offered by such enterprise, shall constitute an act of unfair competition.

(2) Misleading may arise out of advertising or promotion and may, in particular, occur, with respect to any of the following:

(a) the manufacturing process of a product;
(b) the suitability of a product or service for a particular purpose;
(c) the quality or quantity or other characteristics of products or services;
(d) the geographical origin of products or services;
(e) the conditions on which products or services are offered or provided;
(f), the price of products or services or the manner in which it is calculated.

Discrediting another's enterprise or its activities.

8. (1) Any false or unjustifiable allegation, in the course of industrial or commercial activities, that discredits, or is likely to discredit, and another's enterprise or its activities, in particular, the products or services offered by such enterprise, shall constitute an act of unfair competition.

(2) Discrediting may arise out of advertising or promotion and may, in particular, occur with respect to any of the following:

(a) the manufacturing process of a product;
(b) the suitability of a product or service for a particular purpose;
(c) the quality or quantity or other characteristics of products or services;
(d) the conditions on which products or services are offered or provided;

(e) the price of products or services or the manner in which it is calculated.

Unfair competition in respect of trade secrets

9. (1) Any act or practice, in the course of industrial or commercial activities, that results in the disclosure, acquisition or use by others of trade secrets without the consent of the person lawfully in control of that information (hereinafter referred to as "the rightful holder") and in a manner contrary to honest commercial practices shall constitute an act of unfair competition.

(2) Disclosure, acquisition or use of trade secrets by others without the consent of the rightful holder may, in particular, result from --

(a) industrial or commercial espionage;
(b) breach of contract;
(c) breach of confidence;
(d) inducement to commit any of the acts referred to in paragraphs (a) to (c);
(e) acquisition of a trade secret by a third party, who knew, or was grossly negligent in failing to know, that an act referred to in paragraphs (a) to (d) was involved in the acquisition.

(3) For the purposes of this section, information shall be considered "a trade secret" if --
(a) it is not, as a body or in the precise configurations and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
(b) it has commercial value because it is a trade secret; and
(c) it has been subject to reasonable steps under the circumstances, by the rightful holder to keep it secret.

(4) Any act or practice in the course of industrial or commercial activities, shall be considered an act of unfair competition if it consists or results in --

(a) an unfair commercial use of secret test or other data, the origination of which involves considerable effort and which have been submitted to a competent authority for the purposes of obtaining approval of the marketing of pharmaceutical or agricultural chemical products, which utilise new chemical entities; or
(b) the disclosure of such data, except --

(i) were necessary to protect the public; and
(ii) were steps are taken to ensure that the data are protected against unfair commercial use.

13. The amended Section 4 of PAUCA provides:

4. (1) In addition to the acts and practices referred to in sections 5 to 9, any act or practice, in the course of industrial or commercial activities, that is contrary to honest practices shall constitue an act of unfair competition.

(2) Any person damaged or likely to be damaged by an act of unfair competition shall be entitled to the remedies available under the civil law of Trinidad and Tobago.

(3) This section and sections 5 to 9 shall apply independently of, and in addition to, any legislative provisions protecting inventions, industrial designs, trademarks, literary and artistic works and other intellectual property subject matter.

14. Section 9 of PAUCA was amended by substituting "secret information" for the words " a trade secret" or "trade secrets" and a new subsection (5) was added to assist with the construction of section 9(4). It is not necessary to refer to the new section 9(5).

THE CONCESSIONS

15. On 31st December 2005, the Telecommunications Authority of Trinidad and Tobago ("TATT") granted to TSTT a non-exclusive concession to operate a fixed network and a mobile network in Trinidad and Tobago for a term of 10 years from 30th December 2005.

16. Clauses A21 and A22 of the concession to TSTT prohibited certain anti-competitive conduct on the part of a concessionaire.

17. Clause B17 of the concession to TSTT dealt with interconnection. It provided that the concessionaire was to provide direct interconnection with the telecommunications networks of other concessionaires in a prompt and efficient manner. In particular, pursuant to clause B18, the concessionaire was to comply with the terms and conditions set out in schedule H to the concession.

18. Schedule H to TSTT's concession was headed "Interconnection guidelines for Trinidad and Tobago". It is not necessary to set out the many detailed provisions in schedule H. Part III of schedule H dealt with the subject of negotiating an interconnection agreement. Paragraph 11(6) made it clear that a concessionaire was required to negotiate an interconnection agreement with a person who had not already obtained its own concession, provided that this other person had applied for a concession. Thus, TSTT was not entitled to take the line which the C&W companies had taken in other jurisdictions that it would not negotiate an interconnection agreement with a new entrant until the new entrant had obtained its concession. However, the obligations in TSTT's concession could not arise until that concession was granted and that only occurred on 31st December 2005. Because Digicel T&T obtained its own concession on the same day, the possibility of TSTT having to negotiate with Digicel T&T before the latter obtained its concession simply did not arise.

19. The other matter arising from the terms of schedule H to TSTT's concession is that the terms appeared to contemplate that the parties would enter into an interconnection agreement first and would then implement that agreement by, for example, ordering the necessary interconnection equipment and installing and testing it: see Part V dealing with the implementation of interconnection agreements.

20. On 31st December 2005, TATT granted to Digicel T&T a non-exclusive concession to operate a mobile network in Trinidad and Tobago for a term of 10 years from 30th December 2005.

THE FACTS

21. 51% of the shares in TSTT were owned by National Enterprises Ltd. The T&T government directly owned 66% of the shares in National Enterprises Ltd. The T&T government indirectly owned, through a 100% owned subsidiary, 17% of the shares in NEL. The remaining 17% of the shares in NEL were traded publicly. 49% of the shares in TSTT were owned by CWWI.

22. TSTT had a fixed network and a mobile network in T&T. Historically, TSTT had an exclusive licence in relation to its fixed network and its mobile network. The government of T&T had initiated the liberalisation process in 1999 but, for various reasons, liberalisation did not proceed smoothly from that date.

23. T&T passed the Telecommunications Act 2001 to provide for liberalisation of the telecommunications market. The 2001 Act came into force piecemeal. Section 85 of the 2001 Act dealt with repeal of earlier legislation and transitional provisions; this section came into force on 30th June 2004. The precise point at which liberalisation would happen was not clear in 2004 and 2005. Eventually, on 10th August 2005, the relevant minister in T&T wrote to TSTT clarifying the position. The letter stated that in accordance with section 85(9) of the 2001 Act, the period within which all the rights and obligations, afforded to TSTT under the Trinidad and Tobago Telephone Act, remained in force was extended to 31st December 2005, "or until such time as a concession is granted to TSTT, whichever is earlier". The letter went on to provide that in accordance with section 85(3) of the 2001 Act, the period for which licences issued under the Wireless Telegraphy Ordinance remained in force was extended to 31st December 2005. The first part of this letter dealt with domestic telephone services in T&T; the second part of the letter dealt with the provision of international telephone services. As regards domestic telephone services the letter did not guarantee that TSTT would enjoy exclusive rights until 31st December 2005. It was possible that in the period between 10th August 2005 and 31st December 2005, the relevant minister might grant a concession to TSTT under the 2001 Act. The concession would be a non-exclusive right to provide telecommunication services and the earlier exclusive right would come to an end. In fact, the concession to TSTT was granted on 31st December 2005. Also on 31st December 2005, Digicel T&T obtained its concession in T&T.

24. The only claim made by Digicel T&T of a breach of duty on the part of TSTT is an allegation that TSTT committed an act or practice which was "contrary to honest practices", in contravention of section 4 of the Protection Against Unfair Competition Act 1996 (PAUCA). However, it is relevant to know what rights and obligations, if any, in relation to interconnection, TSTT had under the 2001 Act and its concession of 31st December 2005.

25. Part III of the 2001 Act dealt with concessions. By section 22(1)(b) it was provided that every concession would prohibit anti-competitive pricing and other related practices. By section 24(1)(k) it was provided that a concession could require the concessionaire to make available, on a timely basis, to other providers of telecommunications services, certain technical information as to the concessionaire's network.

26. Section 25 of the 2001 Act dealt with interconnection. It provided that a concession should include conditions obliging the concessionaire to provide for direct interconnection with the network of another concessionaire: see section 25(1)(a). Section 25(2) provided that the regulator would require a concessionaire to comply with a number of specified matters in relation to interconnection. When one turns to the concession granted to TSTT, one sees many of these matters provided for in the concession. The point to note at this stage is that the obligations as to interconnection are imposed by the concession and are not imposed by the 2001 Act.

27. As stated above, a concession was granted to TSTT on 31st December 2005. I have referred above to the terms of clauses A21 and A22 dealing with anti-competitive conduct and clause B17 dealing with interconnection. Clause B18 required the concessionaire to comply with the terms and conditions set out in schedule H to the concession. I have also referred above to the terms of, and the operation of, the interconnection guidelines in Schedule H. The obligations imposed by TSTT's concession did not arise until that concession was granted and that only occurred on 31st December 2005.

28. In their closing submissions, the Claimants did not allege that TSTT acted in breach of the 2001 Act or of TSTT's concession. Conversely, TSTT stresses that for much of the period relevant in this case, TSTT was not under any obligation whether pursuant to the statute or pursuant to its concession to provide interconnection to Digicel T&T. The Claimants appear to accept that TSTT did not have legal obligations in this respect. The Claimants say that that fact is irrelevant as the Claimants rely on a different statute, which did apply during the relevant period, in particular, the provisions of section 4 of PAUCA.

29. It is correct that the absence of an obligation on TSTT in relation to interconnection imposed by the 2001 Act or by the licence (prior to 31st December 2005) does not prevent the Claimants putting forward any case which they may have based on section 4 of PAUCA. The absence of obligations arising in other ways does not automatically mean that TSTT was free from any obligation under section 4 of PAUCA. However, there is considerable force in the point made by TSTT that when one considers what it did and failed to do, in particular in the period up to 31st December 2005, and when one considers whether TSTT then acted contrary to honest practices, one has to assess that question against a background where TSTT was not under a legal obligation in relation to interconnection but was, as will be seen, reacting to considerable pressure placed upon it to take action to assist Digicel T&T and where the taking of that action was something that TSTT would not otherwise have done on a voluntary basis. I also note in passing that when I consider whether TSTT acted contrary to honest practices in putting forward a project timetable in the period prior to 31st December 2005, to the extent that section 4 of PAUCA restricted TSTT's freedom of action, section 4 of PAUCA also applied to Digicel T&T who also had put forward a timetable for interconnection and who regularly communicated with the government and the regulator putting forward its point of view as to what should be done.

30. In 2004 and 2005, TSTT had no practical experience in dealing with interconnection. TSTT did have personnel who dealt with carrier services but it could see that help would be needed to deal with interconnection, following liberalisation in T&T. TSTT obtained that assistance from CWWI pursuant to a technical services agreement of 7th July 2005. The agreement was expressed to take effect on the 1st May 2005 and to last for eighteen months from that date, subject to termination on earlier notice. Under the agreement

CWWI was required to provide advice and consultancy services, assistance and support to TSTT in relation to certain carrier services matters and certain regulatory matters. The carrier services matters included items such as business support including data analysis and forecasting, co-ordination and advice in respect of negotiations for interconnection with competitive operators, strategic advice on interconnection and assistance in negotiations with new interconnect and wholesale partners including regulatory negotiations as necessary. The services in relation to regulatory matters referred to advice and support in connection with submissions to the regulator and included analysis of economic, legal and competition matters.

31. The individuals within CWWI's carrier services team who became involved in advising and assisting TSTT, in relation to the interconnection process and negotiations with Digicel T&T, were Mr Barnes, Mr McNaughton, Mr Small and Mr Forrest. The other persons at TSTT who were important in the relevant history were Mr Espinal, the CEO, Miss Agard, the Vice President of Legal and Regulatory and Carrier Services, Mr Prescod, who was initially the manager of Regulatory Affairs and later the head of TSTT's carrier services, and Mr Martin, who was appointed Chairman of TSTT on 1st December 2005. Miss Agard had previously been employed in the C&W group in connection with legal and regulatory matters and had been involved in issues as to interconnection with Digicel companies in other jurisdictions. She was seconded to TSTT in December 2004 to assist TSTT in dealing with liberalisation and interconnection issues.

32. There was considerable evidence as to the position, in relation to both commercial and technical matters, in which TSTT found itself in 2005 in the run up to negotiations with Digicel T&T on the subject of interconnection. TSTT's witnesses themselves described this position and the Claimants relied upon this evidence in support of their case as to the drivers of TSTT's conduct at that time.

33. Mr Espinal, the CEO of TSTT, stated that he was appointed in October 2004 because of the imminent liberalisation of the telecommunications market in T&T. His remit was to prepare TSTT for liberalisation. Before his arrival, TSTT was publicly perceived as a poorly run, out of date, government controlled and a government run organisation. TSTT was strongly under the control of the trade unions, who would frequently take action to disrupt the telecommunications service. Service levels were poor and prices were high. TSTT had a confused and over-manned organisational structure with a lack of clear reporting lines and accountability. Mr Espinal thought that the company was wholly unprepared for liberalisation. When he arrived as CEO, Mr Espinal thought that the employees of TSTT did not have the skills and experience necessary to deal with liberalisation. For this reason, he obtained the services of Miss Agard. Miss Agard agreed with Mr Espinal's assessment. She referred to TSTT having the inefficiencies and problems usually associated with an historic state owned monopoly company with powerful unions. She said that TSTT needed time to prepare itself for competition. It was conducting a massive upgrade to its network and launched a new mobile brand, bMobile, in November 2005. Mr Barnes also commented that in 2005, TSTT was not well placed to face competition. TSTT needed to improve its position in a number of respects to enable it to compete effectively against a new entrant such as Digicel T&T. It needed to overhaul its internal arrangements and procedures. It needed to deal with issues as to trade unions and numbers of employees. It needed to improve the public's perception of it. More technically, it needed, or at least wished, to upgrade its fixed network, in

particular by adding a next generation network ("NGN"). Further, it wished to improve significantly its mobile network. Its plans involved expanding the number of cell sites to increase coverage. It wished to add further mobile switches, using GSM technology. One of these switches was planned to be installed and operational in November 2005 and the other by the end of March 2006. This date became a significant date, as will appear. In terms of marketing its services, TSTT wished to increase the number of mobile subscribers before facing competition with a new entrant.

34. The first allegation made by the Claimants against TSTT is that TSTT prepared a project timetable identifying the stages, and the relevant times, for physical interconnection with Digicel T&T. The Claimants say that TSTT's project timetable was deliberately exaggerated to show a period longer than was necessary. TSTT is criticised because, having allegedly exaggerated the timetable, it pretended that the timetable was reasonable. Further, TSTT is criticised because it said to the government and to the regulator that it would try to achieve physical interconnection with Digicel T&T expeditiously, although it had no real intention of doing so, and the preparation of the project timetable was part of its attempt to slow things down, rather than speed them up. It is said that TSTT had no desire to co-operate in a speedy process towards interconnection, but it wanted to give the appearance of doing so. The Claimants say that the combination of these matters amounted to TSTT acting contrary to honest practices. The Claimants say that TSTT's behaviour was dishonest or, at any rate, was sufficiently reprehensible to be a breach of section 4 of PAUCA.

35. Because this case involves an allegation of dishonesty, or of something reprehensible on the part of TSTT, I feel that it is necessary to go through the history of this matter in a little detail to see what was done and why it was done before attempting to form a view as to whether this conduct was contrary to honest practices.

36. On 23rd June 2005, the government in T&T held an auction for spectrum permitting a successful bidder to operate a domestic mobile telecommunications service. There were two bidders for spectrum. They were Digicel T&T and another company called Laqtel. Both bidders were awarded spectrum. On 24th June 2005, Digicel T&T wrote to TSTT referring to section 25 of the 2001 Act and requesting interconnection with TSTT. The letter included a traffic forecast for a twelve month period.

37. On 28th June 2005 Miss Agard of TSTT replied that it was premature for TSTT to discuss interconnection with Digicel T&T. Miss Agard explained in her evidence that at that stage, TSTT relied upon its legal position to justify this response. TSTT believed, and still believes, that it was under no obligation in relation to interconnection until it and Digicel T&T had obtained concessions. I have already explained that the obligations as to interconnection which were in due course imposed on TSTT were only effective upon the grant of its concession on 31st December 2005. Miss Agard said that TSTT was not going to rush towards interconnection and competition if it had no legal obligation to do so and that TSTT had no commercial or other incentive to do so.

38. As will be seen, TSTT was forced to change this stance. TSTT did attend a meeting with Digicel T&T and Laqtel on 6th July 2005. Digicel T&T's internal note of that meeting records Digicel T&T's opinion that TSTT was stalling in a number of respects. Digicel T&T decided that it would write to TSTT setting out its understanding of the position and would copy that letter to the regulator. On 8th July 2005, Digicel T&T did write to TSTT

and a copy of the letter was sent to the regulator. Digicel T&T said that there was no legal impediment to commencing interconnection discussions and that it was extremely important to Digicel T&T and to the interests of T&T that those discussions commence.

39. The parties met the regulator on 13th July 2005. The regulator stated that TSTT was wrong in saying it did not have to discuss interconnection before concessions were granted. The regulator contended that TSTT had "a fiduciary duty" in this respect. Digicel T&T's note of this meeting assesses whether the regulator would be likely to apply pressure on TSTT to take steps towards interconnection. At that meeting, the regulator did exert pressure on TSTT to fix another meeting with Digicel T&T and Laqtel. TSTT met Digicel T&T and Laqtel on 18th July 2005. At this meeting, TSTT tried to avoid committing itself to starting the process of interconnection.

40. On 20th July 2005, Digicel T&T sent to TSTT a second request for interconnection, again attaching a traffic forecast for one year. The request also included a timetable for completing contractual interconnection and physical interconnection. That timetable showed contractual interconnection being achieved by 29th August 2005 and physical interconnection being completed so that service could commence on 26th September 2005.

41. There was a further meeting between TSTT and Digicel T&T on 22nd July 2005. Digicel T&T's internal note of this meeting is critical of the non-committal behaviour of TSTT.

42. Mr McNaughton asked Mr Barnes to comment on the technical part of the timetable which had been provided by Digicel T&T. On 25th July 2005, Mr Barnes gave his comments. He suggested that the timescale for technical interconnection was "completely unrealistic". He then referred to a number of technical matters. He referred to the need to have an upgrade to the trunking capacity on the TSTT NGN. He said he could guarantee that the switching/transmission equipment could not be in place on the TSTT network and commissioned before the end of October 2005, at the very earliest. He thought one was dealing with a completion date of the second week of November, at the earliest. He said that a quote from Nortel for the necessary equipment would take at least two weeks to complete and it was more likely that it would take four weeks to complete. The ready for service date could not be any earlier than early December. He regarded the fact that TSTT was installing and commissioning the NGN as further complicating the issue. He thought it would be difficult to manage a change of the scope involved in the Digicel interconnection "without major problems". He said that the standard implementation schedule for other interconnection projects, about 20-24 weeks from the request for a quote to a ready for service date, would be appropriate.

43. On 26th July 2005, Mr McNaughton replied to Mr Barnes. He made the comment that TSTT could well benefit from the time needed to sort out regulatory matters to get its house in order "on the interconnect front among others". Mr McNaughton said TSTT needed time to sort out how it was to deal with interconnection. In their closing submissions, the Claimants contended that TSTT did not have a need to sort out its procedures in relation to interconnection. Based on a large number of internal TSTT documents, which I need not list, it is clear that TSTT did need time to resolve issues as to its approach to interconnection. For example, there was a difference of opinion between the CWWI and the TSTT personnel as to the form of any interconnection agreement. However, whilst time may have been needed in that respect, I accept the

Claimants' general point that TSTT wished to have time to make progress on a large number of other fronts, which I have already described, before it found itself in effective competition with Digicel.

44. On 26th July 2005 Digicel T&T wrote a lengthy letter to the regulator expressing its concern about the lack of progress as regards interconnection. On 27th July 2005, Digicel T&T wrote a similar letter to the relevant minister. These letters were highly critical of TSTT. In the letter to the minister, Digicel T&T discussed the role of the authority in relation to negotiations between an incumbent and a new entrant. Digicel T&T said that progress would only occur if the incumbent was compelled to act by the authorities or by public pressure. It was vital for the authorities to play a leading role and to use a high level of pressure to secure progress.

45. On 27th July 2005, there was a board meeting of TSTT. The board was advised that it was not obliged to hold discussions with potential competitors who did not have concessions. There was a presentation by Mr Perai to the board on the NGN project. Mr Perai's presentation recorded that TSTT had engaged Nortel to carry out the NGN project pursuant to a contract of 30th December 2003. The contract provided for a completion date, in relation to phase one of the work, as 31st March 2005 and a completion date, for phase two, of 31st March 2006.

46. On 4th August 2005, TSTT replied to Digicel T&T's letter of 20th July 2005. TSTT explained its stance that it was not obliged to negotiate an interconnection agreement with Digicel T&T. TSTT dealt with a number of other detailed matters which had been raised by Digicel T&T. TSTT turned down a suggestion that Digicel T&T should order the equipment needed for TSTT's side of the interconnection. It also said that Digicel T&T's timetable for interconnection was completely unrealistic.

47. Also on 4th August 2005, there was a meeting between the regulator, Digicel T&T, Laqtel and TSTT. A partial note only of that meeting is available. The note records that the regulator stated that interconnection discussion should begin without delay and the regulator would not tolerate behaviour that would delay the process of liberalisation.

48. On 8th August 2005, TSTT sent to Digicel T&T a draft non-disclosure agreement ("NDA") to govern the negotiations between the parties. It is not necessary to state the detail of what happened in relation to this draft agreement. Digicel T&T objected strongly to one or more terms in the agreement. Digicel T&T involved the regulator with a view to persuading TSTT to vary the draft agreement. TSTT agreed to remove one term which was causing difficulty, but not another. After a long sequence of communications and meetings, Digicel T&T signed the NDA, under protest.

49. On 10th August 2005, Digicel T&T wrote again to TSTT. The letter dealt with the desirability of meetings and of negotiation. In connection with Digicel T&T's timetable for interconnection, Digicel T&T asked TSTT to state what its version of a proper timetable was, rather than TSTT simply rejecting Digicel T&T's timetable.

50. On 10th August 2005, an internal CWWI carrier services email discusses the use of care in preparing minutes of meetings. Mr Forrest of CWWI carrier services stressed the importance of minutes, when matters became the subject of later dispute. He stressed that

TSTT should be aware of the importance of being seen to co-operate, without giving away too much information until the time was right.

51. On 12th August 2005, there was an internal CWWI email discussing a draft of a letter to be sent to the relevant minister in T&T. The email and the draft letter concerned a shareholders' agreement in relation to the shares in TSTT, which had implications for CWWI and for the government of T&T. In the draft letter, CWWI wished to stress that the government needed to re-negotiate the shareholders' agreement as well as to consider the terms of a new concession for TSTT, before concessions were granted to new entrants. In the covering email, Mr McNaughton of carrier services stated that TSTT needed to buy as much time as possible.

52. On 16th August 2005, Digicel T&T wrote to the relevant minister saying that TSTT had been obstructing liberalisation, had not behaved in a reasonable fashion and had abused its monopoly position. Digicel T&T wanted the authorities to make TSTT co-operate with Digicel T&T. Digicel T&T met the relevant minister on 16th August 2005. The regulator attended the meeting. The minister indicated that Digicel T&T and TSTT could not be left to reach agreement without some form of intervention.

53. On 17th August 2005, there was an internal CWWI carrier services email which referred to the strategy to be adopted in connection with interconnection with Digicel T&T. The email referred to "the obvious constraints of TSTT not wanting to appear anything less than co-operative". The email seemed to welcome the fact that Digicel T&T had cancelled a meeting with TSTT because Digicel T&T was not prepared to sign the draft NDA.

54. On 18th August 2005, there was a meeting between the regulator, Laqtel, Digicel T&T and TSTT. The meeting principally concerned the draft NDA. On 19th August 2005, Digicel T&T wrote to the relevant minister pointing out the difficulty caused to Digicel T&T, by reason of the fact it had not been granted a concession.

55. On 19th August 2005, there was an internal CWWI carrier services email referring to the strategy to be adopted in relation to negotiations with Digicel T&T. Mr McNaughton referred to a number of parts of the strategy. One part was that there should be no negotiations without a signed NDA. Another was that TSTT would only pursue physical interconnection once concessions had been granted and, indeed, once the government of T&T had made regulations governing interconnection.

56. On 22nd August 2005, Digicel T&T wrote to TSTT stating that Digicel T&T would extremely reluctantly sign the NDA. This was said to be conditional on TSTT providing a timetable for interconnection. The timetable was to be provided within a few days and was to provide for an end date in mid-October for the completion of all aspects of interconnection. Digicel T&T signed the NDA on 30th August 2005.

57. On 31st August 2005, Mr Barnes sent an indicative timescale for interconnection to Mr Morris of carrier services within TSTT. Mr Barnes referred to an intended discussion of this timescale with Mr Morris the following week. The document was described as "an indicative timeline". Mr Barnes stated that he needed to validate some of the periods "for the TSTT environment" when he met with the technology heads of department in TSTT. Mr Barnes referred to the need to defend timelines with the regulator. He added that

Digicel always quoted "wildly unrealistic timescales" but that, unfortunately, regulators were often impressed by them. Mr Barnes then sent a two page narrative timetable. The total time stated at the end of the narrative was 25 weeks from the start of the timeline. This timetable did not have a period for an evaluation by TSTT of its own network and of the impact on that network of interconnection with Digicel T&T. The timetable showed TSTT issuing a request to Nortel for a quotation for optical line terminating equipment ("OLTE"). The timetable referred to TSTT developing a business case in relation to the expenditure involved, followed by such business case being approved and the equipment being ordered. The delivery time for the OLTE was given as a standard 8-12 weeks.

58. On 1st September 2005, Miss Agard of TSTT told Digicel T&T that TSTT was working on a detailed project plan. Also on 1st September 2005, Mr Morris of carrier services in TSTT replied to Mr Barnes referring to the indicative timescale and saying that "we" had done some work on the timetable. The reference to "we" is a reference to personnel in TSTT.

59. On 2nd September 2005, Mr Barnes sent an internal email to CWWI carrier services. He referred to the fact that Digicel T&T and Laqtel had prepared project plans which had been sent to the regulator. Mr Barnes felt that TSTT probably needed to offer its own indicative timescale but not be bound to any particular start date. The reference to the absence of a start date was consistent with TSTT's position that it had not come under any legal obligation by that time to start the process of physical interconnection. On the same day, Mr McNaughton replied to Mr Barnes stating "this thing is going down hill real fast". Mr McNaughton was not pleased that TSTT was being forced into negotiations on interconnection before the grant of the concession under the 2001 Act.

60. On 5th September 2005, Mr O'Brien, the Chairman of Digicel T&T, wrote to the Prime Minister of T&T. He referred to TSTT's continued obstruction of the interconnection process. He asked the Prime Minister to "intervene with TSTT".

61. By 5th September 2005, meetings between TSTT and Laqtel on the one hand and Digicel T&T on the other had been arranged. The intended meeting with Digicel T&T was set for 9th September 2005. Mr Barnes asked Mr McNaughton what his role should be in these meetings. Mr McNaughton replied on 5th September 2005 telling Mr Barnes that he should take the lead in the meeting in relation to the project plan on interconnection.

62. On 6th September 2005, there was a meeting between the regulator, Digicel T&T, TSTT and Laqtel. The meeting was attended by the Chairman and the Executive Director of the regulator. TSTT's project plan for interconnection was discussed, although no copy was provided for that meeting.

63. On 6th September 2005, an internal email within Digicel T&T referred to the author drafting documents on the basis that the matter could end up in court and the documents would then be considered.

64. On 7th September 2005, there is an internal Digicel T&T email concerning periods which had been estimated for Digicel T&T by Nortel. The email explains that Digicel T&T had gone to Nortel to get proof that TSTT could obtain the interconnection equipment it needed quickly. Digicel T&T's engineers had indicated about 8 weeks for delivery of this equipment. Unfortunately for Digicel T&T, the answer from Nortel was that the

equipment lead time was 12 weeks from receipt of the purchase order. Digicel T&T recognised that this document showed the opposite of what it wanted.

65. In early September 2005, Mr Barnes met various technical people in TSTT. In his witness statement he referred to meeting "the relevant people", including Mr Legall. He said that they worked on producing an indicative timeline for interconnection. He described this timeline as their reasonable estimate as to how long it would take to complete physical interconnection. He referred to an email of 7th September 2005 to Miss Agard and Mr Espinal. He thought there was some scope for improvement in the timeline but he did not see that it could be reduced to much less than 40 weeks in total. One reason for this was that the task of conducting interconnection in T&T was of a different order of magnitude to the interconnections that he had conducted in other jurisdictions. In particular, there was a need for significant expansion of the capacity of the network to accommodate the traffic of new entrants and this was complicated by the fact that TSTT was conducting its upgrade to the NGN. Mr Barnes was cross-examined in great detail about the meeting he had with the technical people in TSTT at this stage. I will refer in due course to the timeline which they produced. He gave the names of other technical people in TSTT whom he had met. He stated that he met a Mr Perai at a time which was later than his meeting with the heads of department. The revised timetable was worked out at the meeting with the heads of department. He met them for a period of 3 or 4 hours in one day. He conducted a question and answer session trying to build an idea of what logistical challenges there might have been in T&T. He adjusted his timetable based on input from the heads of department. It did not necessarily reflect his own views. The resulting timetable identified a period to interconnection of 49.2 weeks. He was surprised at how long this period was. He thought that the personnel in TSTT did not work as efficiently as C&W companies did. The period was based on historical benchmarks TSTT used to assess the length of a project. He challenged their assertions but they were firm in insisting that the timeframes were realistic. The new timetable included an item for an evaluation exercise of the existing network. Periods of 4 to 6 weeks or 6 weeks were stated. The heads of department felt strongly that they needed time to assess the impact on their network of Digicel T&T's and Laqtel's traffic expectations. Although the heads of department thought this time was vital, Mr Barnes did not himself share that view. He also thought that if this work was needed it could be done in parallel with other activities rather than being a pre-condition to other steps being taken. He was asked about various other periods in the resulting timeline and agreed that they did not all accord with his own independent view. He was asked about the stages in the timeline dealing with the internal process in TSTT authorising capital expenditure. Mr Barnes said that the heads of department insisted that these steps were necessary as part of TSTT's internal governance.

66. On 7th September 2005, following Mr Barnes' meetings with TSTT's heads of department, Mr Morris of TSTT sent a draft timetable to Miss Agard and Mr Espinal. This timetable showed a period of 49.2 weeks. An accompanying explanatory note was based on the original timeline prepared by Mr Barnes which showed 25 weeks but had not had been significantly amended. The second item in the new timeline referred to an evaluation being carried out to the TSTT network to assess the demands being made of that network upon interconnection. This was estimated to take 4 to 6 weeks in the text and it was shown in an accompanying Gantt chart as taking 6 weeks. I will not itemise all of the changes from the original 25 weeks, to arrive at a total of 49.2 weeks, but I will refer to some of the more important ones. The timetable provided for a business case

development, followed by business case approval and then for something called a "tender process". This contemplated that, following approval of a business case, there would be an internal tender process in relation to all equipment, materials and services required from external vendors. This tender process was to take 6 weeks. The delivery time for equipment from Nortel was given as 16 weeks, including clearance of customs.

67. Mr Barnes emailed Mr Morris, Mr Espinal, Miss Agard and others in connection with this 49 week timetable. He said that although the timescale was surprising it had been extensively discussed with the heads of departments and had been validated as being realistic by them. He compared the timetable with the time taken, for example, in Barbados and Cayman. He suggested that one reason for the lengthy timetable in TSTT was the total time taken to approve capital expenditure. He suggested that if this part of the timetable could be reduced then the plan might become more palatable for the regulator. He also suggested other ways in which the time could be reduced but he did not think that it could be reduced to much less than 40 weeks even if the capital approval process was fast tracked.

68. On 7th September 2005, Mr Espinal considered the draft timetable of 49.2 weeks. He emailed Miss Agard, Mr Morris and Mr Barnes amongst others, making two observations. The first was that he wished to link the schedule of events with the grant of concessions by the government of T&T. He said this was because TSTT needed to enter into commitments in order to order some equipment. He then said: "the overall completion of interconnection should be completed sometime at the end of March 2006 or 3 months after signing the interconnection agreements (right after the issuance of Concessions), whichever occurs last…" . Mr Espinal's second comment referred to the point of interconnection.

69. There was a detailed investigation at the trial of what had led Mr Espinal to refer to completion of interconnection "at the end of March 2006". Mr Espinal explained that he arrived at the date of end of March 2006 by assuming that concessions were granted at the end of December 2005, that interconnection agreements were immediately entered into and it took 3 months to interconnect pursuant to those agreements. Three months is about 17 or 18 weeks. That would seem to involve equipment being ordered soon after the parties had entered into an interconnection agreement. Mr Espinal must therefore have been contemplating that the earlier stages of the project timetable would take place before the parties obtained concessions and had signed an interconnection agreement. It was pointed out to Mr Espinal that his email referred to completion of interconnection at the end of March 2006, or 3 months after an interconnection agreement, whichever was the later. It was also said that if a concession were granted long before 31st December 2005 and an interconnection agreement entered into before that date, and if interconnection only took 3 months thereafter, a reference to interconnection being completed at the end of March 2006, which would therefore be the later date, showed a desire to hold up interconnection.

70. I find that Mr Espinal did try to assess the date at which interconnection might take place in T&T. It is clear from his own evidence and the background matters to which I have referred, that Mr Espinal did not want interconnection to take place as soon as possible. The idea of only ordering equipment following the signature of an interconnection agreement suggests that Mr Espinal wanted to put back the date for interconnection, rather than achieve the earliest possible date. I find that one reason why Mr Espinal

mentioned the date of the end of March 2006 was that he assessed that concessions were unlikely until late 2005 and if concessions were followed by an interconnection agreement and then followed by the ordering and installation of equipment, the end of March 2006 was a realistic date for completion of interconnection. The reason he referred to a possible later date was that if interconnection agreements were not entered into at the end of 2005, then completion of interconnection could be later than the end of March 2006. I also find that Mr Espinal regarded as unlikely the idea that there would be concessions before 31st December 2005 coupled with interconnection agreements before the end of 2005 leading to interconnection much before end March 2006. It was put to Mr Espinal that the date of end March 2006 was exclusively connected with the date for completion of phase 2 of the NGN works. It was also put to Mr Espinal that he was determined to hold up completion of interconnection, come what may, until the end of March 2006. In my judgment, it is likely that Mr Espinal thought about the stage which TSTT would have reached in relation to the NGN, and probably other matters which were underway, so as to assess the impact on TSTT of interconnection at the end of March 2006. However, I do not find that the completion of phase 2 of the NGN work was the principal driver which led to Mr Espinal referring to the end of March 2006 in his email.

71. On 7th March 2005, Mr Barnes commented on Mr Espinal's earlier email. He thought that there were some "bizarre" things happening with the interconnection discussions.

72. Mr Barnes met Mr Espinal and Miss Agard on 8th September 2005. They amended the earlier timetable which showed 49.2 weeks. The new timetable had explanatory text which referred to 33 weeks. The new timetable included a Gantt chart which showed a period of 32.6 weeks. Many of the individual periods in the timetable of 49.2 weeks had been changed to produce the new period of 33 weeks, or so. The requirement that there be a period for evaluation of the TSTT network, and that this work be done before the later stages in the timetable were progressed, was maintained in the new timetable, although the period of 4 to 6 weeks was changed to 3 weeks. The 33 week timetable included stages for the development of a business case, the approval of that business case followed by a tender process. The time for these three stages was 6 weeks and the tender process was to take 4 of those 6 weeks. The time for delivery of the equipment ordered from Nortel, or other relevant vendors, was 16 weeks. The timetable showed the interconnection being ready for service on 26th April 2006.

73. On 8th September 2005, Mr Barnes sent an email to Mr McNaughton, referring to the new timetable and his meeting that day with Miss Agard and Mr Espinal. Mr Barnes referred to Mr Espinal insisting on two additional milestones for the project plan. The first was a requirement that the new entrant should provide a financial commitment of some kind before equipment was ordered. The second was that there should be signed interconnection agreements before the interconnection was tested. Mr Barnes also referred to other suggestions from Mr Espinal. These related to payment for one year's interconnection service in advance and the question as to who should provide fibre for the joining service of the two switch sites.

74. Mr Barnes referred to this meeting with Mr Espinal and Miss Agard in his witness statement. He said that a period of 33 weeks was "our" best realistic estimate at the time. The period had been reduced as far as was thought to be possible. Mr Barnes was cross-examined in detail about this evidence. It was put to Mr Barnes that the persons at the meeting on 8th September 2005 went through the timetable to end up with a ready for

service date later than 31st March 2006. Mr Barnes agreed that this "was [Mr Espinal's] stated objective". He also agreed that the period in the timetable was to be one which could be defended in front of the regulator. He agreed that completion in late April 2006 was in line with Mr Espinal's expectations. Mr Barnes agreed there were no other technical experts at the meeting on 8th September 2005. He said that the changes were principally at the suggestion of Mr Espinal. Mr Barnes agreed that the evaluation of the existing network was in his view unnecessary. Mr Barnes was not fully conversant with the procedures within TSTT as to tendering works. It was put to Mr Barnes that a 33 week period was longer than he would have expected to see. He replied that because of the added complexity of the work in relation to the NGN, it would be reasonable to expect a period longer that the standard 20 to 25 weeks. He did not agree that 33 weeks was "ridiculous". He said that the persons at the meeting on 8th September 2005 did not choose a date and work backwards from that date.

75. Mr Espinal was cross-examined about his reaction to the timetable showing 49.2 weeks and about the meeting on 8th September 2005. Mr Espinal thought a timetable of 49.2 weeks was absurd. He knew the government and the regulator would not agree such a timetable. Mr Espinal gave detailed evidence that he discussed the timetable with Mr Perai before he had a meeting with Miss Agard and Mr Barnes on 8th September 2005. This evidence is neither corroborated nor contradicted by the documents. The Claimants made a sustained attack on Mr Espinal and asked me to disbelieve this evidence. It is not necessary for me to make a finding on this point and I do not do so. Mr Espinal decided at the meeting on 8th September 2005 to direct reductions in the periods of time used in the project plan. Whether the period of 49.2 weeks was supported by TSTT's technical advisors, or not, it was clear to Mr Espinal that that period would be politically unacceptable and he made reductions. It was suggested to him that these reductions were wholly arbitrary. Mr Espinal replied that he had negotiated the reductions with Mr Perai. In my judgment, whether or not Mr Espinal discussed the 49 week period with Mr Perai, Mr Espinal's principal reason for reducing the 49 week period to a 33 week period was that he could see that a 49 week period would be politically unacceptable and counter-productive for TSTT and, somehow or other, he had to produce a reduced period. To that extent, the process had an element of arbitrariness in it. It might be said that the process was entirely pragmatic to deal with the pressure on TSTT from the government and the regulator.

76. Mr Espinal was asked about the period for the evaluation of the TSTT network. Mr Barnes told Mr Espinal at the meeting on 8th September 2005 that he did not support that item in the plan. It was said that Mr Barnes "complained about the item". Mr Espinal said he was not now clear what precisely Mr Barnes had said. Mr Espinal said that he believed an evaluation was a proper requirement. He gave evidence of difficulties with the TSTT network leading to him being very concerned about the addition of extra traffic on the network. He said this view was shared by the technical team in TSTT. He did not think the evaluation could be done in parallel with other stages in the process. He said TSTT needed to complete the evaluation to know what equipment to order. The decision to change the periods for the business case development and approval were made by Mr Espinal. He explained why a tender process was necessary. He referred to a requirement from the Minister of Finance that TSTT had to tender every purchase in excess of T&T $160,000. The government imposed this regulation for reasons of transparency and to avoid fraud or malpractice.

77. TSTT met Digicel T&T on 9th September 2005. TSTT presented Digicel T&T with the project plan and timetable. Digicel T&T presented TSTT with its proposed project plan. My attention was not specifically drawn to the Digicel T&T project plan. Digicel T&T raised various questions on the TSTT project plan. It referred to the reference to a tender process. It asked for clarification on TSTT's NGN expansion. It referred to the possibility of interconnection with TSTT's mobile network or the legacy network instead of the NGN. TSTT answered that the time required to identify the expanded resource requirement of the network (i.e. the evaluation stage) would not change even if interconnection was to the legacy network. Mr Barnes gave evidence that he took the lead at the meeting in dealing with the technical matters in the project plan. Miss Agard dealt with matters such as internal approvals and she dealt with the commercial issues.

78. Mr Barnes was cross-examined about the role he played at this meeting. He had earlier been cross-examined about some of the stages in this project plan and the earlier 49 week project plan when he indicated the extent to which he agreed and the extent to which he did not agree with the project plan. He explained that at the meeting on 9th September 2005 he was defending TSTT's position by reference to the timetable. It was put to him: "that was obviously your job"; he agreed with that proposition. He was putting forward the timetable whether or not he agreed with it. He indicated some respects in which he did not agree with individual stages in the timetable. He stated that the TSTT technology team felt fairly strongly that an evaluation task of the network should be carried out and it should be carried out at the beginning of the process.

79. Following this meeting, TSTT sent the 33 week project plan to Digicel T&T. It also sent a copy to the regulator. On 12th September 2005, Mr Barnes sent an email to Mr McNaughton. He said that the meeting with Digicel T&T on 9th September 2005 had gone well. He thought that TSTT had done a good job of defending the plan. He then referred to Digicel T&T's proposed switch site. He thought that the intended switch site might "buy TSTT even more time".

80. On 12th September 2005, Digicel T&T wrote to the regulator. They referred to TSTT's timetable for interconnection having an end date of mid-May 2006. That was incorrect. The timetable for interconnection showed an end date of 26th April 2006. There was a further timetable, dealing with the subject of billing, which showed an end date of 19th May 2006. Digicel T&T said that it had suffered over 10 weeks of delaying tactics from TSTT. It said that TSTT's timetable made "a complete mockery" of TSTT's contention that it supports liberalisation. Digicel T&T said that physical interconnection took no more than two months to complete. Digicel T&T said that notwithstanding the fact that Nortel had given it a lead time of 12 weeks for delivery of equipment. Digicel T&T stressed the need for the government and the regulator to put pressure on TSTT to drastically reduce the timeline for interconnection. Digicel T&T said that TSTT's timetable was an affront to all supporters of liberalisation and requested an urgent meeting with the regulator.

81. On 13th September 2005, the regulator telephoned Digicel T&T. The regulator said that TSTT's 32 week schedule was "ludicrous" and that it would not be tolerated. It is not clear what technical information the regulator had to form a view about the technical matters in the timetable. The regulator stated he was going to get delivery dates from Nortel. The regulator said that he would meet Digicel T&T that week and with Mr O'Brien, the Chief Executive of Digicel T&T the week after. The regulator indicated that

Digicel T&T would have interconnection by December. There was then a telephone call between Digicel T&T and the chairman of the regulator. The regulator said there was huge political will in favour of early liberalisation. The regulator met Digicel T&T on 12th September 2005. He said he would propose to TSTT what the regulator regarded as a reasonable timetable.

82. On 13th September 2005, there were internal Digicel emails referring to the fact that Nortel had quoted 12 to 16 weeks for delivery of equipment in T&T. On 13th September 2005, Digicel T&T emailed the regulator stating that delivery periods from Nortel were not reliable as TSTT was a major customer for Nortel.

83. On 15th September 2005, Digicel T&T wrote to TSTT. Digicel T&T said that the timeline for interconnection should be 6 to 8 weeks. The letter attached a revised version of TSTT's project plan showing a period of 8.6 weeks. Digicel T&T added further comments. The first was that an evaluation period, if any was necessary, should be in parallel with other work. The second was that the 16 weeks for equipment delivery should be shortened to 5 weeks or 6 at most.

84. On 14th September 2005, Mr Prescod of TSTT sent an email within TSTT. He identified certain questions arising on the timetable which needed to be addressed. Mr Barnes commented on this email on 15th September 2005. He referred to the evaluation period and the project plan. He said that he had had a concern about this period "from the beginning". He referred to the timelines having been "specified" by Mr Espinal. He said that the evaluation work must be completed before the end of September 2005. Mr Morris also commented on 15th September 2005 that he would like to see this task completed as soon as possible.

85. On 14th and 15th September 2005, there were emails between TSTT and a Mr Davy of Nortel. TSTT asked Nortel to provide standard delivery times for the relevant equipment. Mr Davy replied on 15th September 2005 that the standard delivery interval for most transport and switching equipment was 12 to 16 weeks, under normal situations. He then referred to the recent Hurricane Katrina, suggesting that delivery intervals might be extended by another 2 to 3 weeks if an order were placed at that stage.

86. On 16th September 2005, there was a meeting between the regulator and TSTT. The note of the meeting records a large number of points being raised by the regulator. A summary note at the end of the minute refers to the meeting being extremely fiery, full of accusations, insults and pointing fingers by the regulator. The minute contains a number of action items at the end. TSTT was to provide information in certain respects. TSTT was to consider going into "emergency mode" to effect interconnection.

87. This meeting was followed by a number of internal emails within CWWI carrier services and TSTT commenting upon the various points raised by the regulator and seeking to defend the position of TSTT. On 17th September 2005, Mr McNaughton sent an email to Mr Barnes saying that the regulator wished TSTT to place its own legitimate business on hold at its own cost in order to secure interconnection. Mr Prescod of TSTT commented on 18th September 2005 that an attempt to arrange interconnection before the end of 2005 should not be at the expense of TSTT's own interests. Mr Barnes commented that the regulator was openly biased and insensitive to TSTT's concerns about inefficiency and wasteful costs.

88. On 19th September 2005, the regulator wrote to TSTT. The regulator stated that the timetable was too much concerned with TSTT's internal requirements and did not reflect any effort on the part of TSTT to deal with interconnection expeditiously. The regulator asked TSTT to deal with certain matters accordingly. Also on 19th September 2005, Digicel T&T wrote to the regulator complaining of TSTT's "blatant obstruction". It said that TSTT was not acting in good faith.

89. On 20th September 2005, TSTT replied to Digicel T&T's letter of 15th September 2005. The letter contained a discussion of detailed technical matters which included the question of ordering equipment, re-engineering the TSTT network, delivery times and the billing system. TSTT stated that it was firm that its timeframe was reasonable. The letter also took issue with Digicel T&T's statement that TSTT was not acting in the spirit of liberalisation. TSTT said that unlike incumbent operators in many parts of the world, it had agreed to without prejudice discussions prior to the award of concessions and this was all happening in the absence of any legal obligation to do so.

90. On 20th September 2005, there was a meeting between the regulator, Digicel T&T, Laqtel and TSTT. The regulator stated that it had a duty and an authority to require the parties to interconnect. The regulator then required the parties to achieve commercial and technical interconnection by 30th November 2005. This requirement would be communicated in writing and the date could not be amended without the agreement of all parties.

91. On 21st September 2005, Digicel T&T sent to TSTT a traffic forecast for 3 years which had been requested earlier by TSTT. TSTT's reason for the request was that it wished to have this forecast for the purpose of assessing the demands that would be placed on its network. Digicel T&T sent the forecast in order to assist with expediting the process of interconnection.

92. On 22nd September 2005, the regulator wrote to TSTT referring to the earlier meeting on 20th September 2005. The regulator stated it was obliged to set a deadline for interconnection of 30th November 2005. This deadline was said to be "the outer date" by which interconnection agreements should be finalised and all equipment ordered, installed and made ready for actual interconnection.

93. I will defer considering the Claimants' allegations in relation to TSTT's various project timetables until I have completed my recital of all of the facts which are relevant to all of the allegations made in relation to T&T. Nonetheless, it is useful at this point to summarise how matters developed later in respect of a number of the stages in the project timetable. TSTT did carry out an evaluation of its network. TSTT did request a quote for equipment to be provided by Nortel. TSTT did approve expenditure on that equipment and the equipment was ordered. TSTT waived the requirement for a tender process.

94. On 21st September 2005, there was a meeting between the parties to discuss the timetable for interconnection. Digicel T&T's note of this meeting recorded that TSTT tried to link the ordering of interconnection equipment with the ordering of the equipment that it claimed that it needed for an upgrade and expansion of the network. The parties discussed the date of 30th November 2005 stated by the regulator the previous day. Digicel T&T called this a "deadline". TSTT called this "a recommendation". Digicel T&T noted that TSTT seemed unconcerned about complying with the date of 30th November 2005 for

completion of interconnection. In particular, TSTT told Digicel T&T that it had not received any instructions from its CEO to enable interconnection services to start by 30th November 2005.

95. On 21st September 2005, the CEO of TSTT, Mr Espinal, sent an email to Mr Davy of Nortel. The sending of this email led eventually to Mr Davy writing to Mr Espinal of TSTT on 3rd October 2005. This pair of communications is at the centre of the next allegation, put forward by the Claimants, that TSTT acted contrary to honest practices, in relation to the period from 21st September 2005 to 3rd October 2005. In particular, the Claimants say that TSTT in that period brought influence to bear on Nortel not only to write the letter of 3rd October 2005 but also, more generally, to cause deliberate delay in the provision of the equipment needed by TSTT for its side of the interconnection with Digicel T&T.

96. In order to assess this case based on the sending of the email of 21st September 2005, and all that followed it, it is necessary to place the email in context and to say something about the relationship of TSTT with Nortel. There was evidence from various witnesses about the nature of that relationship. In addition, considerable light has been thrown on that relationship by documents which were produced by Nortel in this litigation. These documents show that TSTT had had technical problems with Nortel in the period before September 2005. There were crashes or "outages" in relation to the Nortel system installed for TSTT. A Nortel email of 6th July 2005 recorded that TSTT had made a request for US $5.65million as compensation. Nortel felt that this claim was exaggerated but the email recorded that the relationship between Nortel and TSTT was very important to Nortel so that Nortel should attempt to do "what is right". The email came from a Mr Holden in Nortel and was sent to Ms Bejar, Mr Taylor and Mr Davy, all of Nortel.

97. On 7th July 2005, an internal Nortel email shows that Mr Espinal of TSTT had telephoned Mr Davy of Nortel. Mr Davy was a salesman for Nortel. His only customer was TSTT. He regarded himself as a go-between in relation to Nortel and TSTT. He saw himself as TSTT's voice within Nortel. Mr Davy was paid commission by reference to the amount of the sales he made to TSTT. In the conversation on 7th July 2005, Mr Espinal protested at what he saw was a conflict of interest on the part of Nortel, because a Mr Richard Nixon of Nortel was present at a meeting between TSTT and Laqtel. Laqtel was, along with Digicel T&T, an intending new entrant into the T&T telecommunications market. Mr Espinal was concerned that Mr Nixon's involvement on behalf of Laqtel would lead to a conflict of interest within Nortel.

98. On 11th July 2005, an internal email within Nortel stressed the importance of TSTT as a customer to Nortel and the importance of the project which Nortel was carrying out on behalf of TSTT. This email was copied to Mr Taylor and Mr Davy, amongst others. An internal Nortel email of 7th August 2005 sent to Mr Taylor amongst others, and copied to Mr Davy, throws further light on the relationship at that time between TSTT and Nortel. TSTT had expressed "extreme dissatisfaction" and "serious concerns" as regards Nortel's support in meeting timetables for completion of the project it was handling for TSTT. The email records that TSTT had requested Nortel to "support aggressively" TSTT in view of the fact that Digicel T&T was entering the T&T market.

99. In September 2005, Mr Morris of TSTT requested information from Mr Davy of Nortel as to the likely lead times for manufactoring and delivery of certain equipment needed in

connection with interconnection. Mr Morris had plainly been in touch with Mr Davy before the 6th September 2005 and sent an email on 6th September 2005 referring to a possible lead time of 16 weeks. Mr Davy forwarded this request within Nortel asking Nortel to confirm "the standard delivery intervals". On 14th September 2005, Mr Morris contacted Mr Davy again telling him that TSTT was meeting the regulator and wanted Nortel's help to support the indications as to time given by TSTT to the regulator. It was against that background that on 15th September 2005, Mr Davy gave a standard delivery time of 12 to 16 weeks but stressed that recent hurricanes in the region had led to an increase in orders, which might cause a delay in those delivery times.

100. On 15th September 2005, Mr Seecheran of the regulator in T&T contacted Nortel asking for Nortel's estimate as to the time for delivery of interconnection equipment. Mr Nixon of Nortel recognised the need for Nortel to be consistent in the various messages which were given by Nortel to TSTT, or to the regulator, or to Laqtel. The position was further complicated because Digicel T&T had earlier placed an order with Nortel for the MUX needed by Digicel T&T. By 16th September 2005, Digicel T&T was chasing Nortel for a delivery date and indeed for an estimated delivery date to be brought forward.

101. On 17th September 2005, Mr Espinal sent an email to Mr Davy, copied to Ms Bejar. The email concerned failures in the TSTT GSM network. The email referred to a conference call with Mr Espinal in which Mr Davy and Ms Bejar were involved. Mr Espinal blamed Nortel for the problems. He suggested that if the problems continued there would be obvious difficulties between Nortel and TSTT. Mr Davy expressed his exasperation within Nortel on 17th September 2005 and Mr Holden replied on the same day referring to TSTT as "our best customer".

102. Digicel T&T told Nortel on 20th September 2005 that the regulator in T&T had stated that interconnection must take place by 30th November 2005. On 21st September 2005, there were several emails within Nortel recognising the problem that Nortel was being asked to quote lead time to various persons with competing interests. Nortel was very concerned that it would be caught in the middle of an argument between these various interests.

103. Against this background, Mr Espinal sent his email to Mr Davy on 21st September 2005. The email was copied to Ms Bejar of Nortel and also to Miss Agard and Mr Perai of TSTT. Miss Agard was involved as a legal and regulatory advisor and Mr Perai was head of technology in TSTT. The detailed wording of this email was examined at length at the hearing and it is appropriate for me to set it out in full. It read as follows:

> "Subject: Update on NGN-September 30, 2005
>
> Tony,
> I would like a "professional" report from Nortel on the reference project dated September 30, 2005. I plan to share the same report with our Regulator.
> The report should have sufficient level of detail to explain the current delays to accommodate our second switch and once this is resolved, to be able to facilitate interconnection with our prospective competitors.
> My request is twofold: One of our prospective competitors is saying that they have ordered the equipment from you and that they will be ready by

> mid November 2005. Our Regulator is demanding that we execute interconnection at the end of November, 2005. In addition, we have proposed to our Regulator and to our prospective competitors a timeframe that would allow us to complete the NGN upgrade required for our own network and to accommodate the increased traffic from our competitor in our network. Based on our reading of our current situation, we expect to effectively allow interconnection to take place no earlier than March 30, 2006.
> The issue of the timing is only for your reference and should not in any way pre-empt your response.
> I want to keep the discussion with TATT at a technical level and I do not want Nortel to take sides, just state the facts as they are, without assuming unrealistic delivery times or implementations that are not consistent with our most recent experiences.
> Best regards,
> Carlos".

104. It was the Claimants' case at the trial that this email was intended to be, and was understood by Mr Davy of Nortel to be, a request for a report from Nortel which would support the timeframe for completion of interconnection that TSTT had earlier put to the regulator, and to TSTT's prospective competitors, with a view to influencing the regulator, and "irrespective of whether, as was the case, it would have been possible for Nortel to provide a timeframe for effecting interconnection with TSTT's prospective competitors that was earlier than the end of March 2006": see paragraph 3.43B(d) of the relevant part of the Particulars of Claim in relation to T&T. The Claimants contend that this character of the instruction was to be "implied" from reading the whole of the email. The reference in the email to Nortel not taking sides and just stating the facts was said to be for the sake of appearances, in the event that the regulator subsequently sought to audit the process by which Nortel came to give its report to TSTT.

105. Notwithstanding what the Claimants say about the true character of the email of 21st September 2005, it was not suggested to Mr Espinal or to Mr Davy, both of whom gave evidence at the hearing, that there had been any prior communication between the two of them in which Mr Espinal indicated that he was proposing to send an email for the sake of appearances and where the true request would be for a report supportive of TSTT, even if the true facts did not support such a report.

106. On 22nd September 2005, Mr Davy sent a holding reply to Mr Espinal's request of 21st September 2005. Mr Davy confirmed receipt of the request and stated that Nortel would prepare the document as requested. Also on 22nd September 2005, Mr Davy sent an internal Nortel email offering his views as to the answer which should be given by Nortel to the regulator as to lead times for equipment delivery. He suggested that he should not be involved, or more accurately should not appear to be involved, in the response to the regulator. He suggested that Nortel's response to the regulator should be conservative on delivery intervals. He also recommended that Nortel should be "realistic" when it came to the impact of the recent hurricanes in the area.

107. Also on 22nd September 2005, there were internal Nortel emails discussing standard lead times for certain equipment. The equipment was referred to as optical equipment and work to the NGN, required for an expansion of the network by TSTT, was also involved.

It seems that these times were being computed for the purpose of being sent to the regulator. The emails referred to two schedules, one showing a period of 170 days, and the other showing a period of 185 days. These schedules were discussed within Nortel in an email on 22nd September 2005. A Mr Bulengo, who was in the part of Nortel dealing with Digicel T&T, expressed his views to a number of others in Nortel, dealing with different customers. Mr Bulengo pointed out that other customers had been given a lead time of 12 weeks from receipt of a purchase order, but he did not think that was significantly different from the standard lead times shown in the schedules. He did however ask that the Laqtel order and the Digicel order be checked to make sure that the time lines were more or less in line with the schedules. In addressing Mr Davy in particular, he expressed the view that even if Digicel T&T or Laqtel got their MUXs earlier, TSTT would still have to do a great deal of work in connection with signalling and switch expansion. Mr Bulengo suggested that Nortel might accelerate the timetable for the good of customer relations. Mr Davy recorded his agreement with these views.

108. On 25th September 2005, in an internal Nortel email, Mr Davy asked to see a draft of the response to the regulator. Also on 25th September 2005, Mr Bulengo sent an email to Mr Davy saying: "I am sure you are aware Martha is involved from what I hear Carlos called her about this. We may want to make sure she reviews also before sending forward." That email contains information which is useful in resolving the conflicts of evidence between the parties as to what was happening at this point. Mr Bulengo says in terms that Mr Espinal telephoned Ms Bejar "about this". This reference would seem to be to a statement or possibly various statements to be made by Nortel about delivery times for interconnection equipment and/or upgrades to the NGN. Mr Bulengo's email also assumes that Mr Davy is aware that Ms Bejar was involved in the matter. Based on this email, there had been a telephone call between Mr Espinal and Ms Bejar before, or possibly on, 25th September 2005.

109. There is a considerable conflict of evidence as to whether Mr Espinal did speak to Ms Bejar around this time and, if so, what he said. The Claimants called, as a witness, Mr Kevin Taylor, formerly of Nortel. Mr Taylor was copied into some of the earlier emails, to which I have referred, discussing the state of the relationship between Nortel and TSTT. Mr Taylor voluntarily left Nortel on good terms in April 2008 and later joined Facey Commodity Co Ltd, as Vice President for new business development. He is responsible for expanding Facey's telecommunications business outside its current customer base. A large part of Facey's current telecommunications business consists of sales to Digicel companies. C&W companies are also current customers of Facey but at very much smaller levels of business.

110. Mr Taylor initially gave his evidence by deposition taken in Florida on 18th March 2009. He gave his evidence in chief orally and was cross-examined by counsel instructed by TSTT and was then re-examined. In his evidence in chief on deposition he referred to a telephone call between Ms Bejar and Mr Espinal. He put the date of the telephone call at around the end of September. He assessed that was the date of the telephone call because the telephone call preceded a meeting between Nortel and Digicel T&T in the first week of October, or 10th October 2005. He described his understanding that during the telephone call Mr Espinal asked Ms Bejar to ensure that Nortel delivered what was called "the final solution" no earlier or no later than 31st March 2006. He described how he knew what had been said in the conversation. After the conversation between Ms Bejar and Mr Espinal, he said that Ms Bejar gave him, Mr Taylor, his "marching orders" that

"the equipment" was to be delivered no earlier and no later than 31st March 2006 and that he needed to ensure that "the troops" understood these delivery dates and that all corresponding schedules matched that date. Mr Taylor also gave evidence on deposition that he spoke to Mr Davy shortly after the meeting with Ms Bejar. Mr Taylor told Mr Davy what Ms Bejar had said to him. Mr Davy asked Mr Taylor to support Mr Davy's efforts in that TSTT was an extremely important customer and it was important that Nortel helped TSTT to ensure that TSTT could complete all the necessary upgrades to their network and therefore deliver "the final solution" on 31st March 2006. Mr Taylor explained there were two reasons for this date. The first was that TSTT wanted a robust network to face the new competition. The second reason was that "ironically" March 31st 2006 would have ensured that the Christmas season and the carnival season would have passed. The carnival season in T&T was in early February. Mr Taylor said he was unhappy with Mr Davy's approach, as Mr Taylor thought that the better course for Nortel was to set out to secure business from Digicel. Mr Taylor also said that he felt it was wrong to take the course requested by Mr Espinal.

111. When cross-examined in Florida, Mr Taylor said that Nortel was not misrepresenting the position to the regulator and the minister. He explained his understanding that Nortel had been asked by its customer to deliver on the date of 31st March 2006 and that Nortel took steps to do so and later took steps to improve on that date. He said that the reason that the March 31st 2006 date was set, and then met, was because that was the date TSTT told Nortel in September 2005 that it was to meet. It was put to Mr Taylor that Nortel was doing its best in meeting that date. He said that it was impossible to speculate whether Nortel could have done better because that was the date that Nortel was asked to hit, and so it did hit that date. He referred to possible opportunities to improve on the date. I will refer to that topic later in this judgment. Mr Taylor was asked why he did not refer the matter of Mr Espinal's telephone conversation in September 2005 to the Nortel ethics officer. He failed to see how there was an ethical problem if Nortel delivered a project in accordance with the request of its own customer. That was notwithstanding the fact that he had said earlier, at page 64 of the transcript of the deposition, that he felt that Nortel was doing something wrong.

112. As I understand it, it was initially the Claimants' intention to rely upon the evidence given by Mr Taylor in Florida. However, in the course of the trial, the Claimants decided to call Mr Taylor to give oral evidence at this hearing. Mr Taylor prepared a witness statement, gave evidence in chief in accordance with that witness statement, was cross-examined and re-examined.

113. In his witness statement, Mr Taylor gave further detail as to the conversation between Mr Espinal and Ms Bejar. He placed the conversation as being during the week of 26th September 2005. He explained the circumstances which led to him being present, to hearing some of the conversation, which was in Spanish, and to Ms Bejar explaining to him in English, after the conversation, what had been said. Mr Taylor stated that Ms Bejar told him, in no uncertain terms, that Mr Espinal had instructed her that Nortel should control the interconnection equipment supply process for the Digicel/TSTT interconnection such that the final interconnection solution was completed, no earlier and no later than March 31, 2006. Ms Bejar gave him his "marching orders" (he said those were his words) that the equipment was to be delivered "no earlier and no later" (he said those were her words). Mr Taylor expressed to Ms Bejar his concern that this approach would cause a problem with Digicel T&T who were already concerned about Nortel's

loyalties to TSTT, in relation to interconnection in T&T. This expressed concern did not cause Ms Bejar to change her mind. After the conversation with Ms Bejar, Mr Taylor spoke to Mr Davy. Mr Davy was aware of the call between Mr Espinal and Ms Bejar. Mr Taylor told Mr Davy exactly what had happened. Mr Davy asked Mr Taylor to support Mr Davy's efforts to help TSTT in relation to TSTT's request to Nortel. Mr Davy said it was important that Nortel helped TSTT through the liberalisation process, to ensure that TSTT could complete all necessary upgrades to its network, before interconnection with Digicel took place and competition arrived in T&T. The fact that TSTT's instruction would allow it to capitalise on the lucrative Christmas and carnival season was also discussed.

114. Mr Taylor was cross-examined in detail as to the conversation between Mr Espinal and Ms Bejar and as to the conversation between Mr Taylor and Mr Davy. Mr Taylor repeated his evidence as to the conversation between Mr Espinal and Ms Bejar. Mr Taylor was shown a number of documents in which the predicted timetable for completion of the TSTT work was not 31st March 2006 but was a later date in April 2006. Mr Taylor insisted that everyone in Nortel including Mr Davy, was driving to a date for completion of 31st March 2006.

115. Mr Espinal gave evidence at the trial. In his first witness statement, he referred to his email to Mr Davy of 21st September 2005 and Nortel's response on 3rd October 2005, to which I later refer. Mr Espinal described that the reason he sent his email of 21st September 2005 was that the regulator had insisted on 20th September 2005 on interconnection being complete by the end of November 2005. He explained that he wanted Nortel to put down in writing their views of how long it would take to have interconnection specific equipment ready to enable full interconnection to take place. He wanted Nortel to provide a realistic deadline. He had concerns about the reliability of Nortel by reason of the major project failures in T&T. He was aware that Nortel were undergoing a huge restructuring and he wanted to be sure of Nortel's resources and commitment to TSTT's interconnection project. He explained that he wanted Nortel's independent view as to the delivery timetable because he knew that the minister in T&T had "direct access to the CEO" (i.e of Nortel). Mr Espinal was aware that the interconnection process would be subject to extensive public scrutiny and he wanted a genuinely realistic timetable that Nortel could work to. He gave evidence that he did not exert any influence over Nortel as to the terms of its response and he did not give instructions to anyone to slow down Nortel in any way by means of any phone call or other communication. This witness statement was signed on 19th January 2009, which was before Mr Taylor gave his evidence in Florida.

116. Mr Espinal prepared a second witness statement which dealt with the allegation of a telephone conversation between himself and Ms Bejar. He referred to the allegation of a conversation in which he was said to have instructed Ms Bejar that Nortel should control the interconnection equipment supply process for the Digicel/TSTT interconnection, so that the final interconnection solution would be completed no earlier and no later than 31st March 2006. He denied that he had had any such conversation with Ms Bejar and he stated that he had never told Ms Bejar or anyone else in Nortel to delay delivering the equipment for interconnection to a particular date. He accepted that he had spoken to Ms Bejar on a few occasions but most of these occasions were for the purpose of asking for her support to secure the right resources to address the multiple issues that TSTT had with the design and support of its network. He also rejected the allegation that he had in

anyway persuaded or instructed Mr Davy to write the letter of 3rd October 2005 with a view to delaying interconnection. He denied that he assisted Mr Davy in drafting that letter.

117. When Mr Espinal was cross-examined, Mr Taylor's account of the conversation between Mr Espinal and Ms Bejar was put to him. He stated that he did not recall this conversation. He accepted that it was possible that he did have such a conversation with Ms Bejar. It was put to him that the occurrence of that conversation was consistent with his attitude at the time, which was that interconnection should not be completed until the end of 31st March 2006. He accepted that suggestion. He also accepted that the occurrence of the conversation was consistent with what he had said in his earlier email of 7th September 2005 and also with his email to Mr Davy of 21st September 2005. Although he did not accept that he had "instructed" Ms Bejar in the way alleged, he appeared to accept that it was possible that he may have "requested" Ms Bejar to act that way. He accepted that a request from him might have been interpreted as an instruction by Ms Bejar. He did not accept that he had telephoned Mr Davy during this period to discuss the email of 21st September 2005. It was put to him that he was dragging out or delaying the interconnection process. His response was that the process had not started and so it was not something he could "delay".

118. Mr Davy also gave evidence and was cross-examined. His first witness statement was signed on 4th November 2008 and was available to the parties at the time of Mr Taylor's deposition in Florida. Mr Davy signed a second witness statement on 23rd April 2009. In his second witness statement, he referred to the allegation of a telephone conversation between Mr Espinal and Ms Bejar at the end of September 2005 and the allegation that he had a discussion with Mr Taylor about that conversation. He stated that he was not aware of any such conversation between Mr Espinal and Ms Bejar. He said that no such conversation was ever reported to him. He did not have any conversations to a similar effect with anyone at TSTT. He did not discuss such a request with Mr Taylor. He also suggested that it was most unlikely that Mr Taylor's version of the conversation between Mr Espinal and Ms Bejar was correct.

119. When cross-examined, Mr Davy denied that he had had any conversation with Mr Taylor of the kind alleged. Later, when asked about the probabilities in relation to a conversation between Mr Espinal and Ms Bejar, he appeared to accept that it was "entirely possible" that Mr Espinal might have discussed with Ms Bejar a timetable for delivery of the various projects that Nortel was engaged in and that Mr Espinal did not wish the project to be delayed past a certain date. When it was put to Mr Davy that Mr Espinal might well have said that he as the customer did not wish to have the solution ready before 31st March 2006, Mr Davy suggested that he himself would have agreed with that request from a customer unless a commitment had been given to the government to act otherwise. He was referring to a commitment from Nortel to the government of T&T. It was later pointed out to Mr Davy that any such commitment was somewhat after the time in question.

120. There was also evidence as to the relationship between Mr Taylor and Mr Davy and a contact which occurred between them in August 2008. Mr Taylor gave evidence that he telephoned Mr Davy at that time. They discussed the evidence that Mr Davy was going to give in this litigation. Mr Taylor gave evidence that Mr Davy explained his attitude to

TSTT, to the possibility that he might need a job from TSTT and Mr Davy is alleged to have said: "you know me Kevin; I would sell guns to the Indians".

121. At this point I will make my findings as to the alleged conversation between Mr Espinal and Ms Bejar and the alleged conversation between Mr Taylor and Mr Davy. I essentially accept Mr Taylor's evidence in relation to both conversations. As regards the alleged conversation between Mr Espinal and Ms Bejar, it is clear from the Nortel emails that Mr Espinal had telephoned Ms Bejar at around this time. The discrepancy in the date between the dates suggested by the email and the dates suggested by Mr Taylor does not seem to me to be significant. I hold that the conversation took place after Mr Espinal had sent his email of 21st September 2005. Although Mr Espinal was more ready to accept that the conversation concerned the problems with the network rather than the question of interconnection, the email suggests that the conversation did turn to the question of interconnection, as Mr Taylor has said. Although Mr Espinal initially denied any such conversation, he came very close to admitting that such a conversation did indeed take place when he was cross-examined. I think it is inherently probable that such a conversation did take place, in accordance with Mr Taylor's evidence. Mr Espinal had been given a deadline by the regulator on 20th September 2005. Mr Espinal did not wish to comply with that deadline. He almost immediately emailed Mr Davy to get Nortel's support for his position. In the interval between making his request to Mr Davy and Nortel delivering a response, there was ample opportunity for Mr Espinal to contact Ms Bejar. The matter was sufficiently important to Mr Espinal to make it appropriate for him to approach Ms Bejar to get her, and therefore Nortel, on his side. Mr Espinal would have known that he would be able to exercise influence over Nortel in this respect because of the commercial relationship between the company and the fact that Nortel had let TSTT down in relation to the serious problems with TSTT's network.

122. Mr Davy could not give direct evidence one way or the other as to whether there had been a conversation between Mr Espinal and Ms Bejar. Mr Davy did however take sides on the question of whether such a conversation had taken place by offering explanations as to how improbable such a conversation would have been. I am not persuaded by Mr Davy's arguments. Indeed, the fact that he made those arguments adds to my dissatisfaction with him as a reliable witness of fact.

123. In coming to my conclusion as to the content of the conversation between Mr Espinal and Ms Bejar, it is relatively easy to be persuaded that Mr Espinal said to Ms Bejar that the upgrade to the network and interconnection should be "not before" 31st March 2006. That was Mr Espinal's settled intention in the period running up to his conversation with Ms Bejar. His settled intention in that respect is revealed by his email of 7th September 2005 and his email to Mr Davy of 21st September 2005.

124. I have taken longer to be persuaded that Mr Espinal told Ms Bejar that the network upgrade and interconnection should be "not later than" 31st March 2006. However, such an instruction is not as implausible as it initially appeared to me. First of all, Mr Espinal was identifying a single date for both the network upgrade and for interconnection. Mr Espinal had no reason to believe that Nortel would be able to deliver the network upgrade before 31st March 2006 and he sincerely wished the network upgrade to be complete by 31st March 2006, and not later. Accordingly, in relation to that part of the work being handled by Nortel, Mr Espinal did wish the work to be completed not later than 31st March 2006. I think there must have been other considerations in Mr Espinal's mind as

well. Mr Espinal knew that there would be pressure from the regulator and the minister in T&T to complete interconnection sooner rather than later. Mr Espinal would have been concerned to identify a date for completion of interconnection that he believed he had some prospect of defending and bringing about. If Mr Espinal had endeavoured to delay interconnection to a date significantly later than 31st March 2006, he must have realised that his prospects of success would be considerably reduced the greater the predicted delay. In any event, Mr Taylor was very clear that the message Mr Espinal gave to Ms Bejar and the message Ms Bejar gave to Mr Taylor was that the work should be completed no earlier and no later than 31st March 2006. The reference to "no later" would have been a somewhat strange detail to fabricate or to mis-remember and, in the end, I am persuaded that that was a part of the instruction given by Mr Espinal to Ms Bejar in late September 2005.

125. As to the conflict of evidence between Mr Taylor and Mr Davy, I prefer the evidence of Mr Taylor. It was suggested to me that Mr Taylor was an unreliable witness because of the commercial connection between his present company and Digicel. Conversely, it was suggested to me that Mr Davy was an unreliable witness because of his longstanding association with TSTT and the indications in the history that he was, and still is, ready to help TSTT. As between these two arguments, I form the view that the connection between Mr Davy and TSTT was more significant than the connection between Mr Taylor and Digicel. I can understand that Mr Taylor's connection with Digicel has led to him volunteering to Digicel some useful information as to the conversations in question. However, I do not think that the relationship between Mr Taylor and Digicel is of a character so as to make it likely that Mr Taylor would concoct an untrue story to try to help Digicel. Conversely, I am persuaded that the connection between Mr Davy and TSTT does explain why Mr Davy would have been prepared to give untruthful evidence in an attempt to help TSTT. Accordingly, on the question whether a conversation took place between Mr Taylor and Mr Davy as Mr Taylor has described, I make the finding that that conversation did indeed take place.

126. My finding as to the conversation between Mr Taylor and Mr Davy means that Mr Davy was aware that Ms Bejar had agreed with Mr Espinal that Nortel would endeavour to comply with the request or instruction from TSTT that the NGN upgrade and interconnection should be complete not earlier and not later than 31st March 2006. Further, Mr Davy made it clear to Mr Taylor that Mr Davy saw his role as supporting TSTT in this respect.

127. The internal Nortel documents in late September and in the first few days of October 2005 show that various persons at Nortel were considering how to answer requests for information as to lead times for delivery of interconnection equipment. The different persons within Nortel were aware of requests for this information from TSTT, and from the regulator. These people were also aware that Digicel T&T and Laqtel had previously ordered MUXs from Nortel and these purchasers had been given estimated periods for delivery of the equipment ordered. There was a considerable concern within Nortel that the information given to Nortel's various clients and to the regulator should be consistent. The internal Nortel documents also show that Nortel was not in possession of all the technical information it would need to design the appropriate interconnection equipment to be supplied to TSTT. Mr Davy was kept aware of these various internal discussions and was shown a draft of the Nortel letter to the regulator before it was dispatched on 6th October 2005. This letter stated that the general manufacturing interval for optical

equipment was approximately 13 weeks, from receipt of a purchase order to the shipment from the Nortel factory. The letter also stated that because of the high demand for optical equipment at that time there was no difference in the manufacturing interval between a normal delivery as against a rush order. Air shipment from Miami to Trinidad took approximately two days and delivery by ocean transport took approximately one week. These intervals did not include customs clearance.

128. On 22nd September 2005, Mr Espinal notified the senior management of TSTT of the regulator's deadline for interconnection by 30th November 2005. He proposed that the matter be discussed at the next meeting of senior management. A Mr Thrush of TSTT prepared a presentation to be given at that meeting. Mr Thrush had previously been an employee of a Digicel company. His presentation was headed: "The Games Begin". It referred briefly to some of the history of the matter in T&T and to the fact that TSTT had laid down a timeline of April 2006. This appears to be a reference to TSTT's project plan. Mr Thrush discussed the question of delay. He referred to the possibility of Digicel T&T missing out on trade over Christmas and the carnival season. He said that TSTT was aggressively improving its network and that if Digicel T&T were delayed too long this would impact on their success. He later pointed out that delay was costing Digicel T&T, in view of the size of its investment in T&T, and he doubted if Digicel T&T could afford a period of delay of as long as six months. He also reviewed the process of interconnection between Digicel companies and C&W companies in other parts of the Caribbean. As regards TSTT, he pointed out that TSTT needed as long as possible to prepare for competition. In that context he referred to the fact that T&T had not issued licences (concessions) to TSTT or to the new entrants. When discussing the next steps to be taken, Mr Thrust stated that if TSTT delayed, the dispute with Digicel T&T would escalate aggressively; TSTT would be portrayed as blocking competition and negativity of that kind would be very serious for TSTT. Mr Thrush recommended that TSTT should "go on the offensive" and in particular should attack the regulator for failing to implement the process properly and should aggressively defend TSTT's position. TSTT should use legal routes that might be available to it to "buy time".

129. Mr Espinal gave evidence that this presentation was given to senior management around that time. In his evidence, Mr Espinal appeared to wish to distance himself from Mr Thrush's presentation and, in particular, his recommendations. However, the specific point which Mr Espinal made about the recommendations was that Mr Espinal was not prepared to attack the regulator as had been suggested. It seems therefore that the presentation represented what Mr Thrush genuinely believed and there was not general dissent from his analysis of the situation.

130. On 27th September 2005, Mr Espinal sent an email to Mr Thrush commenting on various features of the presentation. Reference was made to the public communications side of the strategy. Mr Espinal suggested that there be weekly meetings in a "war room" on that matter. Mr Espinal said that other initiatives in the presentation should be reviewed "off line"; I interpret that as showing that TSTT did not, in that respect, wish to leave a written record of the discussions.

131. On 28th September 2005, Miss Agard on behalf of TSTT replied to the regulator's letter of 19th September 2005. She stated that it was not necessary to have a schedule or a timetable for interconnection with each new entrant. She stated that TSTT was at that time ascertaining its requirements to satisfy the requests for interconnection from the two

new entrants, prior to ordering interconnection equipment. Her letter discussed the technical question of whether new entrants could connect to TSTT's legacy network or whether interconnection should be to the NGN. She then wrote:

> "TSTT has made, and continues to make, all efforts to expedite the completion of the activities related to providing interconnection to both parties. However, as TSTT stated in the meetings on September 15th and 20th the timelines associated with most of the tasks presented in its schedule are out of its control, including the delivery time of interconnection equipment by the relevant supplier, which may be further delayed due to circumstances beyond TSTT's or the supplier's control, i.e. Hurricane Katrina. TSTT reminds the Authority of the evidence provided of this delivery time at the meeting on September 15th. TSTT undertakes to ensure that every effort is made to complete interconnection with the companies that won the Authority's auction within the shortest possible timeframe."

132. Ms Agard's letter went on to say that once TSTT ascertained with its vendor, Nortel, the equipment required, TSTT would explore which timeframes could be further shortened without breaching TSTT's corporate governance procedures. The letter ended by saying:

> "TSTT stresses that regardless of which approach is taken to achieve interconnection, all of the activities outlined in this proposed timetable will have to be completed, and that the tasks identified present the shortest possible timeframe for completion. TSTT once again reaffirms its commitment to support the liberalization efforts of the Government of Trinidad and Tobago and the Authority as evidenced particularly by its agreement to have discussions on interconnection with prospective new entrants in advance of the award of concession."

133. On 3rd October 2005, Mr Davy of Nortel provided to Mr Espinal of TSTT a letter discussing the time which Nortel would take to deliver equipment which was to be ordered by TSTT. The letter had the heading "Interconnect Requirements to TSTT network". The body of the letter read:

> "This is to advise you that we are in receipt of a request form (*sic*) your Technology Organization for the development and implementation of a comprehensive solution to accommodate the interconnection of the two new mobile entrants to the TSTT NGN network. I would like to assure you that this request will be given top priority in Nortel, however, I would like to take a few moments to outline what is involved so that expectations are clearly understood by TSTT, the two new Market Entrants, the Nortel Engineering Operations teams and all other stakeholders.
>
> We have examined the current capacities of both your TDM (legacy) and Next Generation Networks and can clearly state that no additional traffic can be accommodated without major extension (in fact your network is currently under provisioned in many areas today). We would strongly recommend interconnection with the new Market Entrants using the NGN infrastructure.

> As you are aware we are currently in the process of implementing Phase 2 of the NGN infrastructure rollout which is due to be completed March 31, 2006. My Operations team has confirmed that Phase 2 is on schedule and will complete as originally scheduled. However, Phase 2 did not take into account any of the interconnect requirements that was just provided by your team, consequently a new project has to be developed now.
>
> Attachments 1 and 2 of this letter provide the typical timeframes required to develop and implement a project of this size and complexity, which include major expansion to the switching, data core, optical, signaling (*sic*) and synchronisation networks. As you can see the timeframes vary between 170 working days (when equipment is forecasted to our factory) and 185 working days (when equipment is not forecasted to our factory). Unfortunately your interconnection requirements were not forecasted with our factory. I must also emphasise that there will need to be great co-ordination between the current NGN deployment team and the new team that will be doing the interconnect requirements because both projects will be running concurrently and will have many dependencies and overlaps.
>
> Based on the above scenario it is my view that we can implement the interconnection project concurrently with the NGN infrastructure rollout project and have it completed by April 30, 2006 working extended hours and weekends. I would like to emphasise this is a best-case scenario and does not leave any room for unforeseen situations."

134. Attached to this letter were two timetables, one showing a period of 170 days and the other showing a period of 185 days. These were the same timetables as were circulating within Nortel on 22nd September 2005. 185 days is a little over six months so that a timetable of six months beginning at the date of the letter of 3rd October 2005 would take one to early April 2006. The evidence showed that this letter of 3rd October 2005 was understood by Mr Espinal and Mr Davy to be a letter written in response to Mr Espinal's request, by email of 21st September 2005, for a report from Nortel. The heading to the email of 21st September 2005 was "update on NGN" but the heading to the letter of 3rd October 2005 had been varied to read "Interconnect Requirement to TSTT Network". The email of 21st September 2005 was an email from Mr Espinal whereas the letter of 3rd October 2005 stated that Nortel was in receipt of a request from TSTT's "Technology Organisation". There is no evidence that the Technology Organisation did originate such a request nor is there any evidence that the technical personnel at TSTT were in discussion with Mr Davy, in the period running up to 3rd October 2005, as to what Nortel should put in a report on the subject of interconnection. As against that, it is possible that Mr Davy was in contact with the technical personnel at TSTT for other more general reasons around this time.

135. The letter of 3rd October 2005 correctly stated that Nortel was in the process of implementing phase 2 of the NGN infrastructure rollout and that that phase was due to be completed by 31st March 2006. The letter of 3rd October 2005 identified a date for completion of interconnection by 30th April 2006. This was on the basis that the interconnection project would be implemented concurrently with phase 2 of the NGN project. When the letter said that the interconnection project could be completed "by April 30, 2006", the letter was not stating that interconnection could be achieved at some

unidentified point much earlier than that date; the letter was stating that the realistic target date for achieving completion of interconnection project was 30th April 2006 and, indeed, that date could only be achieved if Nortel worked extended hours and at weekends. The 30th April 2006 was therefore "a best-case scenario".

136. The details as to the composition of the letter of 3rd October 2005 and the identity of the persons who contributed to that composition are unclear. It emerged however that there was an earlier draft of this letter which Mr Davy sent by email to various persons on Sunday 2nd October 2005. The email was addressed to Mr Espinal and was copied to three others at TSTT, namely, Ms Agard, Mr Mitchell and Mr Perai, who was head of technology at TSTT . The email was also copied to five persons at Nortel including Ms Bejar and others who have been involved in email communications between 21st September 2005 and 2nd October 2005, which communications discussed the answers that should be given to TSTT and the regulator so as to be consistent with timelines earlier quoted to Digicel T&T and Laqtel.

137. The email of 2nd October 2005 was written in terms which indicated that the letter attached to the email was the final version. The email did not contemplate that the attached letter was a draft which required further discussion or amendment. Mr Davy stated in the email of 2nd October 2005 that he would bring a signed copy of the attached letter to T&T and deliver it to Mr Espinal's office on Monday 3rd October 2005.

138. There were several differences between the draft of 2nd October 2005 and the final version of 3rd October 2005. The words "and all other stakeholders" in the final version did not appear in the draft. Mr Davy said that those words were suggested by Jamie Gibson of Nortel. I am hesitant about accepting Mr Davy's evidence in this case because I have already held that he deliberately misled the court as to a conversation he had with Mr Taylor, following Mr Taylor's conversation with Ms Bejar. However, it is possible that the reference to other stakeholders was added by Mr Gibson so that it would be a non-explicit reference to the regulator and possibly the government in T&T. If that was the meaning of "other stakeholders", then it is also possible that persons other than Mr Gibson may have suggested that amendment. The part of the fourth paragraph of the letter of 3rd October 2005, which describes what was involved in the project as regards major expansion to the network, also did not appear in the draft of 2nd October 2005. Again, Mr Davy said that Mr Gibson suggested the change in the wording.

139. What is striking in the draft of 2nd October 2005 is the last paragraph which read:

> "Based on the above scenario it is my view that we can implement the interconnection project, concurrently with the NGN infrastructure rollout project and have it also complete by March 31, 2006. I would like to emphasise that this is a best case scenario and does not leave any room for any unforeseen situations."

140. This last paragraph obviously had received careful attention from whoever drafted the letter of 3rd October 2005. The draft refers to "best case" (without a hyphen) whereas the letter of 3rd October 2005 uses "best-case". Further, a final "s" has been added to the word "situation" in the final version. More importantly, on 2nd October 2005, Mr Davy expressed the view in the letter that interconnection could be complete by 31st March

2006, whereas the next day he expressed a different view, namely, that interconnection could be complete by 30th April 2006, but only by working extended hours and weekends.

141. I was not given reliable evidence as to how these changes came about between 2nd and 3rd October 2005. Mr Davy said that the reference to working extended hours and weekends came from Mr Naccarato of Nortel. Mr Davy said that the reference to 31st March 2006 was a mistake. He said that he had been given the date of 30th April 2006 by the operations team at Nortel. When he drafted the letter dated 2nd October 2005, he put in the date of 31st March 2006 by mistake. Then (he said) in the course of Sunday, 2nd October 2005, Mr Naccarato contacted Mr Davy to say that the letter of 2nd October 2005 was wrong in this respect and that the date should be corrected to 30th April 2006. I find it very difficult to believe any of this evidence from Mr Davy. In particular, I do not accept his evidence as to why he originally referred to 31st March 2006 and how that date was then changed in the letter of 3rd October 2005.

142. Mr Espinal gave evidence that he took no part in the editing of the letter of 2nd October 2005. He pointed out that the 2nd October 2005 was a Sunday and he further stated that his typical pattern of work on a Monday would not have allowed him to give attention to a task such as editing the letter sent by email on 2nd October 2005.

143. As I have said, I do not regard the evidence from Mr Davy as in any way reliable. The fact that Mr Davy went to some lengths to make up a detailed story as to how the changes to the two letters were made suggests that he did so to cover up the real facts. Of the possible explanations that Mr Davy would have wished to cover up, the most likely is that the letter of 2nd October 2005 was altered following the involvement of Mr Espinal. I did not regard Mr Espinal's denial of such involvement as reliable.

144. In the result, I am left with no reliable explanation from a witness as to how and why the changes were made. I therefore have to resort to the probabilities of the case to determine what happened. The letter of 2nd October 2005 which refers in two places to 31st March 2006, is entirely consistent with my earlier finding that Mr Espinal told Ms Bejar, and this message was passed on within Nortel, that Mr Espinal wanted the NGN upgrade and interconnection to be not earlier and not later than 31st March 2006. With that instruction in his mind, given that Mr Davy wished to say to TSTT what TSTT wanted to hear, Mr Davy drafted the letter of 2nd October 2005 to say that phase 2 of the NGN upgrade was due to complete on 31st March 2006 and that it was Mr Davy's view that interconnection would also be complete by 31st March 2006. His selection of that date was deliberate, the result of Mr Espinal's conversation with Ms Bejar, and it was not a mistake on Mr Davy's part.

145. There are various possible explanations for the change in the letters of the date of 31st March 2006 to 30th April 2006. One possibility is that someone pointed out that if the letter attached the two timetables, one of which was 185 days and the other was 170 days, those timetables would take one past 31st March 2006. If that had been pointed out, it might have been thought desirable to amend the letter of 2nd October 2005, so that it had a date for completion of interconnection which was not inconsistent with the timetables. Another possibility is that the technical people at Nortel were unhappy about Nortel making a commitment to achieve interconnection by 31st March 2006 and they wished to have further time up to 30th April 2006. There are, indeed, later internal Nortel documents which show that Nortel was working to a timetable for interconnection which gave them

up to 30th April 2006 to achieve interconnection. However, it is possible that those later documents used the date of 30th April 2006 because that was the date in the letter of 3rd October 2005. If the technical people at Nortel had asked Mr Davy on 2nd October 2005 to change his date for interconnection from 31st March 2006 to 30th April 2006, then it seems likely that Mr Davy would have had to mention that to Mr Espinal to get Mr Espinal's clearance to putting in a date for interconnection which was later than 31st March 2006, which Mr Espinal had specified to Ms Bejar. Yet Mr Davy and Mr Espinal gave evidence that there was no communication between them as to the change in the date. In particular, they did not give evidence of any attempt by Mr Davy to contact Mr Espinal on 2nd October 2005 to tell him to ignore the letter of 2nd October 2005 and that it would be replaced with another letter with a different completion date.

146. The other possibility is that Mr Espinal was involved in the decision to change the date from 31st March 2006 to 30th April 2006. Mr Espinal would have been keen to ensure that phase 2 of the NGN upgrade was completed by March 31st 2006 and the letter of 3rd October 2005 is consistent with that. If Mr Espinal did not wish to achieve interconnection before 31st March 2006 and he saw that the attached timetables took the date for interconnection past 31st March 2006, it is possible that Mr Espinal took advantage of that fact and requested an amendment to Mr Davy's letter in relation to the date. Further, TSTT's project timetable showed a date for completion of interconnection which was later than 31st March 2006. In those circumstances, Mr Espinal may well have thought that having a date later than 31st March 2006 might be useful to TSTT and if the worst came to the worst TSTT could always make a virtue of accelerating completion of interconnection so that it was earlier than 30th April 2006, provided always it was not earlier than 31st March 2006.

147. My conclusion, on the balance of probabilities is that Mr Davy and Mr Espinal together redrafted the letter of 2nd October 2005. I have identified the principal considerations which have led me to this conclusion. In summary, they are: (1) the original choice of the date of 31st March 2006 was not a mistake; (2) the choice of the date of 31st March 2006 was the result of Mr Davy's wish to give effect to Mr Espinal's instruction to Ms Bejar, which had been passed on to Mr Davy; (3) Mr Davy told lies at the trial as to the change in the letters and the purpose of his lies was, more likely than not, to cover up the fact that Mr Espinal had been involved in the redrafting of the letter; (4) if Mr Espinal had not been involved in the redrafting, then there would have had to be some explanation given to Mr Espinal as to why his instruction, referring to "not later than" 31st March 2006, was being disregarded in the letter of 3rd October 2005 and neither Mr Davy nor Mr Espinal gave any such evidence; (5) Mr Davy and Mr Espinal had the opportunity on 3rd October 2005 to discuss the redrafting of the letter, as both were in T&T and Mr Davy had said to Mr Espinal that he would go to Mr Espinal's office that day; (6) it is inherently credible that Mr Espinal would have liked to have seen the date of 30th April 2006 in the final form of the letter.

148. On or about the 3rd October 2005, there appears to have been a meeting between the minister, the regulator and TSTT. This meeting is referred to in an internal Digicel T&T email of 3rd October 2005. Digicel T&T appeared to have obtained its information about the meeting from Dr Prince, of the regulator. Dr Prince told Digicel T&T that the minister instructed TSTT immediately to order the interconnection equipment. The minister required Digicel T&T, Laqtel and TSTT to meet and report to the minister weekly on

progress. Dr Prince said that the minister was acting in his capacity as majority shareholder in TSTT.

149. On 4th October 2005, various representatives of Nortel, including Ms Bejar, met representatives of Digicel T&T, including Mr O'Brien and Mr Leslie Buckley. An internal Nortel email of 5th October 2005 describes what happened at this meeting. Mr O'Brien had obtained a copy of the letter which Mr Davy had written to Mr Espinal on 3rd October 2005. Mr O'Brien referred to the timetable attached to the letter. The note refers to a period of 180 days, although the timetable attached to the letter referred to 185 days, alternatively 170 days. The note records that Nortel tried to explain to Mr O'Brien that this timetable was a conservative timetable which covered the period from requesting a proposal from Nortel to the interconnection being ready for service. Mr O'Brien suggested that someone in Nortel was seeking to undermine Digicel T&T's opportunity to launch before Christmas 2005. Ms Bejar promised to look into the matter. The Nortel note records that, overall, the meeting went well for Nortel.

150. On 6th October 2005, Mr Espinal of TSTT sent to the regulator the letter Mr Espinal had received from Mr Davy on 3rd October 2005. The Nortel letter was said to be sent further to TSTT's project plan that had earlier been submitted. On 7th October 2005, Mr Davy sent an email to Ms Bejar of Nortel enclosing a copy of the letter of 3rd October 2005. He said that this was the letter that "Carlos Espinal was referring to". It seems from this email that Mr Espinal must have spoken to Ms Bejar and referred to the Nortel letter of 3rd October 2005.

151. Also on 7th October 2005, there was a meeting attended by government officials, the regulator, Digicel T&T and TSTT. TSTT said that the interconnection equipment had not been ordered by it. TSTT also said that it was not adhering to a deadline of 30th November 2005 for completion of interconnection but was adhering to its original project plan. Also, on 7th October 2005, the parties met to discuss a draft interconnection agreement. There were representatives from the ministry and from the regulator, as observers.

152. On 10th October 2005, Mr O'Brien, the Chairman of Digicel T&T wrote to the Prime Minister of T&T. He referred to the stance taken by TSTT at the meeting of 7th October 2005. He described TSTT's project plan as "farcical". He stated that TSTT were obviously ignoring the wishes of the government and the regulator as regards ordering equipment and a deadline of 30th November 2005. Mr O'Brien requested a meeting with the Prime Minister on 17th October to discuss the position as a matter of urgency.

153. On 11th October 2005, the regulator wrote to Mr Espinal referring to Mr Davy's letter of 3rd October 2005 and asking Mr Espinal to provide the regulator with a copy of the request sent to Nortel which had resulted in the letter of 3rd October 2005. On 13th October 2005, TSTT sent to the regulator a copy of Mr Espinal's email of 21st September 2005. After a mild protest at the regulator's request, TSTT said it was sending the copy email "in the interest of complete transparency".

154. On 13th October 2005, there was a meeting between the ministry and TSTT. Mr Davy appears to have been present at that meeting. On 14th October 2005, Mr Davy wrote to the ministry. Mr Davy referred to two questions put to him at the meeting on 13th October 2005 and provided written answers to those questions. His answers stated that the

handover to the NGN would be completed by 31st March 2006. He referred to the capacity constraint on TSTT's network at that time. When asked whether there was traffic information or studies that supported an alleged inability to interconnect forthwith or other information supporting the constraints on capacity of the current network, Mr Davy said that Nortel did not have access to TSTT traffic information. Mr Davy said that there was no alternative to the existing network or the NGN to facilitate early interconnection. As regards the current status of interconnection, Mr Davy said that Nortel had received "the interconnect requirements" from TSTT, had asked for clarification and answers were to be provided on 12th October 2005.

155. Also on 14th October 2005, Miss Agard of TSTT wrote to the ministry. Her letter enclosed project plans for interconnection and for a billing system submitted to Digicel T&T, Laqtel and the regulator. I have been shown the timetable for interconnection attached to that letter. It gives a total time for interconnection of about 33 weeks. The timetable appears to be a slightly abbreviated version of the earlier timetable discussed in September 2005, but the precise breakdown of the 33 weeks is not apparent. Miss Agard added in her letter that TSTT did not anticipate a delay in the implementation of phase 2 of the NGN.

156. On 17th October 2005, Mr Barnes of carrier services sent an email to Ms Agard and others. The subject was "Laqtel". Mr Barnes stated that TSTT needed to put pressure on Nortel to complete the engineering for the NGN network expansion as soon as possible so that TSTT kept pace with its earlier project plan. Mr Barnes then went on to refer to a quotation from Nortel which would be shown to the potential new entrant to have their commitment as to payment for the equipment. This seems to be a reference to equipment needed for interconnection. On the same day, Miss Agard replied to Mr Barnes and stated "we are pushing Nortel".

157. On 18th October 2005, there was a meeting between the regulator, TSTT, Digicel T&T and Laqtel. Mr Espinal attended that meeting. It was stated that the MUXs for interconnection had not been ordered by TSTT. Mr Espinal said that he would invite the regulator to a presentation about the issues arising in connection with interconnection. Mr Espinal said that certain advertisements placed by Digicel T&T in the T&T press were hostile to TSTT, were not in good faith and he would suspend communications between TSTT and Digicel T&T. Mr Espinal suggested that changes at Nortel would endanger the timetable for equipment from Nortel. He said that a deadline of 30th November 2005 could not be realised. An internal Digicel T&T email discussed this meeting. It described the regulator as using strong language and expressing similar anger directed at TSTT.

158. On 19th October 2005, TSTT and Digicel T&T exchanged emails about a possible meeting on 20th October 2005. TSTT stated that it could not meet, as apparently had been earlier arranged. Digicel T&T demanded an immediate reinstatement of the meeting and said that if the meeting did not take place then TSTT was to be considered as making a formal declaration of its intent to obstruct competition in T&T. Miss Agard of TSTT replied stating that Digicel T&T was not in a position to demand anything of TSTT as TSTT was voluntarily engaged in a process on a without prejudice basis. Miss Agard was correct as a matter of law in that there was no obligation on TSTT in relation to interconnection with T&T at that time or, indeed, until the government of T&T granted a concession to TSTT imposing obligations upon it.

159. Digicel T&T complained to the regulator and on 21st October 2005, the regulator wrote to TSTT calling it to a meeting with the regulator on 26th October 2005. Mr Espinal of TSTT replied on 25th October 2005 stating that he was unable to attend a meeting as requested. Mr Espinal referred to an opinion from senior counsel, Mr Daly, which had been provided to TSTT and sent to the regulator. In the opinion, Mr Daly advised that the directive given by the regulator requiring interconnection by 30th November 2005 was unlawful. Mr Espinal remarked that TSTT had committed to engage in, without prejudice, voluntary discussions with proposed concession holders and that TSTT had diligently proceeded with those discussions on a good faith basis. He then complained about Digicel T&T's advertising campaign which was hostile to TSTT. He said that the government, as distinct from the regulator, had not directed TSTT to achieve interconnection by 30th November 2005. The date of 30th November 2005 for interconnection was impracticable. He stated that Digicel T&T's advertising campaign was in breach of a non-disclosure agreement which was in operation between TSTT and Digicel T&T. Nonetheless, TSTT would continue to honour any commitments it had made which predated Digicel T&T's breaches.

160. On 19th and 20th October 2005, TSTT contacted Nortel for the purpose of requesting a quotation for certain equipment to be provided by Nortel. There had been an earlier communication between these parties on 29th September 2005, when Nortel was sent a forecast for the traffic expected by the new entrants. On 19th October 2005, Mr Perai of TSTT spoke to Mr Davy of Nortel and followed the matter up with an email which was copied to Mr Espinal and Miss Agard. The email referred to a formal request for a proposal which was being finalised and which would request a proposal for interconnection equipment and also equipment to augment TSTT's network to meet with the traffic forecast. Mr Perai asked Nortel to quote for the interconnection equipment first, by 21st October 2005, and quote a little later for the second part of the equipment.

161. On 20th October 2005, Mr Davy sent to others in Nortel a copy of his letter of 2nd October 2005 (not the version of 3rd October 2005). This was apparently for the purpose of informing others in Nortel of what had been stated to TSTT as to the upgrade to its network and as to interconnection. The email therefore included the two plans showing 170 days and 185 days.

162. The formal request for a proposal was sent by TSTT to Nortel on 20th October 2005. The equipment described in the request included optical equipment for the purpose of interconnection, equipment required to expand the network to accommodate the new entrant's traffic forecasts and further equipment to expand different parts of the network. The internal Nortel documents show that considerable efforts were taken by Nortel to deal promptly with this request. Nortel prepared a proposal relating only to interconnection specific equipment. The quoted price was some US $166,000. TSTT had received this quotation on or before 25th October 2005.

163. On 26th October 2005, there was a meeting of TSTT and Digicel T&T with the regulator. The first part of the meeting was concerned with whether the parties would resume negotiations as to interconnection, having regard to the complaints made by TSTT in respect of Digicel T&T's advertising campaign. Eventually, the parties agreed to resume negotiations. Digicel T&T pressed for a timetable to be complied with by TSTT. TSTT insisted that it would comply with its project plan. It also referred to the timetable provided by Nortel. TSTT declined to answer certain questions put by Digicel T&T but

said it would reply later in writing. Digicel T&T expressed concern that the interconnection equipment had still not been ordered by TSTT.

164. On 27th October 2005, Digicel T&T wrote to TSTT raising a number of questions. These questions related to TSTT's timetable for completion of interconnection with Digicel T&T and as to the detail of the equipment to be ordered.

165. On 31st October 2005, Nortel prepared quotations for equipment to be supplied to TSTT. These quotations exist in various forms. One form relates to Digicel T&T alone but the quotation exists in an edited and an unedited form. There is also a quotation for interconnection to both Digicel T&T and Laqtel. In relation to the quotation for Digicel T&T, the equipment is described as "interconnect specific equipment" but extends beyond the optical equipment to certain respects in which the network was to be upgraded. The price provided by Nortel was some US $1.5 million to be expended in 2006 and some US $340,000 to be expended in 2007, making a total of US $1.835 million. Similar, but slightly lower, prices were provided for similar equipment involved in the proposed interconnection with Laqtel.

166. Digicel T&T, TSTT and the regulator met on 31st October 2005. I have been provided with two notes of this meeting, both prepared by Digicel T&T. Digicel T&T recorded its observations that TSTT was not paying any attention to the regulator's deadline of 30th November 2005 and TSTT obviously felt under no significant political pressure to expedite interconnection. TSTT said that it had not ordered the interconnection equipment and would not commit to dates for the civil works. There was a major row as to whether TSTT had previously stated that Digicel T&T could connect to the legacy network rather than the NGN network. It is not necessary to determine who was right and who was wrong about that matter but the reaction of the regulator to TSTT's statement on 31st October 2005, that it would not permit interconnection to the legacy network, is of interest. Dr Prince of the regulator said that "one party is hell bent on stalling"; he was obviously referring to TSTT. He also said that the situation had moved from one of "disingenuousness to dishonesty". Dr Prince indicated that he intended to make his views public.

167. At the beginning of November 2005, the tenders committee within TSTT received a report dated 26th October 2005 requesting a waiver of the internal tender procedures, otherwise needed in order to purchase equipment. In connection with the optical equipment to be purchased from Nortel, the report misstated the amount of expenditure involved. The report referred to a sum in Trinidadian dollars which was approximately US $400,000. Miss Agard of TSTT gave evidence that these figures were "guessed". The report supported a waiver of the tender procedures and the tenders committee approved the application on certain grounds. It will be remembered that the project plans of September 2005 provided for a period of time to follow through the tender procedures of TSTT. In the event, this waiver meant that period of time was not needed. Although the figures considered on 1st November 2005 were inaccurate, there was no further request for a waiver of tender in relation to the correct, larger, figures.

168. On 1st November 2005, Mr O'Brien, the Chairman of Digicel T&T, wrote to the minister in T&T. Mr O'Brien expressed his exasperation that no interconnection equipment had been ordered by TSTT and TSTT would not comply with the direction to complete interconnection by 30th November 2005. Mr O'Brien referred to "dishonest and

procrastinating behaviour" on the part of TSTT and he suggested that this enjoyed the tacit approval of the ministry.

169. On 1st November 2005, TSTT wrote to Digicel T&T on the subject of whether Digicel T&T would be permitted to interconnect with the legacy network of TSTT. During November 2005, that subject occupied a considerable amount of time and received detailed attention from the parties and from a panel set up by the regulator. At one stage, in this trial, the detail of those matters was said to be of importance but in view of subsequent amendments to the Claimants' pleading, it is no longer necessary to explain the detail of those matters.

170. On 1st November 2005, TSTT wrote to Digicel T&T referring to the quotation from Nortel for what was described as interconnect specific equipment for Digicel T&T. Nortel's quotation for 2006 was approximately US $1.5million. TSTT asked Digicel T&T to review and agree the specification of equipment. TSTT required Digicel T&T to pay the sum of approximately US $1.5million immediately and as soon as that had been done, TSTT would immediately place the order for this equipment. In the event that Digicel T&T responded expeditiously, TSTT said that it would order this equipment in advance of 14th November 2005, the date which was originally put forward in its project plan.

171. On 1st November 2005, an internal Nortel document shows that Digicel T&T were seeking to exert pressure on Nortel to speed up the process of the equipment to be ordered by TSTT for interconnection.

172. On 2nd November 2005, there was a meeting between TSTT and Digicel T&T. Mr De Goeij prepared an internal note for Digicel T&T. He remarked that the meeting was a complete farce. He referred to there being hostility and personal attacks. Digicel T&T obviously regarded TSTT as deliberately being obstructive. On 3rd November 2005, Digicel T&T wrote to TSTT in connection with the Nortel quotation for what was said to be interconnect specific equipment. Digicel T&T challenged that the equipment in the quotation was specific to interconnection. Digicel T&T stated that it wished to remind TSTT of its legal obligations to provide interconnection. It did not explain what those legal obligations were.

173. On 3rd November 2005, information from within Nortel was disclosed to Digicel T&T that the MUX ordered by TSTT was in the production line in Nortel although TSTT had not yet sent a purchase order for that MUX.

174. On 4th November 2005, TSTT wrote to Digicel T&T categorically denying that it was legally required to provide interconnection. TSTT explained that it was engaged in a voluntary process only.

175. On 8th November 2005, the regulator wrote to the minister in T&T reporting on the position as regards interconnection with TSTT. The regulator referred to a lack of co-operation on the part of TSTT. The regulator stated that in the absence of immediate intervention from the minister, the regulator would need to await the grant of concessions to TSTT and the new entrants and the promulgation of interconnection regulations to enable the regulator properly to mandate interconnection between the operators. The

regulator therefore suggested that the minister exercise such powers and influence as he thought fit to assist in achieving interconnection.

176. On 9th November 2005, Mr Davy of Nortel sent an email to Mr Perai of TSTT. He stated that the in-service date for the Laqtel interconnection equipment was scheduled for April 30th 2006. He stated that when the order was placed with the Nortel factory within a few days Nortel would try to expedite manufacturing to see if it could better this date of 30th April 2006.

177. On 10th November 2005, Mr Perai sent an email to Mr Davy of Nortel referring to Mr Davy's letter of 3rd October 2005 and referring to a project completion date of 30th April 2006.

178. On 10th November 2005, TSTT had a meeting with the minister. On 11th November 2005, TSTT wrote to the regulator setting out the terms and conditions upon which TSTT would agree to facilitate interconnection. In respect of the optical equipment, TSTT stated that the timeframe for the manufacture, shipping, installation and testing of this equipment would be 17 weeks from the date of placing the purchase order with Nortel. That period was not guaranteed but was dependant upon Nortel. TSTT would use its best endeavours to ensure that Nortel delivered in accordance with this timescale. As regards interconnection equipment, Digicel was required to pay for the equipment. TSTT would continue with the core upgrade to its NGN which was scheduled to be completed at the end of April 2006. TSTT referred to a schedule submitted by Nortel. This may have been Mr Davy's letter of 3rd October 2005, although that letter referred to the upgrade to the network being completed by 31st March 2006 and interconnection being completed by the end of April 2006. TSTT pointed out in its letter of 11th November 2005 that there might need to be a high level of call blocking and non- completion of calls, because TSTT's network might not be fully provisioned when interconnection was achieved. TSTT stated that degradation to the quality of service would be experienced until 30th April 2006, when the upgrade to the NGN was expected to be completed. TSTT's letter enclosed a signature page which was available to be signed on behalf of Digicel T&T. Digicel T&T never did sign a copy of this letter.

179. Also on 11th November 2005, Miss Agard of TSTT wrote to Digicel T&T on the points arising. She stressed that TSTT did not have, at that juncture, a legal obligation to provide interconnection. On 11th November 2005, the regulator replied to TSTT's letter of earlier that day. The regulator stated that a 15 week period instead of the 17 weeks suggested by TSTT would be achievable. The regulator stated that it expected TSTT to do all in its power to expedite delivery by Nortel.

180. On 14th November 2005, the regulator met Digicel T&T. Following the meeting, the regulator wrote to Digicel T&T referring to TSTT's proposal of 11th November 2005.

181. On 14th November 2005, TSTT replied to the regulator's letter of 11th November 2005. TSTT attached Mr Davy's letter of 3rd October 2005 and the timetable referred to in that letter. TSTT then stated that it would "make best efforts to expedite this process" and reduce a period of 4 weeks for installation and testing of the optical equipment to a period of 2 weeks. TSTT confirmed that it would order the required equipment as soon as it received a commitment from Digicel T&T to cover the associated costs.

182. On 14th November 2005, there was an internal Nortel document reporting on the approach being taken by Digicel T&T towards Nortel and towards the government in T&T. The document reported that Mr O'Brien of Digicel T&T wished to try and embarrass the T&T government into forcing the pace of interconnect with TSTT. Mr O'Brien revealed that he had inside information as to the internal workings of TSTT. Mr O'Brien intended to contact Ms Bejar of Nortel to have Nortel provide assistance to Digicel T&T.

183. On 15th November 2005, the minister in T&T replied to Mr O'Brien's letter in which Mr O'Brien had accused the minister of tacitly approving TSTT's behaviour. The minister referred to differences of opinion as to the legal and regulatory obligations regarding interconnection. He also referred to the difference of opinion as to how physical interconnection would be achieved. He said that interconnection arrangements must be concluded as far as practicable in the form of commercial agreements negotiated at arms length. As regards the power of the government of T&T to control TSTT, he pointed out the constraints of company law, fiduciary responsibilities and the position of minority shareholders. The minister then took strong exception to the allegation of tacit approval on the part of the ministry.

184. On 17th November 2005, Digicel T&T prepared a report to its board. The board report stated Digicel T&T's view of TSTT's behaviour. It regarded TSTT as continuing to deploy delaying tactics and that it was ignoring the direction to complete interconnection by 30th November 2005. Digicel T&T was of the view that TSTT was guilty of dishonest practices by arguing that it could not interconnect by 30th November 2005. However, Digicel T&T recognised the limitations on its position by reason of the fact that no concessions had been granted. Also on 17th November 2005, Digicel T&T wrote to the minister complaining of obstruction by TSTT.

185. On 18th November 2005, Digicel T&T sent to TSTT a bankers draft for the sum of approximately US $1.5million which had been requested by TSTT as a pre-condition to TSTT ordering the equipment for which Nortel had quoted. Digicel T&T protested vociferously at the amount being demanded and suggested that TSTT was asking for payment for equipment that was not interconnection specific equipment. Digicel T&T stated that TSTT's behaviour was "both disgraceful and dishonest".

186. On 18th November 2005, TSTT wrote to Digicel T&T acknowledging the bankers draft. TSTT stated that it was under no legal obligation to provide interconnection but was nonetheless, in good faith, proceeding immediately to request the Digicel T&T specific interconnection equipment from Nortel. TSTT stated that it would use best efforts to expedite the process of delivery from Nortel and it had been informed by Nortel that this process would take approximately 17 weeks from the date of placing the order for the equipment. TSTT stated it would place the order that day and thus Digicel T&T could expect to interconnect in late March to early April 2006, assuming no unforeseen delays and further assuming that the parties were able to negotiate an interconnection agreement.

187. On 23rd November 2005, an internal email within Nortel referred to a period of 17 weeks from Nortel receiving a purchase order for interconnection equipment to some later stage. I interpret the email as referring to the period leading to the completion of installation and testing of the interconnection equipment. The email refers to the 17 week period becoming challenging.

188. On 24th November 2005, TSTT reported to the regulator that it had issued a purchase order to Nortel on Monday 21st November 2005. TSTT stated that the order was sent to a fax number provided by Nortel but the fax number was not correct and the order was faxed to the correct number on 23rd November 2005 and receipt was confirmed.

189. On 25th November 2005, an internal document within Nortel reported that TSTT was proposing to interconnect with Digicel T&T and Laqtel when the optical equipment was installed. Nortel interpreted this as referring to a date for interconnection of 30th March 2006, or possibly 30th April 2006.

190. On 28th November 2005, Digicel T&T wrote to TSTT in response to the letter of 18th November 2005. Digicel T&T stated that if TSTT wished to use best efforts to expedite the process, it would find that Nortel might significantly reduce the time for delivery if pressed to do so.

191. On 28th November 2005, Mr Espinal sent an email to Mr Davy of Nortel asking for information about the position in relation to the interconnection specific equipment for Digicel T&T and Laqtel. Mr Espinal asked Mr Davy for a weekly report on the two orders and Nortel's plans to improve the delivery times of the purchases.

192. On 29th November 2005, the regulator sent an email to Mr Davy of Nortel; the email was copied to Ms Bejar. The regulator referred to discussions with Nortel concerning possible assistance in connection with expediting equipment ordered by TSTT which was required for interconnection. The email referred to the minister having met the president of Nortel to seek this assistance. Any effort on Nortel's part in expediting delivery of the equipment would be greatly appreciated. The email then asked for information as to the expected delivery date for the interconnection equipment for Digicel. Ms Bejar sent her copy of this request to Mr Guerra of Nortel who asked Mr Davy for his advice on how to handle what was a very politically sensitive request.

193. On 29th November 2005, Ms Ramos of Nortel reported in an internal Nortel document on the position in relation to the Laqtel interconnection equipment and the Digicel T&T interconnection equipment. Nortel was seeking to advance the date for the Laqtel equipment. In relation to the Digicel T&T equipment, Nortel still had further work to do.

194. On 30th November 2005, Mr Davy sent an email to Mr Espinal of TSTT saying that he would keep Mr Espinal informed of the response which Nortel gave to the request from the regulator for information about the delivery date of the Digicel T&T equipment.

195. On 30th November 2005, Mr Davy was informed by an internal Nortel email as to the position in relation to the interconnection project for TSTT. As regards the Laqtel project, the email reported that the purchase order for the Laqtel equipment had been received on 9th November 2005 and the target ready for service date was mid-March 2006. As regards the Digicel T&T equipment, the purchase order was received on 21st November 2005 but there was missing information which was required. A revised purchase order was received on 23rd November 2005 and the target ready for service date was end of March 2006.

196. On 1st December 2005, Mr Davy replied to the regulator's email of 29th November 2005 seeking Nortel's assistance in expediting the delivery of the equipment ordered by TSTT which was required for interconnection. Mr Davy stated that, in relation to the equipment ordered by TSTT for interconnection with Digicel, the target ready for service date was end of March 2006. He then stated that Nortel had already improved the ready for service date for this project by more than 4 weeks from the initial estimate given to TSTT in early October 2005. He stated that Nortel would continue to try and improve the ready for service date even further if at all possible but Nortel closed for 2 weeks over Christmas and there would not be a firm timetable before the first week of January 2006. Mr Davy was referring in this email to his own letter of 3rd October 2005 which had given a date for completion of interconnection of 30th April 2006. The point he was making was that a ready for service date of end of March 2006 was an improvement of more than 4 weeks on the April date.

197. Mr Davy sent a copy of his email of 1st December 2005 to Mr Espinal. Also on 1st December 2005, Mr Davy sent to Mr Espinal an update on the three projects Nortel was handling for TSTT. The first project was the TSTT core network expansion project. Mr Davy wrote in his email that Nortel had provided a proposal to TSTT on 29th November 2005, that it was awaiting a purchase order and that the target ready for service date was 30th April 2006. As regards the Laqtel interconnection project and the Digicel interconnection project, the target ready for service dates were given as end of March 2006. Mr Davy noted that Mr Espinal had requested Nortel to make every effort to better the above target ready for service dates.

198. Mr Espinal replied to Mr Davy by email on 1st December 2005. Mr Espinal stated he was not aware that TSTT had received a proposal on the core network upgrade project, nor a delivery date of 30th April 2006. Mr Espinal wished Nortel to review that delivery date in order to minimise the degradation in the quality of service that would be provided to TSTT's customers and customers of its mobile competitors. In particular, he wanted the delivery date for the core network upgrade to be no later than the end of March 2006. These exchanges between Mr Espinal and Mr Davy were purely internal between TSTT and Nortel and do not appear to have been intended to have been shown to third parties, such as the regulator.

199. On 1st December 2005, Mr Gibson of Nortel, who had received Mr Davy's reply to the regulator of earlier the same day, emailed Mr Davy to say that the current plan for the ready for service date for interconnection equipment was the end of April 2006. He suggested that Mr Davy might have been wrong with his date of end of March 2006. Mr Davy replied to Mr Gibson sending information originally provided by Mr Naccarato of Nortel. On receipt of this information, Mr Gibson appeared to accept that there was a distinction between the date for the core network which was end of April 2006 and the date for the Laqtel and Digicel T&T interconnection specific equipment which was indeed the end of March 2006.

200. Later on 1st December 2005, there was internal email traffic within Nortel suggesting there would be difficulties in achieving end of March 2006 as the date for completion of the core network upgrade.

201. On 1st December 2005, TSTT wrote to Digicel T&T stating that TSTT had moved with all reasonable dispatch to accelerate interconnection. TSTT pointed out that Digicel T&T still did not have a concession.

202. On 2nd December 2005, TSTT asked Nortel to provide a timetable for the delivery, installation, testing and commissioning of the interconnection specific equipment. Mr Davy replied on the same day saying he was not in a position to provide a detailed timetable. He did not expect he would have such a timetable before December 16th 2005 but he was able to commit Nortel to a final in service date of 31st March 2006.

203. On 2nd December 2005, an internal Nortel email attached a schedule of dates for the three projects which Nortel was handling for TSTT. The email said that the timetable was for distribution within Nortel only. The timetable showed completion of interconnection with Laqtel on 9th March 2006, completion of interconnection with Digicel T&T on 3rd April 2006 and completion of the core network upgrade on 1st May 2006.

204. On 3rd December 2005, Mr Prescod of TSTT emailed Mr Espinal to report on difficulties which were being encountered in obtaining fibre to join the various switch sites in T&T. Mr Prescod referred to TSTT having a deadline for interconnection with Digicel T&T at the end of March 2006.

205. On 5th December 2005, there was internal email traffic in Nortel discussing two possible dates for completion of interconnection. There was confusion as to whether the date was 31st March 2006 or 30th April 2006.

206. On 6th December 2005, the CEO of Digicel T&T contacted Ms Bejar of Nortel for information about TSTT's order for interconnection equipment to be used for Digicel T&T. Ms Bejar asked others in Nortel for this information. Mr Guerra told Ms Bejar in reply that "the initial agreement" was to have everything in place by the end of April 2006. This seems to be a reference to the time when that date was put in the letter of 3rd October 2005. Mr Davy also told Mr Guerra that in order to keep everybody happy Nortel should not commit to better improvement dates than end of March 2006.

207. On 6th December 2005, Nortel sent Mr Espinal further updates on the three projects. There was continuing discussion as to the core network upgrade project but the ready for service dates for interconnection remained at the end of March 2006.

208. At this stage, difficulties arose in connection with the core network upgrade project. TSTT had not yet placed the necessary purchase order with Nortel for the work which was to be done. Nortel pressed TSTT to place the order but TSTT was plainly having second thoughts about whether the work should be done by Nortel, or by another supplier. In the event, TSTT did not place the order with Nortel. That led to Nortel and TSTT devising an interim arrangement which would permit interconnection in accordance with the planned ready for service dates.

209. On 8th December 2005, Ms Ramos of Nortel sent an email within Nortel stating that the TSTT interconnection equipment for Digicel T&T was scheduled to ship out of Miami in week 52, i.e. the last week of 2005. She said that based on a review carried out by the deployment team within Nortel, "the reasonable but aggressive schedule" would have

installation beginning week 4, that is, the week of 23rd January 2006, and ready for service by 17th February 2006. There was a lengthy debate at the hearing as to whether Ms Ramos' email was correct in referring to the interconnection equipment for Digicel T&T or whether the equipment which could have been ready for service by 17th February 2006 was the equipment which had been ordered for Laqtel. Ms Ramos' email was passed on to Ms Bejar who indicated that she would like to discuss the matter with Mr Espinal.

210. On the same day, Mr Holden of Nortel suggested that there might be confusion between the Laqtel and the Digicel T&T equipment. Mr Guerra replied that there was no confusion whereas Mr Davy said the contrary. He stated in an email of 8th December 2005 that Nortel had not ordered any equipment, in the sense of placing an order in the factory, for the Digicel T&T interconnection equipment. Mr Davy wanted to emphasise that he had told TSTT two days earlier that the Digicel T&T interconnection equipment had not been ordered and would not be ordered until the next week.

211. Later that day, Mr Guerra sent an email to Mr Davy stating that the date of 17th February 2006 was possible from an operations' perspective. Whilst Mr Guerra's email is not clear, one reading is that he was accepting Mr Davy's distinction between the Laqtel equipment and the Digicel equipment but was still stating that in relation to the Digicel equipment, the ready for service date of the 17th February 2006 was possible. He went on to say that he did not recommend changing the end of March 2006 ready for service date, but the decision should be taken by Ms Bejar.

212. The debate within Nortel as to whether the order for the Digicel T&T interconnection equipment had been placed in Nortel's factory and whether some improvement could be achieved in delivery times continued the next day. Mr Davy sent a further email within Nortel warning that Nortel was: "heading down the road of pissing off Carlos and Bernard [of TSTT] by trying to advance Digicel interconnect project to February 17th and not advancing the core project from April 30th". Mr Davy pointed out that if Nortel did advance the Digicel interconnect project in this way, the instruction from TSTT for the core network upgrade might not be given. Mr Davy initially gave evidence that he had spoken to Mr Espinal about the matter on 9th December 2005 but he later withdrew that evidence.

213. Later on 9th December 2005, TSTT emailed Nortel stating that TSTT had decided not to purchase the core network upgrade from Nortel at that stage but would instead put the work out to tender. Mr Davy replied on 9th December 2005 stating that Nortel would participate in the tender process. He added that the core network was a critical part of the interconnect proposals and interconnection would not function without it. He also stated that there was a need to re-evaluate the in-service date for the interconnection proposals; he stated that 30th April 2006 might no longer be feasible. He recommended that Nortel should begin to look at alternatives, should the core network not be in place by April 2006. An internal Nortel email from Mr Naccarato also stated that Nortel could not make a commitment to 30th April 2006 in view of TSTT's decision. It is far from clear, from these emails, what Nortel did believe at this point was achievable in relation to interconnection with Laqtel and Digicel T&T.

214. On 9th December 2005, Mr Prescod of TSTT sent an internal TSTT email attaching project timetables showing interim interconnection for Laqtel on 30th March 2006 and for Digicel T&T on 20th April 2006.

215. On 10th December 2005, there was an email exchange between a Mr Bulengo of Nortel and a Mr Collins, who was an intermediary between Nortel and Digicel T&T. Mr Bulengo's perspective was that Nortel had to drive to rapid fulfilment of the purchase orders. He said that there was a meeting on Monday 12th December 2005 to decide what to do.

216. On Monday 12th December 2005, Nortel prepared a detailed timetable for the three TSTT projects. The first project related to the core network upgrade. The timetable recorded that TSTT had not placed a purchase order for this work. Nonetheless, the timetable showed the work taking a period of 20 weeks to the 1st May 2006. The timetable then showed three scenarios, A, B and C, for interconnection. Scenario C involved interconnection using the new core capacity to be provided on 1st May 2006. On this scenario interconnection would take place on 1st May 2006. The two more relevant scenarios are A and B. Scenario A was described as "interconnect customer 1 and 2" and scenario B was described as "interconnect customer 1 or 2". For scenario B, interconnection was to be completed by 17th February 2006. With scenario A, interconnection was to be completed by 30th March 2006. I interpret scenarios A and B as showing that Nortel could provide interconnection for one new entrant by 17th February 2006. It is not clear whether this could only be achieved by, in some way, delaying the other new entrant past 30th March 2006. Scenario A involved providing interconnection to both new entrants with interconnection to be completed by 30th March 2006. The timetable of 12th December 2005 contains a note in relation to scenario B. The note states that scenario B was high risk and was on a best efforts basis, with aggressive timelines. Scenario B assumed customs clearance was very aggressive in one week or less. It also assumed that TSTT would provide the necessary site access 24 hours a day and 7 days a week and TSTT would need to provide the necessary trunking.

217. Also on 12th December 2005, there was an internal Nortel email updating the position as regards the TSTT projects with Nortel. In relation to interconnection with Laqtel, the ready for service date was given as mid March 2006. As regards the interconnection with Digicel T&T, the ready for service date was given as end March 2006. In both cases, interconnection was to be on the basis of what was described as "the interim solution", to reflect the fact that the core network upgrade would not be complete by the target interconnection dates. This updated position was emailed to Mr Espinal on 13th December 2005.

218. On 12th December 2005, Digicel T&T met the regulator. An internal Digicel T&T email of 13th December 2005 reported on the meeting. The meeting concerned the proposed grant of a concession to Digicel T&T. The regulator assured Digicel T&T that as soon as TSTT came under the jurisdiction of the regulator: "there will be no more pleading with TSTT".

219. On 13th December 2005, the regulator emailed Mr Davy requesting up to date information as to the status of the interconnection equipment ordered by TSTT.

220. On 14th December 2005, an internal Nortel email stated that delivery of "the interim solution" was targeted for 30th March 2006 for both Laqtel and Digicel T&T, until there was a direction to the contrary effect.

221. On 14th December 2005, Digicel T&T prepared a report for its board. The report commented that Digicel T&T was concentrating on influencing the government and, through the media, the public in T&T.

222. On 14th December 2005, Digicel T&T wrote to the regulator protesting about delays on the part of TSTT. On 14th December 2005, TSTT wrote to the minister with an update as to the progress towards interconnection. TSTT told the minister about the orders having been placed. It said that the expected delivery time including installation and testing and subject to speedy customs clearance would be 16 to 17 weeks from the date of the purchase order.

223. On 16th December 2005, Mr Davy replied to the request of 13th December 2005 from the regulator but only to say that the request should be passed to general counsel within Nortel as Nortel could only disclose information relating to a customer with the customer's consent or under court order or as required by law. On 16th December 2005, the regulator called TSTT and Digicel T&T to a meeting on 21st December 2005.

224. On 16th December 2005, Ms Bejar appears to have drafted an email to be sent to Mr Espinal. The draft email referred to Nortel meeting the minister in October 2005 when the minister requested Nortel to seek to improve delivery times for interconnection equipment for the new entrants in T&T. The draft said that Nortel had had the opportunity to confirm TSTT's detailed engineering requirements in this respect at a customer information meeting on 8th December 2005. The draft then continued:

> "With the detailed requirements, Nortel has now had the opportunity to poll our supply chain and we are pleased to inform you that we will be securing better ship dates for some of, if not all of the interconnect equipment.
>
> Based upon this and the request by the minister, we would like to request that we meet to revisit the interconnect schedules to reflect possible improvements. Please let us know the availability of your team to do so."

225. In the documents made available by Nortel and by TSTT, there is no copy of this email being received by Mr Espinal. The form in which the draft email appears in the documents before the court shows the email under an email header which purports to be <u>from</u> Mr Espinal to Mr Davy, Mr Holden and Ms Hea of Nortel, sent on Friday 16th December 2005 at 11:54am. Thus, this document does not show the email being sent by Ms Bejar to Mr Espinal. This document is itself part of another email which shows that Ms Bejar sent an email (possibly the intended email to Mr Espinal) to Mr Davy, Ms Hea and Mr Holden of Nortel on Friday, 16th December 2005 at 11:56am. As I understand it, the Claimants accept that they cannot show that Ms Bejar sent an email to Mr Espinal on 16th December 2005, in accordance with the draft to which I have referred.

226. On 19th December 2005, an internal Nortel document showed the position as regards the TSTT projects with Nortel. The position was that the target ready for service date for the Laqtel project was the middle of March 2006 and the target ready for service date for

the Digicel T&T project was the end of March 2006. These dates were based upon the use of the interim solution to which I have referred.

227. On 19th December 2005, Mr Collins, the go-between for Digicel T&T contacted Nortel asking for information about the MUX needed for interconnection with Digicel. Nortel replied the same day stating that it did not have a delivery schedule at that point. Nortel explained that it was shipping a MUX for Laqtel the following week. Nortel had received legal advice that it could not redirect the Laqtel MUX to Digicel T&T because it had no request from TSTT to do so. Nortel added that the two MUX's were not identical.

228. Later that day, Nortel sent a second email to Mr Collins. It stated that Ms Bejar had written to Mr Espinal advising him that Nortel intended to improve the schedules for the interconnection equipment. Nortel's email to Mr Collins also stated that Ms Bejar was expecting the shipping date for the MUX for interconnection with Digicel T&T the following week.

229. On 19th December 2005, the minister in T&T wrote to Mr Zafirovski, the President and CEO of Nortel. The minister stated that he would appreciate Mr Zafirovski's intervention in securing Nortel's delivery, installation and testing of the interconnection specific equipment in the shortest possible timeframe.

230. On 19th December 2005, Digicel T&T wrote to the minister protesting at delays on the part of TSTT.

231. On 20th December 2005, following receipt by Mr Espinal of the Nortel status report of 20th December 2005, Mr Espinal asked Mr Perai of TSTT to review the status report with Nortel to ensure that TSTT and Nortel had a clear understanding of TSTT's contractual obligations in relation to Laqtel and Digicel T&T.

232. On 20th December 2005, Nortel sent an update on the position with TSTT's projects with Nortel. In relation to the Laqtel interconnection equipment, the target ready for service date was the middle of March 2006, using the interim solution. The update stated that the initial order for Laqtel equipment was ready to ship from Miami. The position in relation to the Digicel T&T interconnection equipment was that the target ready for service date was the end of March 2006, using the interim solution. The delivery timetable was to be confirmed.

233. On 21st December 2005, Mr Zafirovski replied to the letter from the minister of 19th December 2005. He stated that Nortel would continue to work closely with TSTT on the interconnection projects for Laqtel and Digicel so that the projects would be completed in a timely manner.

234. On 22nd December 2005, Nortel emailed Mr Collins to say that the delivery date for some equipment was 3rd February 2006. It seems likely that the equipment being referred to was the equipment ordered by TSTT for interconnection with Digicel T&T.

235. An internal Digicel T&T document of 22nd December 2005 showed that Digicel T&T was considering libel proceedings against TSTT and was also gathering information on a daily basis to support a case of "dishonest business practice" against TSTT.

236. The meeting of TSTT and Digicel T&T with the regulator appears to have taken place on 22nd December 2005. Later that day Mr Barrins of Digicel T&T sent an email to Mr Prescod of TSTT referring to the meeting. Mr Barrins stated that both parties had expressed an interest in trying to expedite the process of interconnection. Mr Barrins had drafted a joint letter to be sent by TSTT and Digicel T&T to Mr Zafirovski of Nortel asking for assistance in securing Nortel's expeditious delivery, installation and testing of the interconnection equipment in the shortest timeframe possible.

237. On 22nd December 2005, there was an internal Digicel T&T email reporting on a conversation which Ms O'Marcaigh of Digicel T&T had with Brian Collins, the go-between for Nortel and Digicel T&T. The email records that Mr Collins told Ms O'Marcaigh that Ms Bejar had spoken to Mr Espinal that week to advise Mr Espinal that the equipment was being shipped early. The reported conversation was that Mr Espinal told Ms Bejar it would make no difference as TSTT was not ready. Mr Espinal was cross-examined about this possible conversation and he stated that he did not recall it. In the internal Digicel T&T document of 22nd December 2005, Digicel T&T referred to the meeting with the regulator on 22nd December 2005. Digicel T&T thought that TSTT was just "playing games" in thanking the regulator for trying to expedite the delivery of interconnection equipment. Digicel T&T also thought it was highly unlikely that TSTT would sign the draft joint letter to Nortel.

238. On 30th December 2005, Mr Barrins emailed Mr Prescod of TSTT urging him to sign the draft joint letter.

239. On 31st December 2005, T&T granted a concession to TSTT pursuant to the Telecommunications Act 2001. As I have earlier described, this placed obligations on TSTT, for the first time, in relation to providing interconnection to Digicel T&T. Also on 31st December 2005, T&T granted a concession to Digicel T&T, pursuant to the Telecommunications Act 2001.

240. It is convenient at this point to turn to the oral evidence in relation to the arrangements within Nortel in December 2005, in relation to possible delivery dates for interconnection equipment to TSTT. I heard evidence on that subject from Mr Taylor and Mr Davy and indirectly from Mr Espinal.

241. It will be remembered that Mr Taylor gave evidence on deposition in Florida on 18th March 2009. In the course of his examination in chief on deposition, Mr Taylor was taken to a number of the internal Nortel documents from December 2005 and he was asked whether those documents suggested to him various possibilities. The impression one gets from reading the transcript is that Mr Taylor was interpreting the documents and offering his views as to what they showed.

242. When cross-examined on deposition, it was put to Mr Taylor that Nortel was working hard during December 2005, and later, to make sure that the interconnection equipment was delivered without delay. Mr Taylor stated that there did come a time when Nortel had the opportunity to shorten delivery times and Nortel was waiting guidance from Ms Bejar, following her intended discussions with TSTT. He said that the reason that Nortel met the target date of 31st March 2006 was because that was the date Nortel was told to meet in September 2005. He said that it was impossible to speculate whether Nortel could have done better because the 31st March 2006 was the date it was asked to hit and

that was the date it did hit. He was asked to identify the opportunity that was turned down. He said that by the 10th January 2006 there was an opportunity to accelerate the project but it was speculative. There could have been, possibly, a saving of two weeks in relation to shipping. He was later asked to identify the opportunity said to have been available in December to bring forward the delivery date. He answered that the opportunity was to get the equipment manufactured earlier or to take and use equipment that was being manufactured for other customers and to advance the schedule by a couple of weeks.

243. In the course of his re-examination on deposition, Mr Taylor was asked a large number of blatantly leading questions. One such question invited him to agree that as of the summer of 2005, interconnection with Digicel could have been completed on a much more expedited basis. He said it was difficult for him to speculate as to the position in the summer and then he discussed whether it was necessary for interconnection to await the completion of phase 2 of the NGN upgrade.

244. In his witness statement served in these proceedings, Mr Taylor described his personal involvement in relation to interconnection between TSTT and Digicel T&T. He said that he was very much involved, in that Mr Gibson and Mr Reddy reported directly to him. In paragraph 49 of his witness statement, he gave detailed evidence on the question whether it would be speculative to conclude that interconnection could have been completed prior to 31st March 2006. He said there was nothing magical or significant about that target date; it was simply the date fixed in advance by TSTT and ultimately met. He also said that it was evident from the emails and his own recollection that interconnection could have been accelerated if there had been a desire to do so on the part of TSTT. He then said: "Admittedly, answering how far in advance of the March 31, 2006, pre-fixed date interconnection could have been completed does, to some extent, remain speculative because there was never any interest or attempt to achieve an earlier completion date." He then said that the documents revealed that interconnection could have been advanced but TSTT did not allow Nortel to act in that way. He then gave his interpretation of some of the documents starting with the email from Ms Ramos of 8th December 2005. He referred to the project plan of 12th December 2005, which included scenario B, which identified the possibility of one interconnection customer being ready for service on 17th February 2006. He said that the one interconnection customer must have been Digicel T&T because it was the body exerting maximum pressure on Nortel. He said that Laqtel did not in the event launch a mobile service in T&T. He also referred to a later attempt at a meeting on 10th January 2006 to discuss bringing forward the interconnection schedule.

245. When cross-examined, Mr Taylor stated on a number of occasions that in the period January to February 2006, Nortel was doing everything it could to ensure that it met the target date of 31st March 2006. He was asked to identify the opportunity to bring forward that date, which opportunity was said to have been missed. He said there was an opportunity, in one specific case, to ship equipment earlier. He thought it was in December 2005, in or around the last couple of weeks in December 2005, to achieve an in-service date of 17th March 2006. It may be that Mr Taylor meant to refer to 17th February 2006, alternatively, he may have been deducting two weeks from 31st March 2006. He said that, apart from that opportunity, there was no other opportunity to bring forward the delivery of interconnection for Digicel T&T prior to 31st March 2006. He was asked about the evidence he gave on deposition about the difficulty of speculating how much time, if any, might have been saved. He said that the only opportunity to

advance interconnection was to do with the discussion about equipment in the middle of December 2005 that could have brought forward interconnection to 17th February 2006. This evidence is consistent with him saying that the opportunity to interconnect one customer on 17th February 2006 was the only opportunity which presented itself, and is inconsistent with him saying or intending to say that Nortel could have saved two weeks in terms of delivery of equipment, moving the interconnection date from 31st March 2006 to 17th March 2006. Nonetheless, in other parts of his evidence, he suggested that one could speculate that interconnection could have been expedited by some two weeks. He was cross-examined in detail about whether Ms Ramos' reference to interconnection by 17th February 2006 referred to the Laqtel equipment or the equipment for Digicel T&T. My impression was that Mr Taylor was interpreting the documents rather than offering any detailed facts from within his own knowledge. He confirmed that although Laqtel did not launch a mobile network in T&T, that fact was unknown at any time up to 31st March 2006. He suggested that the reference to Nortel being able to ship equipment in week 52 referred to equipment for Digicel T&T. He accepted that there were only two possible interpretations of that statement. One interpretation was that it was a reference to the interconnection equipment for Laqtel. The other interpretation was that it was the Digicel T&T equipment which had been ordered in the Nortel factory on 16th December 2005 and which would have been ready for shipping in the week beginning 24th December 2005, but only on the basis that the necessary equipment was already in the factory pre-manufactured and so only required some packaging to make it ready for shipping.

246. Mr Davy gave evidence as to the discussions within Nortel in December 2005 in relation to the timetable for delivery of interconnection equipment to TSTT. He considered whether there had been opportunities available for Nortel to bring forward delivery dates for this equipment. At paragraph 18 of his witness statement he stated that Nortel looked for opportunities to speed up the timetable and moved the initial deadline of 30th April 2006 to 31st March 2006. His reference to the initial deadline was a reference to the date of 30th April 2006, given in his letter of 3rd October 2005. At paragraph 21 of his witness statement, he referred to communications within Nortel in December 2005 referring to a possible delivery date of 17th February 2006. He stressed that this related to interconnection for one customer only and that the equipment for interconnection with Laqtel had been ordered before the equipment for interconnection with Digicel T&T.

247. In relation to the email of 9th December 2005 which referred to "pissing Mr Espinal off", Mr Davy suggested in cross-examination that he had had a conversation with Mr Espinal about the potential of advancing the delivery date for interconnection equipment to 17th February 2006. It was suggested to Mr Davy in cross-examination that no such conversation took place and he then withdrew that evidence. When cross-examined, he explained in greater detail than in his witness statement why it was the case that the possible date of 17th February 2006 related to interconnection with one new entrant only and did not provide for interconnection with both Laqtel and Digicel by that date.

248. Mr Espinal gave evidence on the question as to whether there were opportunities for Nortel to bring forward delivery dates, which TSTT turned down. At paragraph 19 of his second witness statement he said he had no recollection of any discussion about improving the interconnection timetable to a date earlier than the end of March 2006 and no concrete proposal was ever put to him. He said that if such a suggestion had been

made, he thought he would have asked if it meant that the time for the network upgrade that needed to be performed to accommodate the increased traffic was going to be improved as well. If the answer to that question had been "no", then such an approach would have been unacceptable to him, as he wished to provide a reasonable quality of service following interconnection, otherwise TSTT was going to be perceived by the public as damaging the quality of service.

249. When cross-examined Mr Espinal stated that he did not receive an email on or about 16th December 2005 in accordance with the draft prepared by Ms Bejar on that date. He was also asked about the email from Ms O'Marcaigh of 22nd December 2005 which reported that Ms Bejar had spoken to Mr Espinal that week. Mr Espinal stated that he did not recall such a conversation; it might have happened but he thought it was more likely that it had not happened.

250. I can now express my conclusions on some of the disputed matters of fact. I have already held that in the period between 21st September 2005 (the date of Mr Espinal's email to Mr Davy) and 2nd October 2005 (the date of Mr Davy's email to Mr Espinal), Mr Espinal telephoned Ms Bejar and told her that TSTT did not wish to see interconnection completed before 31st March 2006. In particular, Mr Espinal said he wanted to see interconnection no earlier and no later than 31st March 2006. Ms Bejar passed this message onto Mr Taylor and Mr Taylor discussed it with Mr Davy. Mr Davy understood TSTT's requirements in this respect and wished to give effect to those requirements. The letter of 2nd October 2005, referring to a date for completion of interconnection of 31st March 2006, was distributed within Nortel, so that some of the personnel in Nortel, concerned with the later purchase orders from TSTT for interconnection equipment, were aware of this target date.

251. Nortel was in a very difficult position in relation to TSTT's orders for interconnection equipment. Nortel wished to keep TSTT happy as regards its requirements and timescales. Nortel also wished to keep Digicel T&T and the Digicel group of companies happy, because the Digicel group of companies was a potential source of lucrative business for Nortel. Nortel was also put on the spot by specific and searching requests for information from the regulator in T&T. The way in which, for the greater part of the time, Nortel tried to combine the apparently incompatible pressures was to use the date of 31st March 2006 as the target date for completion of interconnection and to make efforts to ensure that it did not go past that date. Thus, Nortel could tell TSTT and Digicel T&T and the regulator of a target date of 31st March 2006. Mr Davy of Nortel could even go so far as to claim credit because that date was a month earlier than 30th April 2006, the date he had put in his letter of 3rd October 2005.

252. Time went by before TSTT placed a purchase order, first, for Laqtel and then for Digicel T&T and then TSTT revised the second purchase order. Some time may have been taken up due to the fact that Nortel wanted to see one purchase order for the aggregate of the Laqtel and Digicel T&T interconnection equipment, but TSTT did not wish to combine the two orders into one. In the event, the Claimants do not make any specific complaint about the way in which the purchase orders were handled by TSTT and it seems that Nortel made, and acted on, its own assumptions as to what the orders would require of it when the orders were eventually made.

253. There is a major issue as to what opportunity existed within Nortel in December 2005 to deliver some interconnection equipment by 17th February 2006. In my judgment, the opportunity to deliver interconnection equipment by this date was interconnection equipment for one new entrant only. The internal Nortel documents in December 2005 are not wholly clear on this subject. In attempting to resolve the difficulty, there is one document which is more precise than some of the general statements, which being general are open to interpretation. That document is the timetable dated 12th December 2005, apparently prepared for, or as a result of, a meeting on that day to clear up the matter. That document, if correct, shows clearly that the date of 17th February 2006 only related to interconnection for one new entrant and that date was not a possible date for interconnection for both new entrants. I hold that I should rely upon that specific document rather than the arguably different interpretations of more general statements in other documents.

254. Mr Taylor gave evidence suggesting that the 17th February 2006 was a possible date for the Digicel interconnection equipment. I place more reliance on what Mr Taylor said in his witness statement than what he said in his oral evidence. In his witness statement, he appeared to identify the date of 17th February 2006 as the date for the Digicel T&T interconnection equipment, not because two new entrants could be interconnected on that date but because, out of the two new entrants, Digicel was the one applying the greater pressure. Apart from that consideration, it seemed to me, on this question of a possible opportunity for delivery by 17th February 2006, that Mr Taylor was attempting to interpret the documents rather than state his own recollection of events from within his own knowledge.

255. Mr Davy gave clear evidence that the date of 17th February 2006 was a possible date for one new entrant only. I have already indicated that I am hesitant about accepting Mr Davy's evidence and, indeed, I have rejected it outright as regards the conversation he had with Mr Taylor in September 2005 and the way in which the letter of 3rd October 2005 came to be composed. However, there is a contemporaneous internal Nortel document in which Mr Davy made the same point as he made in his oral evidence, to the effect that the equipment which was ready for 17th February 2006 was the equipment intended for Laqtel.

256. There are also more general references in the internal Nortel documents in December 2005 which refer to the possibility of shortening the time for delivery of interconnection equipment. In particular, there is a reference to interconnection equipment being available for shipping in week 52 of 2005. Mr Taylor explained to me that there were two possible explanations of that statement. The first was that the statement referred to the Laqtel equipment. The second was that it referred to the Digicel equipment, on the basis that the Digicel equipment had been ordered from the Nortel factory on 16th December 2005, whereupon it was found that the equipment had been pre-manufactured and needed packaging only. Of these two possibilities, in my judgment, the explanation that the equipment in question was the Laqtel equipment is much more probable and I so find.

257. On the question whether TSTT applied any pressure to Nortel to speed up manufacture and delivery of the interconnection equipment or whether, conversely, TSTT tried to retard that process, I have already made the finding that Mr Espinal told Ms Bejar in late September 2005 that interconnection was to be ready not earlier and not later than 31st

March 2006. There are various communications from TSTT to Nortel up to the end of December 2005 when TSTT appeared to be following up and pressing for a commitment from Nortel in relation to manufacture and delivery of the equipment. It would be wrong to say that TSTT allowed the matter to drift. Conversely, there is no suggestion that TSTT at any time up to the end of December 2005 pressed for an improvement on a target date of the end of March 2006 for the interconnection equipment needed for Digicel T&T.

258. I will next refer to some of the events in the period from 1st January 2006 to 6th April 2006, when Digicel T&T launched its network in T&T, in order to complete the narrative of events. In their pleadings, the Claimants made a large number of detailed allegations about the conduct of TSTT during this period, but did not repeat the majority of those allegations in their closing submissions, nor did they seek findings in relation to the majority of them. The Claimants did make submissions in closing as to an email sent by Ms Bejar to Mr Espinal on 4th January 2006 and Mr Espinal's response to it. However, there is no independent allegation in the Re-Re-Amended pleading in relation to T&T that Mr Espinal acted contrary to honest practices in the way he responded to this email. Further, as I have stated, I accept the Claimants' own evidence from Mr Taylor that in January and February 2006, Nortel worked hard to achieve interconnection by 31st March 2006.

259. It will be remembered that the documents included a draft email which Ms Bejar intended to send to Mr Espinal on 16th December 2005. That draft email referred to Nortel securing better delivery dates for some of, if not all of, the interconnection equipment. On the evidence before me, I have held that this email was not received by Mr Espinal around that time. However, on 4th January 2006, Ms Bejar re-sent the email to Mr Espinal and he received her email of 4th January 2006. Her email of that date referred to a discussion with Mr Espinal and invited Mr Espinal to tell Ms Bejar his stance in relation to her email of 16th December 2005.

260. Mr Espinal's response appears to have been accurately recorded by Mr Davy in an internal Nortel email of 6th January 2006. Mr Espinal told Mr Davy that he had seen the email of 16th December 2005, for the first time on 4th January 2006. Mr Espinal said that he did not intend to respond to the email in writing but gave a verbal response to Mr Davy. Mr Espinal stated that Nortel needed to address the schedules for all TSTT mobile projects, including the Laqtel interconnection, the Digicel T&T interconnection and the core network expansion, to accommodate interconnection and the integration of a third mobile switch. Mr Espinal added that an improvement in the schedules for Laqtel and Digicel T&T, whilst leaving the core network expansion and the integration of the third switch in accordance with the original timetables, was unacceptable to TSTT.

261. Another matter which I will record was that on 4th January 2006, Miss Agard of TSTT replied to the emails from Digicel T&T requesting TSTT to join in sending a joint letter to Nortel following statements made at the meeting of the parties with the regulator on 22nd December 2005. TSTT declined to join in such a letter stating that such a letter was not necessary or appropriate. On 5th January 2006, Digicel T&T wrote to Ms Bejar referring to the meeting of the parties with the regulator on 22nd December 2005, to the fact that TSTT had expressed gratitude at that meeting for the efforts being made to bring forward interconnection and Digicel T&T called on Nortel to make its very best efforts to reduce the proposed delivery time of 17 weeks which had been indicated by TSTT. Also

on 5th January 2006, Digicel T&T wrote to the minister in T&T complaining that TSTT had not been prepared to join in sending a letter of this kind to Nortel.

262. On 10th January 2006, Ms Bejar met representatives of TSTT. It seems likely that those representatives included Mr Martin, who had been appointed Chairman of TSTT with effect from 1st December 2005. An internal Nortel email of 10th January 2006 referred to Ms Bejar attempting to persuade TSTT to change its stance "towards supporting accelerating these interconnect projects". The email reports that Ms Bejar gave information to TSTT on how she could execute and complete the projects sooner than the currently public date of 30th March 2006. The author of the email did not know what TSTT's response was. Some information about this meeting was provided by Mr Martin of TSTT. Mr Martin gave evidence that he told Ms Bejar and Mr Davy that he expected Nortel to do everything that it could to meet the timetable to provide interconnection by 31st March 2006 in accordance with a commitment that Mr Martin had given to the government in T&T. The internal Nortel email of 10th January 2006 also stated that shipments of equipment for TSTT were scheduled for 3rd February 2006 "with a possibility that they may ship one week earlier". The email explained that this was the best that the Nortel factory could do as there were some critical shortages that would not be available until at least week 4 of 2006.

263. On 20th January 2006, Mr Martin sent an email to Ms Bejar and Mr Davy; this email was copied to Mr Espinal and Miss Agard of TSTT. Mr Martin expressed concern about a rumour that might have led to delay in delivery of interconnection equipment to TSTT. Mr Martin referred to his earlier meeting with Ms Bejar and Mr Davy and repeated that he had given an undertaking to the minister in T&T that he would do everything possible to ensure that TSTT delivered on its expressed intent to try to make interconnection happen no later than end March 2006. Mr Martin added that he needed to be able to advise the regulator and the minister whether the rumour was correct and if not what the real position was. He pressed for an urgent response.

264. On the same day, Mr Davy replied to Mr Martin giving highly specific information about the degree of progress by Nortel in manufacturing the required equipment. Mr Davy assured Mr Martin that the final in-service date for the two interconnection projects, 31st March 2006, would be met.

265. Physical interconnection was complete in T&T on 31st March 2006. Interconnection was possible using the interim solution which had been referred to by Nortel on a number of occasions in Nortel's documents updating the position as regards interconnection in T&T.

266. The parties did not enter into an interconnection agreement prior to 31st March 2006. Instead, an arbitration panel gave its decision on 31st March 2006 which enabled Digicel T&T to launch its network, on 6th April 2006, without there being an interconnection agreement in place. The panel's decision came about as a result of certain steps which were taken between January 2006 and 31st March 2006. On 19th January 2006, Digicel T&T served a notice of dispute under the dispute resolution procedures in T&T. On 20th January 2006, the regulator confirmed the existence of a dispute. On 27th January 2006, Digicel T&T served on TSTT a document setting out the subject matter of its complaint and attaching the form of the draft interconnection agreement then being negotiated. There were further procedural steps leading to a hearing on 9th March 2006. There was

then a procedural hearing on 31st March 2006 at which an arbitration panel made two relevant decisions. The panel decided that it had jurisdiction to establish interim rates for interconnection. The panel also established a sender-keep-all arrangement, effective from 31st March 2006, so that interconnection could be established. Although the matters referred to arbitration continued after 31st March 2006 and indeed escalated into more disputes which were in turn referred to arbitration, the effect of the decision on 31st March 2006 was that Digicel T&T was able to interconnect with TSTT and on 6th April 2006, Digicel T&T launched its network in T&T.

THE CLAIMANTS' ALLEGATIONS
The pleadings

267. The Claimants' case in T&T is set out in the Re-Re-Amended part of the Particulars of Claim relating to T&T. The final form of the Particulars of Claim therefore involves three sets of amendments. The Claimants applied on more than one occasion during the trial for permission to make these amendments. Those applications led to extensive argument as to whether permission should be given. TSTT objected to the grant of permission on various grounds. In relation to some draft amendments, it was said that the amendments did not disclose a proper basis for a claim or that the amendments were not adequately particularised. In relation to other draft amendments, it was said that it was too late to allow the Claimants to make the suggested amendments and it would be unfair to TSTT to permit the amendments to be made. I considered the justice of the case and I gave the Claimants permission to make certain amendments, but not others. As it turned out, some of the matters which were then pleaded by way of amendment were later abandoned after they had been investigated in detail at the trial.

268. The essential allegation made by the Claimants is an allegation that TSTT acted contrary to honest practices. I have already explained what I understand is involved in such conduct. I regard an allegation of that kind as a serious allegation which must be properly particularised in any pleading. The Claimants should not be allowed to advance such an allegation unless it is properly pleaded. This is particularly so in this case where the Claimants have sought permission to make amendments and where I have sometimes refused that permission on various grounds which included the need to be fair to TSTT. In these circumstances, I will pay particular attention to the way in which the Claimants plead their case as to conduct contrary to honest practices and will give a fair reading to the pleaded case. However, I will not permit the Claimants to rely upon wider or different allegations, which are not within a fair reading of their pleaded case. As will be seen, in their closing submissions, the Claimants did put forward versions of their case which I do not recognise as being within the pleaded case.

269. The first pleaded allegation that TSTT acted contrary to honest practices, relates to TSTT's timetable showing 33 weeks for completion of interconnection, which timetable was discussed at a meeting on 9th September 2005. The Claimants aver that a period of 33 weeks in the timetable was an unreasonable period, was part of a strategy to delay and obstruct interconnection with Digicel T&T and was contrary to honest practices. The Claimants focus in particular on the part of the timetable, at the beginning of the period, which referred to three weeks for an evaluation of TSTT's network. The Claimants plead that it was unnecessary and unreasonable for TSTT to include this period and in particular to include it at the commencement of the period covered by the timetable. The Claimants then plead the evidence on which they rely to show that the period was unnecessary, at

any rate coming at the beginning of the timetable period. They refer to Mr Barnes' views on the matter. They say Mr Barnes must have known that the period was unnecessary, at any rate at the beginning of the timetable period, or he was at least reckless as to whether a statement that this period was necessary was a true or a false statement. The Claimants also say that TSTT prepared a 33 week project timetable which was inconsistent with an impression it was seeking to portray to the regulator that TSTT was embracing the principle of liberalisation and was trying to expedite interconnection. The Claimants rely in their pleading on the letter from TSTT to the regulator of 28th September 2005, which came after the regulator had rejected the project timetable on 20th September 2005. The Claimants say that the deployment of the project timetable delayed interconnection by at least three weeks. This three week delay was caused by TSTT's carrying out an evaluation of the impact of interconnection on its network.

270. The second major respect in which the Claimants have pleaded that TSTT acted contrary to honest practices relates to the production of Mr Davy's letter of 3rd October 2005 and in particular the contents of the letter and what led up to the letter. The Claimants' pleaded allegation covers many pages. I will in due course attempt to summarise the principal assertions which are made in this respect and indicate my findings of fact, and of law, in relation to this allegation.

271. The third pleaded allegation which is still relied upon by the Claimants can best be explained by referring to paragraphs 4.1 and 4.2(q) of the relevant pleading. Paragraph 4.1 makes the general plea that C&W and TSTT deliberately delayed interconnection from certain dates until 6th April 2006, when interconnection was completed. This conduct is said to be contrary to honest practices. Paragraph 4.2 of the pleading then alleges that "C&W's" strategy of delay included certain acts or omissions. I note the reference to "C&W" rather than TSTT. This reference was never amended to refer to TSTT. I will assume in the Claimants' favour that they intended to refer to C&W and TSTT. The case in relation to T&T against C&W has of course now been dropped and the case continues against TSTT alone. Paragraph 4.2(q) refers to TSTT's exertion of influence over Nortel including as described in a number of earlier paragraphs, whose numbers are listed. I will in due course deal with this third pleaded allegation and make my findings in relation to it.

272. I have now referred to the three principal matters which are alleged to have been unlawful conduct on the part of TSTT. I have detected in the pleadings other allegations of a more minor nature which I will deal with as "other matters" after I have considered the three principal allegations.

General matters

273. Before I deal with the pleaded allegations to which I have referred, I will discuss some general matters on which the Claimants rely to advance their case.

274. The Claimants say that the history of the events which I have earlier set out involved action by, or omissions by, TSTT which were contrary to honest practices and therefore in breach of Section 4 of PAUCA. The Claimants' written closing submissions were set out at length and proceeded through a large number of individual reasoned stages. I will attempt to summarise the more important steps in the Claimants' case.

275. The Claimants say that TSTT wished to delay interconnection with Digicel T&T. They say that I should find this to be so because TSTT had a motive to cause delay and had a perceived need to cause delay. The Claimants rely on matters which are not much in dispute. I have already referred to the background matters which were largely admitted by TSTT, and possibly even prayed in aid by TSTT, to the effect that TSTT was not ready for competition. The Claimants also rely upon some of the matters I have already referred to and further events which took place after September 2005 to show that TSTT wished to delay interconnection.

276. If the issue of "delay" to interconnection involves a comparison between what TSTT wanted to do and what Digicel T&T wanted to see happen, then it is quite clear that TSTT did wish to "delay" interconnection in that sense. Digicel T&T wanted interconnection to be completed in a matter of weeks or, in any event, as quickly as conceivably possible, starting the process in June 2005 or at the earliest date thereafter. TSTT did not wish to do what Digicel T&T wanted. It was in Digicel T&T's commercial interest to proceed as quickly as possible. It was not in TSTT's commercial interest to proceed so quickly. TSTT wanted to make many changes to its network, and other changes internally within TSTT, to put it in a better position to compete. TSTT also thought, rightly, that it was not under a legal obligation to advance interconnection until, at the earliest, a concession was granted to TSTT, which placed obligations upon it in that respect.

277. The Claimants next say that TSTT held meetings with Digicel T&T as a result of pressure from the government and the regulator. In my judgment, that is quite clear. Miss Agard explained that, left to itself, TSTT would not have wished to advance interconnection until it was obliged to do so. Instead, it found itself having meetings with Digicel T&T and Laqtel and the regulator and engaging in detailed correspondence on the subject of interconnection. The reason why it behaved this way was that the government and the regulator put considerable pressure on TSTT to do so. TSTT found itself having to submit to that pressure and did things which it would not otherwise have wanted to do. The pressure from the government and the regulator was as intense as it was by reason of the complaints made by Digicel T&T about TSTT's behaviour. Digicel T&T continually made very serious criticisms of TSTT to encourage the government and the regulator to put pressure on TSTT.

278. The Claimants then say that TSTT had taken an early decision that it would not permit interconnection to happen until at least the end of March 2006. In relation to the period up to 20th September 2005, the Claimants rely on Mr Espinal's email of 7th September 2005. I have considered the contents of that email, and Mr Espinal's evidence upon it, earlier in this judgment.

The first allegation: discussion

279. I will now deal with the issue whether TSTT was guilty of dishonest practices by putting forward its project timetable, up until 20th September 2005 when that project timetable was rejected by the regulator. I will then deal briefly with the question whether any such breach of section 4 of PAUCA (in relation to the project timetable) caused loss to Digicel T&T.

280. In their submissions, the Claimants examined in detail the project timetable, the stages in that timetable and the period of time allocated to those stages. The Claimants focussed

upon the period for evaluation of TSTT's network, the period in relation to the business case coupled with the period for the tender process and, finally, the lead time for equipment delivery.

281. The Claimants made detailed submissions on the evolution of the various timetables. The Claimants do not contend that the periods used for the business case and the tender process had any effect on delay when one has regard to what actually happened. As regards the time for delivery of equipment, the Claimants have a separate case to the effect that TSTT did not take up an opportunity offered to it by Nortel to speed up delivery of the equipment. I will discuss later in this judgment whether there was a causal link between the periods stated in the timetable and what subsequently happened. The Claimants do say that the period in the timetable for evaluation of the network did cause delay to the completion of interconnection. The Claimants then consider in detail the period in the timetable for the evaluation of the network. The Claimants say that that period was unnecessary and it was known to be unnecessary. They say the period was included for the purpose of introducing an unacceptable delay before TSTT would even request a quotation from Nortel.

282. The Claimants also criticise the role played by Mr Barnes at the meeting on 9th September 2005 when he defended the timetable, even though his personal views were not in accordance with all of the stages in that timetable. The Claimants go so far as to say that even if technical people within TSTT genuinely believed that the evaluation had to be carried out and had to be carried out prior to sending a request for a quotation to Nortel, and even if the court held that view was a reasonable view, it was misleading of TSTT to keep secret the fact that Mr Barnes held a different view.

283. The Claimants say that the appearance of the period for evaluation in the project timetable led to a delay of at least three weeks in the interconnection process. The Claimants say that TSTT ought to have sent a request for a quotation to Nortel not later than 12th September 2005, the Monday after the meeting on 9th September 2005. The Claimants say that the fact that TSTT was not under a legal obligation to commence physical interconnection, and therefore not under a legal obligation to send a request for a quote to Nortel, is irrelevant.

284. In the period in question and indeed up until 31st December 2005, TSTT did not owe any legal obligation to Digicel T&T to progress interconnection with Digicel T&T or Laqtel. In that period, Digicel T&T, no doubt acting in what it believed to be its commercial interests, was very keen to progress interconnection, even though it had not yet achieved a concession, and had no legal right to insist upon interconnection. During that period, TSTT, acting in what it believed was its commercial interests, did not wish to advance interconnection. TSTT was not wholly able to give effect to its wishes in this respect. Digicel T&T waged a successful campaign to persuade the government and the regulator to put increasing pressure on TSTT to act contrary to what TSTT regarded was in its best commercial interests. TSTT recognised that it would have to engage with the process of interconnection to some extent.

285. The first stage of the process involved discussions with Digicel T&T and discussions did take place. At an early stage, Digicel T&T put forward a timetable for interconnection. TSTT genuinely believed that Digicel T&T's timetable was quite unrealistic. TSTT said so to Digicel T&T and to the regulator. Digicel T&T challenged

TSTT to put forward its own timetable and TSTT recognised that if it were to make progress in any debate about a timetable, it would have to have its own properly considered and defendable timetable.

286. The timetable produced by Mr Barnes which showed 20 to 24 weeks, or 25 weeks, was based on standard requirements in relation to interconnection and was not tailor made for T&T. Mr Barnes wished to discuss with the technical people in TSTT the particular circumstances in T&T. When Mr Barnes did so, he was persuaded that interconnection in T&T was a more complicated affair and would take more than 25 weeks. Mr Barnes also had views which he was reluctant to express within TSTT to the effect that TSTT was somewhat slow and inefficient.

287. The technical people in TSTT genuinely wanted an evaluation of its network before making progress with interconnection. The technical people in TSTT did carry out that evaluation before requesting a quote from Nortel. An experienced technical man like Mr Barnes thought that it was not essential to have that evaluation before even requesting a quote for equipment. The technical people in TSTT did not see it the same way. It is difficult to judge whether the technical people in TSTT had regard exclusively to technical considerations or whether they were influenced by a desire to delay the completion of interconnection. The desire within TSTT to interconnect at a time when it suited TSTT, rather than the earliest conceivable time which suited Digicel T&T, makes it possible that the technical people in TSTT were influenced by that desire when forming their view as to the need for an early evaluation of the network. The timetable of 49 weeks was not a genuine attempt to arrive at the fastest possible timetable for interconnection. It was a timetable conceived in TSTT's own self interests and to protect its own network.

288. When Mr Espinal saw the timetable of 49 weeks, he realised that it could not be defended politically. He therefore tried to arrive at a timetable that could be so defended. Technical considerations may have been present in Mr Espinal's mind but there were other considerations as well. He had to make a pragmatic decision to settle on a timetable, that was not uncomfortably short, but which could at least be defended. He cut and pruned the various stages. If Mr Espinal had applied his mind in order to arrive at the fastest possible timetable for interconnection, he could have produced a timetable of less than 33 weeks. If Mr Barnes had been instructed to produce the shortest timetable from a technical point of view, he too would have been able to produce a shorter period than 33 weeks. Whilst I cannot say for certain what that period might have been, I think that such a period would have been somewhere between 25 and 33 weeks.

289. At the heart of the Claimants' case is the allegation that TSTT did one thing and said another or that TSTT did one thing and tried to give the appearance of doing another. In fact, in the period up to 20th September 2005, TSTT said very little to the effect that they welcomed interconnection and wanted it to happen as speedily as possible. TSTT said a whole range of other things inconsistent with the desire to bring about interconnection as soon as possible. TSTT said it was not obliged to deal with interconnection before the grant of a concession. TSTT expressed its concern about discussing interconnection before the regulations were promulgated in T&T. TSTT stressed its desire to make progress on a number of other fronts, before it provided for interconnection.

290. The only document referred to in closing submissions, in the period prior to the meeting on 20th September 2005, in support of the allegation of pretence, was the letter of 16th August 2005. It was on 20th September 2005 that the regulator rejected the timetable put forward by TSTT. The Claimants have quoted from the letter of 16th August 2005 the sentence: "TSTT has embraced the liberalisation process and will do all in its power to carry that process forward". The letter is a two page letter and contains a large number of statements about TSTT's position and its intended behaviour. TSTT stated that before the parties had obtained concessions, discussions would only be preliminary and exploratory; the ability of the parties to make commitments must be without prejudice; anything more required the grant of concessions and certainty as to the regulatory framework; until concessions were granted, the role of the regulator would be persuasive, albeit highly persuasive; TSTT was seeking to protect its interests as far as it was able; TSTT did not think that publicity would be beneficial; Digicel T&T's timeframe for interconnection did not match TSTT's timeframe. The letter then referred to TSTT embracing the liberalisation process. It added that carrying the process forward would not be done at the expense of operating irrationally and without detailed consideration of the impact on TSTT's operations and that TSTT was committed to continuing preliminary negotiations in good faith but would be mindful of its right to benefit from its commercial activity in the same way as Digicel T&T wished to benefit from its commercial activities.

291. Having referred to the contents of the letter of 16th August 2005, I do not regard the single sentence relied upon by the Claimants as providing any real support to their case that TSTT were saying one thing and doing another in the period up to 20th September 2005 when the regulator rejected TSTT's project timetable. I will, however, later return to this question of TSTT saying one thing and doing another when I discuss the part played by Mr Davy's letter of 3rd October 2005.

292. In relation to the project timetable, the discussions about the timetable occurred because Digicel T&T put forward its own timetable for interconnection. TSTT genuinely believed that Digicel T&T's timetable was unrealistic. Having heard the evidence as to TSTT's timetable, in my judgment, I find that Digicel T&T's timetable was unrealistic. Faced with an unrealistic timetable from Digicel T&T, in circumstances where there was a debate about the length of a realistic timetable, TSTT argued a contrary case. It argued its case in its own self-interests. In my judgment, TSTT's conduct in presenting a 33 week timetable and defending it at the meeting on the 9th September 2005 was not contrary to honest practices.

293. In relation to Mr Barnes' position, I do not see that Mr Barnes did anything which is open to criticism by putting forward the 33 week timetable even though he himself held different views in relation to some parts of the timetable. Mr Barnes was acting as the advocate for TSTT. TSTT was not acting contrary to honest practices in asking Mr Barnes to act as an advocate in that way.

294. Accordingly, I find that the matters complained of in relation to the project timetable were not a breach of section 4 of PAUCA. In these circumstances, I will deal briefly with the issue whether any such breach of section 4 of PAUCA would have caused any loss to Digicel T&T.

The first allegation: causation

295. This is not a case where Digicel T&T entered into an agreement that interconnection should proceed in accordance with TSTT's timetable and are now saying that they were misled into making such an agreement. The TSTT project plan never became the subject of any agreement. Digicel T&T made clear that it did not accept TSTT's plan. Further, TSTT did not misled the regulator as the regulator rejected the reliability of TSTT's plan and tried very hard to insist upon interconnection more quickly than in accordance with that plan.

296. As regards alleged losses to Digicel T&T, it does not say that the time taken up in discussing the project plan was longer than it should have been and that the discussion on the project plan could have taken place more quickly, if TSTT had been more realistic. The Claimants do say that time was wasted because TSTT actually did carry out an evaluation of its network before it requested a quote from Nortel. However, the pleaded case against TSTT is not that TSTT took time in doing work, which it did not need to do, or that it did the work in advance of taking other steps. The pleaded case is that it was not an honest practice to include such a step in a project timetable and to defend that timetable at a meeting on 9th September 2005. Whether the step was or was not in the project timetable, TSTT was entitled to carry out its own evaluation of its own network at a time of its choosing.

297. The Claimants' case in closing submissions was that TSTT should have requested a quote from Nortel on 12th September 2005, rather than at a later date. The difficulty with this case is that TSTT was not under an obligation to request a quote on 12th September 2005, or indeed at any time before it came under an obligation pursuant to its concession, granted on 31st December 2005.

298. The Claimants have not put their case on the basis that if TSTT had put forward a project plan which showed the first step as being a request for a quote from Nortel, then TSTT would on a voluntary basis have made that request. TSTT did not wish to make that request and one could only assess loss on the basis that it should have voluntarily made such a request if one held that TSTT would have come under pressure, which it would not have been able to resist, to make that request on or about 12th September 2005, if that step had been the first step in the project plan. However, at this stage, and indeed later, TSTT was under immense pressure to make progress towards interconnection. TSTT resisted that pressure. The reason it was able to do so was that TSTT was not under any legal obligation to make progress towards interconnection and because it could not be forced legally to act otherwise, TSTT took its own course as regards the pace of progress towards interconnection. Accordingly, it did not at that stage request a quotation from Nortel for interconnection equipment.

299. In these circumstances, in my judgment, even if I were to hold that TSTT acted contrary to honest practices in putting forward a project plan for 33 weeks and defending it at a meeting on 9th September 2005, I would not have been able to hold that such action had caused loss to Digicel T&T.

The second allegation: discussion

300. The second major respect in which the Claimants have pleaded that TSTT acted contrary to honest practices relates to the production of Mr Davy's letter of 3rd October 2005 and in particular the contents of the letter and what led up to the letter. The Claimants' pleaded allegation covers many pages. I will now attempt to summarise the principal assertions which are made and indicate my findings of fact, and of law, in relation to the allegations.

301. The first assertion is that by 7th September 2005, TSTT had determined that interconnection with Digicel T&T would not be effected until 31st March 2006 at the earliest. The Claimants rely upon Mr Espinal's email to Ms Agard of 7th September 2005 and his email to Mr Davy of 21st September 2005. I have referred above to the contents of the two emails. I find that by 21st September 2005, at the latest, Mr Espinal of TSTT had reached a settled position that he would endeavour to ensure that interconnection with Digicel T&T did not take place before the end of March 2006.

302. The Claimants then refer to the email of 21st September 2005. They refer to certain of the matters expressly stated in the email. They allege that TSTT wanted Nortel to produce a report supporting the case that it was not possible for Nortel to achieve interconnection before the end of March 2006, whether or not that was a true statement. The Claimants say that this character of the instruction on 21st September 2005 is implicit in the way the email was written. They say that Mr Davy was in effect told to pay no heed to Mr Espinal's comment that Nortel should not take sides. In my judgment, I am not able to make that finding as to the character of the instruction on 21st September 2005. The Claimants have not alleged that there was any communication between Mr Espinal and Mr Davy before the email of 21st September 2005 which would cause Mr Davy to think that he was being asked to support TSTT's position on a particular point, irrespective of whether he believed that position to be accurate or not. The express terms of the email of the 21st September 2005 make it extremely difficult, in my judgment, to say that Mr Davy, assuming that he had not been primed as to what was expected of him, should realise that he was expected to support a position, irrespective of whether he believed it or not.

303. The Claimants next averment is that prior to the letter of 3rd October 2005, Mr Davy knew that TSTT intended to delay interconnection with Digicel T&T until the end of March 2006 at the earliest. That fact is said to be apparent from the email of 21st September 2005 and the Claimants also rely upon Mr Taylor's evidence as to the conversation between Mr Espinal and Ms Bejar.

304. I have already made my finding as to the character of the email of 21st September 2005. I have also made findings about the conversation between Mr Espinal and Ms Bejar and the conversation between Mr Taylor and Mr Davy. I have found that Mr Davy knew before the 2nd October 2005 that Mr Espinal was directing Nortel not to deliver interconnection with Digicel T&T before the end of March 2006. The evidence on these conversations did not go so far as to say that Mr Espinal instructed Ms Bejar, or indirectly Mr Davy, to produce a report which supported the date of 31st March 2006, irrespective of whether Mr Davy believed the contents of his report or not. There was no evidence that Mr Espinal raised with Ms Bejar the specific matter of his outstanding request of 21st September 2005. As I interpret Mr Taylor's evidence, Mr Davy appeared to know something about a conversation between Mr Espinal and Ms Bejar, even before Mr Taylor told Mr Davy about it. There was no investigation in the evidence of what

precisely Mr Davy knew before his conversation with Mr Taylor. However, it is to be inferred that Mr Espinal telephoned Ms Bejar for a purpose and that purpose was to influence Nortel's behaviour as regards the delivery date for interconnection in T&T. The matter which was outstanding between TSTT and Nortel at the time of the conversation was the request of 21st September 2005 or, at the lowest, the matters outstanding included that request. When Mr Davy produced his letter of 2nd October 2005 the letter fitted closely with Mr Espinal's instruction to Ms Bejar. In his letter of 2nd October 2005, Mr Davy stated that Nortel could complete the interconnection project by 31st March 2006 but this was a best case scenario and there was no room for any unforeseen matters.

305. I would have liked to have known more about the conversation between Mr Espinal and Ms Bejar and I would have liked the evidence to have dealt with the possibility that Mr Davy was aware of the conversation with Ms Bejar even before Mr Taylor told him. Nonetheless, with such evidence as I have on those matters, I will next examine Mr Davy's behaviour when he wrote the letters of 2nd and 3rd October 2005 and Mr Espinal's involvement in the composition of the letter of 3rd October 2005.

306. The Claimants' pleaded case focuses upon the letter of 3rd October 2005. The Claimants aver that the letter of 3rd October 2005, referring to a completion date of 30th April 2006, carried the implication, intended by Mr Davy, that interconnection could not be completed before 30th April 2006. I agree that that was the implication of the letter and that Mr Davy intended it.

307. The Claimants then say that a statement that interconnection could not be achieved before the end of April 2006 was known to be false and interconnection was capable of being effected well before that date. To advance that case, the Claimants rely upon what was later said by Ms Ramos on 8th December 2005 about interconnection being possible by 17th February 2006. The Claimants are prepared to assume in their pleading that this date could be achieved in a case where TSTT placed an order for the Digicel T&T interconnection equipment by 23rd November 2005 (the date on which the actual purchase order was placed). Accordingly, the Claimants did not submit the timetables attached to the letter of 3rd October 2005 to examination nor did they ask me to make findings of fact as to possibly shorter reasonable periods to be substituted for the periods in the timetables. The Claimants also appear to accept that the period between 3rd October 2005 and a purchase order on 23rd November 2005 is not to be held against TSTT.

308. The Claimants' case hinges on the fact that, as they say, TSTT placed a purchase order for the Digicel T&T interconnection equipment on 23rd November 2005 and Ms Ramos wrote the email which she did on 8th December 2005. In my judgment, I am wholly unable to reach the conclusion contended for by the Claimants based upon the matters they have pleaded. On my findings of fact, Ms Ramos' email of 8th December 2005 was not referring to interconnection equipment for Digicel T&T. It was referring to interconnection equipment for Laqtel. The Laqtel equipment was not identical to the Digicel T&T equipment and the Laqtel order had been placed on 9th November 2005. In the case of an order placed for Digicel T&T equipment on 23rd November 2005, Ms Ramos' email gives no guidance as to when that equipment would be ready for delivery, installation and testing

309. Mr Taylor referred to an opportunity for Nortel to complete interconnection by 17th February 2006 or to deliver the Digicel equipment in week 52 of 2005. I have made my findings on those matters and I have not accepted the points being made by Mr Taylor. Mr Taylor gave evidence that there were no other opportunities to bring forward the target date of 31st March 2006. Mr Taylor said that in January and February 2006, Nortel was trying hard to achieve that target date and not overrun.

310. In addition, the Nortel internal documents make clear that there was a difference between constructing a timetable at an early stage in a procurement process and selecting a delivery date once the particular order has been placed with the factory for manufacture. It is only at the later stage that more reliable predictions as to delivery dates can be made. Accordingly, I do not accept the Claimants' reasoning that the evidence as to what later happened, or allegedly happened, in relation to the order for the Digicel T&T interconnection equipment, allows me to conclude that the date of 30th April 2006 as stated in the letter of 3rd October 2005 was known to be a false date.

311. The Claimants next averment is that when Mr Davy wrote his letter of 3rd October 2005 he knew that the contents of the letter were false or he was reckless not caring whether the contents were true or false. The Claimants give particulars of the alleged knowledge or recklessness. They refer to the differences between the letters of 2nd and 3rd October 2005. The letter of 2nd October 2005 gave an end date of 31st March 2006 and did not refer to working extended hours or weekends. The Claimants say that Mr Espinal's email of 21st September 2005 did not contain the information which Mr Davy would need to make an assessment of when interconnection could be completed. It is also said that Nortel had not carried out an examination of the capacities of TSTT's networks as at 3rd October 2005. That being so it is said that it was impossible for Mr Davy to provide a definitive date as the earliest date for completion of interconnection. It is then said that on 1st December 2005, Nortel provided a target ready for service date of end of March 2006 without any explanation as to why the prediction had changed from 3rd October 2005 to 1st December 2005.

312. The Claimants further say that by mid-December, physical interconnection was thought to be achievable by 17th February 2006. Finally, the Claimants say that the timetable stated by Mr Davy in his letter of 3rd October 2005 was no more than guess work on his part and was designed to give Mr Espinal what he had asked for.

313. In my judgment, some but not all of these points are well founded. In particular, in relation to the letter of 2nd October 2005, I find that Mr Davy drafted that letter to refer to a completion date of 31st March 2006 because he felt he was giving Mr Espinal what would suit Mr Espinal, namely, a letter from Nortel, which TSTT could show to the regulator, to support the position which TSTT wanted to achieve, namely, interconnection not earlier than 31st March 2006. Mr Davy was not genuinely trying to assess how long interconnection would take. Instead, he was simply saying what he believed TSTT wanted him to say.

314. I have already made my finding as how and why the date of 31st March 2006 was changed to 30th April 2006 in the letter of 3rd October 2005. I have found that the date was changed by Mr Espinal. The date of 30th April 2006, was compatible with the project plan which TSTT was using to argue its position with the regulator. Whilst it is conceivable that Mr Davy was shown the project plan and felt able to judge that it was a

reliable project plan and so was behaving properly when he put his name to the letter of 3rd October 2005, Mr Davy did not give evidence to that effect. I have not accepted the evidence which Mr Davy did give to the effect that the date of 30th April 2006 was provided to him by the technical people at Nortel. I find that Mr Davy signed the letter of 3rd October 2005 referring to the date of 30th April 2006 for the same reason that he signed the letter of 2nd October 2005. He was not genuinely trying to assess how long interconnection would take. Instead, he was simply saying what he believed TSTT wanted him to say.

315. The Claimants next say that the change between the letters of 2nd October 2005 and 3rd October 2005 was effected in discussions between Mr Espinal and Mr Davy and, accordingly, Mr Espinal knew that the contents of the letter were no more than guess work on the part of Mr Davy and Mr Davy was saying something he knew to be untrue or he was reckless as to the contents of the letter.

316. Having already made the finding that the change between the letters of 2nd and 3rd October 2005 was the result of a discussion between Mr Davy and Mr Espinal, I conclude that Mr Espinal did appreciate that what was being written in Mr Davy's name was not something that Mr Davy was able to put forward as an accurate assessment of the time needed to effect interconnection but was instead a statement which Mr Espinal had decided would be made to the regulator. Mr Espinal had decided that TSTT's position in relation to the regulator would be that interconnection could not happen before the end of April 2006, approximately in accordance with the TSTT project timetable. Mr Espinal knew that he was procuring Mr Davy of Nortel to make a statement which was apparently technically well founded but was instead simply drafted to adopt TSTT's pre-existing and continuing position. Mr Espinal knew that the letter was designed to support his stance and was not a genuine technical assessment of the earliest date at which interconnection could be achieved.

317. Having made these findings of fact as to the involvement of the CEO of TSTT in the creation of the letter of 3rd October 2005, and directing myself in accordance with my earlier rulings as to the meaning of conduct "contrary to honest practices" in section 4 of PAUCA, I hold that TSTT was guilty of conduct contrary to honest practices in that respect.

318. In the course of describing the relevant events in T&T, I have referred to the way in which Mr Espinal used the letter of 3rd October 2005 and put it forward as a genuine technical assessment of the earliest date at which interconnection could be achieved, when Mr Espinal knew that that was not the true character of the letter. In that respect also, I hold that TSTT was guilty of conduct contrary to honest practices in breach of section 4 of PAUCA.

The second allegation: causation

319. Having held that TSTT did act in relation to the letter of 3rd October 2005 in a way which was contrary to honest practices, the next question is whether that conduct caused loss to Digicel T&T. For this purpose, I need to consider the part played by the letter of 3rd October 2005 and whether the use of the letter had any effect on the time when interconnection was completed.

320. In the period up to the end of December 2005, TSTT did not have a legal obligation owed to Digicel T&T, or to the regulator or to the government, to effect interconnection with Digicel T&T. Digicel T&T sought to make good that deficiency by using powers of persuasion and applying pressure in order to make progress on interconnection. Digicel T&T applied very considerable and sustained, indeed almost daily, pressure on the regulator and also considerable pressure on the minister. Digicel T&T ran an advertising campaign to generate public support for its position and hostility to that of TSTT.

321. TSTT did not wish to advance interconnection in a way which would result in interconnection before 31st March 2006. However, it had to contend with the pressure being placed on it by the regulator and the minister. TSTT plainly found it difficult to adopt the stance which some C&W companies adopted in other countries, namely, a stance of outright refusal to make progress on interconnection, on the grounds that the incumbent had no legal obligation to co-operate in relation to interconnection until the new entrant obtained a licence or a concession. TSTT therefore sought to deflect criticism by putting forward its arguments as to the requisite timetable involved in interconnection. It sought to use its timetable and the letter of 3rd October 2005 for this purpose. However, those arguments, and the use of the timetable and the letter of 3rd October 2005, were wholly unsuccessful as a means of deflecting criticism.

322. I have deliberately set out in considerable detail the reactions of Digicel T&T, the regulator and the minister to the stance being taken by TSTT and the reaction to TSTT's timetable and the letter of 3rd October 2005. Digicel T&T did not rely upon the statements being made by TSTT and did not change its behaviour as a result, thereby suffering loss and damage. The reverse was the case. Digicel T&T was vociferous in criticising TSTT and in condemning it as downright dishonest in the stance it was taking.

323. The regulator and the minister were receptive to Digicel T&T's complaints. The regulator plainly thought that TSTT's stance was unjustified and said so. The minister also was aware that TSTT was not co-operating with the process.

324. The real problem for Digicel T&T was that there was no legal obligation on TSTT to progress interconnection. As the weeks and months went by and as the government in T&T delayed in granting concessions to TSTT and Digicel T&T, TSTT's ability to delay the process of interconnection became more straightforward. Even though none of the relevant parties believed what TSTT was saying, no one was able to take effective action because of the lack of legal obligation on TSTT.

325. After 31st December 2005, TSTT was under a legal obligation as set out in its concession in relation to interconnection. However, the Claimants have not asserted in their closing submissions that TSTT broke that obligation.

326. In these circumstances, the pleaded case which I have upheld, to the effect that TSTT acted contrary to honest practices in relation to the letter of 3rd October 2005, is not what caused delay to interconnection in T&T.

The third allegation: discussion

327. The third pleaded allegation which is relied upon by the Claimants is encapsulated in paragraphs 4.1 and 4.2(q) of the relevant pleading in T&T. Paragraph 4.1 makes the

general plea that TSTT deliberately delayed interconnection from certain dates until 6th April 2006, when interconnection was completed. This conduct is said to be contrary to honest practices. Paragraph 4.2 of the pleading then alleges that the strategy of delay included certain acts or omissions. Paragraph 4.2(q) refers to TSTT's exertion of influence over Nortel including as described in a number of earlier paragraphs, whose numbers are listed.

328. One of the groups of paragraphs listed in paragraph 4.2(q) is the group of paragraphs 3.43A-3.43L. Those are the paragraphs that refer to Mr Espinal's emails of 7th and 21st September 2005 and certain matters which led up to Mr Davy's letter of 3rd October 2005. In pleading that case, the paragraphs refer to the part of Mr Taylor's witness statement which had mentioned the conversations between Mr Espinal and Ms Bejar and between Mr Davy and Mr Taylor. Those paragraphs also mention the date of 17th February 2006 and Ms Ramos' email of 8th December 2005. I have referred to all these documents earlier in this judgment. When the Claimants made their closing submissions, they submitted that TSTT acted contrary to honest practices by turning down the opportunity offered by Nortel to expedite completion of interconnection to 17th February 2006, alternatively, caused delay by reason of the instruction given by Mr Espinal to Ms Bejar in late September 2005. The suggestion was that if that instruction had not been given, then Nortel would have proceeded more quickly and, in particular, would not have taken time waiting for a reply to the email which Ms Bejar thought that she had sent on 16th December 2005.

329. My initial reaction to the pleading is that it did not contain a clear statement setting out the allegation which was put forward in the Claimants' closing submissions. The conversation between Mr Espinal and Ms Bejar was pleaded only for the purpose of alleging that Mr Davy knew that TSTT wished to delay interconnection until the end of March 2006. Further, the reference to completion of interconnection by 17th February 2006 was only for the purpose of alleging that as at the date of Mr Davy's letter of 3rd October 2005, it was the case that interconnection could have been completed before the end of March 2006. If the pleadings had stopped there, I may have held that it was not open to the Claimants to allege that TSTT had delayed interconnection by reason of the conversation with Ms Bejar in late September 2005 or by reason of what happened in relation to the alleged opportunity to bring forward interconnection to 17th February 2006.

330. However, paragraph 4.2(q) of the pleading also refers to paragraph 3.86 which alleges that TSTT applied pressure upon Nortel to slow down delivery of the interconnection equipment and that such pressure was successful in delaying interconnection. Paragraph 3.86 was in the original unamended pleading. TSTT requested further information in relation to another part of paragraph 3.86 but not in relation to the part which asserted that TSTT had applied pressure on Nortel. Based on the way in which the Claimants answered other requests for information, it is fairly clear to me that if further information had been sought of the relevant part of paragraph 3.86, the information would not have been provided. However, the fact remains that further information of the relevant allegation was not sought. The allegation is general and not particularised. Nonetheless, in view of the fact that the conversation with Ms Bejar and Ms Ramos' email referring to the date of 17th February 2006 are mentioned in the pleading, I have come to the conclusion that it would be wrong to prevent the Claimants putting the case they want to put as to the significance of those matters.

331. I have made my findings of fact as to the conversation between Mr Espinal and Ms Bejar at the end of September 2005. I now need to consider whether that conversation comprised conduct by TSTT which was contrary to honest practices. If the conversation had merely been to state TSTT's preferences as to when it wished to have completion of the various projects for which TSTT was considering placing orders with Nortel, then the passing of information of that kind to Nortel might not have been contrary to honest practices. If on the other hand, the conversation was for the purpose of persuading Nortel not to permit interconnection to occur before the end of March 2006, then in view of the statements being made by TSTT to Digicel T&T, the regulator and the minister, then I think that behaviour would cross the line and I would hold it was contrary to honest practices to behave in that way. My conclusion is that the conversation was for the second purpose referred to above and that TSTT in this respect acted contrary to honest practices.

332. As to the alleged opportunity to bring forward interconnection to 17th February 2006, I have held that there was not an opportunity in December 2005 to bring forward interconnection between TSTT and Digicel T&T, as distinct from Laqtel, to that date.

The third allegation: causation

333. In the light of these findings, the next question is what would have happened if Mr Espinal had not directed Ms Bejar in late September 2005 that Nortel was not to complete interconnection before the end of March 2006. The Claimants submitted in their written closing submissions that the position as regards the assessment of the counterfactual was "relatively straightforward". The Claimants explained their version of the counterfactual in a mere 3 pages, out of a total of 211 pages of closing submissions dealing with T&T. That counterfactual was on the basis that there was an opportunity in December 2005 to bring forward the date for interconnection with Digicel T&T to 17th February 2006. I have held that there was no such opportunity. In any event, I do not agree that assessing what might have happened is as straightforward as the Claimants say.

334. The Claimants say that if, as the chart of 12th December 2005 showed, there was an opportunity to bring forward interconnection for one new entrant to 17th February 2006, I should proceed on the basis that the relevant new entrant would have been Digicel T&T. I do not agree. On the evidence the equipment in question was the equipment which had been ordered for Laqtel. The specification of the equipment for Laqtel was different from the specification for the equipment for Digicel T&T. There was no specific evidence as to what would have been involved in modifying or supplementing the Laqtel equipment to make it suitable for Digicel T&T. However, I think it is likely that the Laqtel equipment could have been modified or supplemented for this purpose.

335. Nortel could not unilaterally have switched the Laqtel equipment so that it could be used for interconnection with Digicel T&T. Even if Mr Espinal had had no relevant conversation with Ms Bejar in late September 2005, Nortel would still have needed to approach TSTT to seek its consent as to what should be done in this respect. When Nortel did try to approach TSTT on 16th December 2005, there was a delay because Ms Bejar's email was not successfully transmitted to Mr Espinal. It is possible that Ms Bejar and Mr Espinal spoke later in December, alternatively, it is possible that Mr Espinal was not sounded out on the possible switch of equipment until 4th January 2006. TSTT was not under any legal obligation, at least without obtaining the consent of Laqtel, to direct

Nortel to use the equipment ordered for Laqtel for the purpose of interconnection with Digicel T&T.

336. I did not receive any reliable evidence which would enable me to make a finding as to what Laqtel's attitude would have been if it had been asked in late December 2005 or early January 2006 to allow the equipment ordered for it to be diverted to be used for Digicel T&T. I can only speculate on that topic. I do not see why Laqtel would have been prepared to agree to any such proposal. On the evidence before me, I find that there was no real or substantial chance that Laqtel would have consented to the same. Accordingly, there was no real or substantial chance that any arrangements between Nortel and TSTT in late December 2005 or early January 2006, which TSTT was in any event not obliged to entertain, would have resulted in the date for interconnection with Digicel T&T being brought forward to 17th February 2006.

337. In the light of these findings, putting on one side the specific suggestion that Nortel could have provided equipment for interconnection with Digicel T&T by 17th February 2006, I have considered the more general questions of what might have happened if: (1) TSTT had applied pressure to Nortel at some stage or other to bring forward the date of 31st March 2006 for completion of interconnection with Digicel T&T; or (2) if TSTT had not told Nortel in late September 2005 that it did not wish interconnection to be completed before 31st March 2006 and had simply left it to Nortel to take its own course without any influence from TSTT either to speed up or slow down the process.

338. As regards the first of these possibilities, speaking generally and in the absence of specific evidence from anyone within Nortel, it can be said on behalf of the Claimants that a supplier is more likely to achieve an earlier delivery date if the customer is pressing for delivery, as compared with a case where the customer is relaxed about delivery dates. If TSTT had pressed Nortel for an early delivery date, then TSTT would be joining with Digicel T&T and the regulator and the minister in asking Nortel to assist in that way. Again speaking generally, that suggests there might have been a possibility of Nortel achieving an earlier delivery date than it actually achieved.

339. As regards the second of the possibilities, i.e. TSTT leaving it to Nortel to take its own course without any influence either way from TSTT, it is possible that one result might have been that Nortel would then have wanted to assist Digicel T&T and the regulator and the minister by doing what it could to improve on the delivery date.

340. The discussion as to what might have happened in different hypothetical circumstances is necessarily speculative. In that discussion I have not yet taken into account the evidence I have been given as to what Nortel could have done, and might have done, if it had wished to improve on the delivery date for the interconnection equipment ordered by TSTT. I heard evidence from two witnesses who were inside Nortel at the relevant time, Mr Davy and Mr Taylor.

341. As regards Mr Davy, the Claimants get no support from him for their case as to what could have happened. As already explained, I am reluctant to give much weight to what Mr Davy told me and so I do not rely upon Mr Davy's evidence in so far as it might have been contrary to the Claimants' case.

342. The other Nortel witness was Mr Taylor. The Claimants specifically called Mr Taylor to give evidence about the possibility of bringing forward the interconnection date. He gave evidence about a possible interconnection date of 17th February 2006, on which I have already made specific findings. He also gave evidence about the possibility of delivery of equipment in week 52 of 2005, about which I have again made specific findings. More generally, Mr Taylor's evidence was to the effect that one could only speculate as to what might have happened if TSTT had tried to apply pressure to bring forward Nortel's target delivery dates. In one sense, Mr Taylor is absolutely right. A question of the present kind as to what might have happened necessarily involves an assessment, or speculation, as to what might have happened in circumstances that did not actually exist. However, Mr Taylor's evidence is, on the whole, unhelpful to the Claimants. When Mr Taylor did try to speculate on these questions, his comments as to interconnection by 17th February 2006 and as to delivery in week 52 of 2005 were, I find, wide of the mark. As regards other possible speculations, I interpret Mr Taylor to be saying that, in other respects to those that he mentioned, he simply could not tell what could have happened, and therefore what might have happened, in circumstances such as those which are now being considered.

343. This assessment of what might have happened in other circumstances involves an assessment of how a third party, Nortel, might have behaved. The law is clear that where one has to assess the possible conduct of a third party, i.e. neither a Claimant nor a Defendant, the law is concerned to assess the chance of the third party acting in a particular way, which would have been more beneficial to the Claimants than the actual situation in which they were placed. The assessment does not involve the court finding whether particular conduct by the third party was more likely than not, and then either deciding that the third party's conduct would definitely have happened or would definitely not have happened. Instead, the court has to assess the chance of the third party acting in the way contended for. If there was a "real" or "substantial" chance of a better result coming about, the court assesses what that chance was. If there was only a "speculative" chance of a better result, then that speculative chance is ignored. The legal principles are stated in the well known case of Allied Maples Group Ltd v Simmons & Simmons [1995] 1 WLR 1602. Although this is, to my mind, clearly the position, the Claimants have not put their case that way. In the course of his opening, I asked Mr Rubin QC acting for the Claimants, on more than one occasion, whether he was contending for damages to be assessed on the basis that the Claimants had lost the chance of a better result, compared with the one which actually came about. He answered that the Claimants were not contending for damages to be assessed on the basis of a lost chance. In closing submissions, Mr Rubin repeated that that was the Claimants' position but he added that the Claimants would wish to put forward, in the alternative to their principal claim, a claim to damages based on the loss of a chance of a third party acting in a way more beneficial to the Claimants than their actual position. The written closing submissions for the Claimants in relation to T&T do not identify any case based on an alleged loss of a chance but seek to claim as damages 100% of the improvement in their position if Nortel had acted in a way which was more favourable to the Claimants.

344. It is difficult to assess whether TSTT's mode of conducting its defence of the claim against it was influenced by the Claimants' statement in opening that the Claimants did not claim on the basis of a lost chance. Nonetheless, the stance adopted by the Claimants in this respect does not encourage me to be too adventurous in speculating as to the

possibility that the Claimants might have lost a chance of being better off, if Mr Espinal had not had his conversation with Ms Bejar in late September 2005.

345. Before coming to a view on the question of what might have happened in relation to Nortel's conduct in certain circumstances, it is also necessary to consider what TSTT ought to have done. Speaking generally, I should proceed on the basis that TSTT would have performed any legal obligations upon it at the relevant time. TSTT was only placed under a legal obligation in relation to the progress of interconnection when it was granted its concession on 31st December 2005. Up to that point it was not obliged to put pressure on Nortel to improve on delivery dates for interconnection equipment. As regards TSTT's obligations under section 4 of PAUCA, it was not contrary to honest practices for TSTT to decline to put that pressure on Nortel. It was perfectly entitled to say to Digicel T&T and to the regulator and to the minister that it would not put pressure on Nortel in this way. TSTT was even entitled to say to Nortel that it did not wish to see interconnection completed until 31st March 2006, provided that TSTT did not say inconsistent things to Digicel T&T, the regulator and the minister. As described above, TSTT did say inconsistent things to those persons but its protestations were simply not believed. It is possible, albeit rather difficult to tell, whether TSTT would have been prepared to be candid with Digicel T&T, the regulator and the minister, and have explained that unless and until it was placed under a legal obligation to act otherwise, it was not prepared to take steps which might result in interconnection being completed before 31st March 2006. It is much too speculative to attempt to assess whether, if TSTT had said that, the government in T&T would have granted a concession to TSTT before 31st December 2005 and thereby brought forward the date when TSTT came under a legal obligation in relation to interconnection.

346. So far I have confined the discussion to the question of what might have happened in relation to physical interconnection. Physical interconnection is usually not enough to allow a new entrant to launch its network. The new entrant normally needs both physical and contractual interconnection. The events in relation to contractual interconnection in T&T were somewhat unusual. When setting out my findings of fact in relation to T&T, I described the sequence of events which led to the decision of the arbitration panel on 31st March 2006.

347. In their lengthy written closing submissions, the Claimants did not put forward any specific submissions at all as to why I should hold that the arbitration process would have been completed earlier than 31st March 2006, if physical interconnection had been completed earlier than that date. Similarly, the Claimants put forward no submission to the effect that contractual interconnection would have been concluded before 31st March 2006, but for the matters alleged against TSTT. This was a remarkable state of affairs. It meant that even if I held that TSTT had acted unlawfully in delaying physical interconnection, the Claimants put forward no reasoned case that contractual interconnection (or an alternative way forward imposed by an arbitration panel) would have come about before 31st March 2006. TSTT drew attention to this point and the absence of any submission on it from the Claimants when, in turn, TSTT made its written closing submissions. This prompted the Claimants in their oral closing submissions to submit, for the first time, that if physical interconnection had been completed before 31st March 2006 then the dispute resolution procedures would have led to a conclusion earlier than 31st March 2006, but to the same effect as the actual decision of 31st March 2006.

348. I can see how it can be argued that if physical interconnection had been completed a good deal earlier than 31st March 2006, then there might have been a chance of the dispute resolution procedures being expedited to produce a decision by the arbitration panel that might have been before 31st March 2006. Conversely, if physical interconnection were only completed a few weeks before 31st March 2006, it becomes much less likely that those procedures would have been expedited to any marked extent. In the end, the debate on what, to my mind, is a critical element in the assessment of the case on loss of a chance came down to the Claimants asserting that it was obvious that they were right on the point, without seeing any need to examine the individual steps in the period January 2006 to March 2006 in order to see how, and if so when, the actual timetable towards the decision on 31st March 2006 might have been shortened. Conversely, TSTT submitted that there was simply no material before the court which would enable me to reach a judicial conclusion in favour of the Claimants on this point.

349. I can now express my conclusions as to whether the Claimants have established that, if Mr Espinal had not had his conversation with Ms Bejar in late September 2005, and assuming that TSTT ordered, on 21st or 23rd November 2005, equipment to be used for interconnection with Digicel T&T (as it actually did), there was a real or substantial chance that interconnection would have happened earlier than 31st March 2006. In this formulation I use the word "interconnection" to comprise either (1) physical and contractual interconnection or (2) physical interconnection and a ruling by the arbitration panel so as to dispense with the pre-condition of contractual interconnection.

350. In the event described in the last paragraph, I consider that there was some possibility that completion of physical interconnection might have come about earlier. I can see that there was a possibility that this might have occurred a few weeks before 31st March 2006. In the light of all the evidence, and in particular the evidence of Mr Taylor, I do not think that I could find that the chance of that happening was greater than 50%. Overall, I do not think it would be right to assess the chance as being above a 1/3 chance. I consider that this 1/3 chance should be downgraded further to allow for the possibility that it was open to TSTT to invite Nortel to act as it actually did act, without TSTT doing anything unlawful. Finally, if physical interconnection might have been brought forward, but only by a few weeks at the most, then I do not think that I could reach the conclusion on the material (or more properly the lack of material) before me that there was a real or substantial chance that the arbitration procedures would have been appreciably speeded up so as to produce a decision from the arbitration panel, favourable to Digicel T&T, on any date earlier than the date of the actual decision, 31st March 2006. In these circumstances, the chance of Digicel T&T being better off if Mr Espinal had not had his conversation with Ms Bejar in late September 2005 was not "real" or "substantial" but was "speculative" only. In law, the loss of such a chance is not loss and damage for which damages are awarded.

Other matters

351. For the sake of completeness, I will now address the further paragraphs of the Claimants' pleading in T&T, which are referred to in paragraph 4.2(q) of that pleading, in support of the general allegation that TSTT exerted influence over Nortel. I will deal only with the alleged exercise of influence up to the end of December 2005. I limit my examination to that period in view of the evidence of the Claimants' own witness, Mr

Taylor, to the effect that in January and February 2006 Nortel worked hard to achieve the interconnection date of 31st March 2006.

352. The Claimants say that on 1st December 2005, TSTT declined to provide Digicel T&T with copies of correspondence with Nortel to prevent Digicel T&T seeing the nature of the order which had been placed with Nortel. In my judgment, this allegation, if true, would not amount to conduct contrary to honest practices on the part of TSTT.

353. The Claimants then say that when Nortel wrote to the minister in T&T on 21st December 2005, Nortel omitted to provide estimates of when it would be able to complete interconnection in T&T. This is alleged to be the result of pressure by TSTT on Nortel. In my judgment, even if the allegation were true as a matter of fact, I do not see how it caused any loss to Digicel T&T.

354. The Claimants then say that TSTT's refusal to sign a joint letter to Nortel asking Nortel to expedite interconnection, in response to Digicel T&T's requesting a joint letter on 22nd December 2005, was contrary to honest practices. TSTT did decline to send that letter but, in my judgment, this was not contrary to honest practices.

The overall result in T&T

355. The overall result of the above findings of fact and other conclusions is that Digicel T&T has succeeded in establishing that TSTT acted contrary to honest practices in relation to the composition of and the use of Mr Davy's letter of 3rd October 2005 and in relation to the conversation which Mr Espinal had with Ms Bejar in late September 2005. However, I have concluded that TSTT's conduct in relation to the composition of and the use of Mr Davy's letter of 3rd October 2005 has not been shown to have caused delay in achieving interconnection between the parties in T&T. Further, Digicel T&T has failed to establish that it suffered loss and damage as a result of the conversation referred to above in that Digicel T&T has failed to show that it lost a real or substantial chance of having been better off if that conversation had not taken place.

ANNEX G – TURKS & CAICOS ISLANDS

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THE TELECOMMUNICATIONS ORDINANCE 2004

1. The Telecommunications Ordinance 2004 came into force on 20th August 2004.

2. Section 2 of the Ordinance contained definitions including the following:

"carrier" means a person who has been granted a licence under this Ordinance to own and operate a telecommunications network;

…

"dominant", for the purposes of Part 111 of this Ordinance, in relation to a licensee, means that a licensee enjoys, either individually or jointly with others, a position of economic strength that enables it to behave independently of competitors and customers in any relevant market for telecommunications services;

…

"interconnection" means the physical linking of public telecommunications networks to allow users of one licensed carrier to communicate with users of another licensed carrier;

…

"licensee" means a person who has been granted a licence under this Ordinance;

…

"network termination point" means the network interface device designated by a carrier for connection by a customer of equipment to that carriers network;

…

"rate" means an amount of money or other consideration and includes a charge, fare, price, rental, toll or other compensation payable to a licensee for the use of his services;

"regulated service" means a service designated by the Commission as a service of which the Commission approves the rates of the service;

"service provider" means a person who has been granted a licence under this Ordinance to provide telecommunications services to the public;

…

"telecommunications" means any form of transmission, emission, or reception of signs, text, images and sounds or other intelligence of any nature by wire, radio, optical or other electro magnetic means.

"telecommunications apparatus" means apparatus designed or adapted for use in conveying, emitting, receiving, switching or transmitting messages over a telecommunications network;

"telecommunications network" means any wire ,radio, optical, or other electromagnetic system used to route, switch, or transmit telecommunications;

"telecommunications service" means a service consisting of -

(a) conveying, emitting, receiving, switching or transmitting messages or having messages conveyed, emitted, received, switched or transmitted, by means of a telecommunications system; and

(b) installing, maintaining, adjusting, repairing, altering, moving, removing or replacing telecommunications equipment which may be connected to a telecommunications system;

…

3. Part II of the Ordinance established the Telecommunications Commission and the Director General of Telecommunications. The more relevant provisions in Part II are:

3. Telecommunications Commission
(1) There is hereby established a Commission to be known the Telecommunications Commission of the Turks and Caicos Islands (hereinafter referred to as the Commission) which shall consist of not more than seven members all of whom shall be appointed by the Minister, acting with the approval of the Executive Council.

(2) The members of the Commission shall be -

(a) the Permanent Secretary, Communications or representative ex officio;

(b) an Attorney-at-law;

(c) an Accountant or Economist;

(d) a technical person who has experience of, and shown capacity in Telecommunications matters; and

(e) four other persons.

(3) The Minister, acting with the approval of Executive Council shall appoint a chairman of the Commission from among the members of the Commission.

(4) A member shall be appointed to hold office for a period not exceeding five years; but may be removed by the Minister, acting with the approval of Executive Council, if, in the Minister opinion, based on evidence provided to the Minster the member is guilty of misconduct or malfeasance.

(5) A member of the Commission shall be eligible for reappointment.

(6) A member of the Commission who directly or indirectly has a pecuniary interest in any matter under consideration by the Commission shall be bound to declare such interest and shall not participate in any vote regarding such matter.

(7) The Commission shall be a body corporate having perpetual succession, a common seal and power to acquire, hold and dispose of land and other property.

(8) The Minister, acting with the approval of the Executive Council, shall set -

(a) the payments for the members of the Commission; and

(b) the travel expenses to be paid to members.

(9) Schedule I shall have effect with respect to the meetings and proceedings of the Commission.

(10) Schedule 2 shall have effect with respect to the operations, staff and finances of the Commission.

4. Functions of the Commission

(1) The functions of the Commission are -

(a) to carry out the functions conferred on it by this Ordinance;.

(b) to advise the Minister on telecommunications;

(c) to regulate telecommunications in the Islands in accordance with the policy guidelines published in the Gazette from time to time and in accordance with the principle of technological neutrality;

(d) to facilitate, maintain and promote effective and sustainable competition in telecommunications;

(e) to set standards for the quality of telecommunications services to be delivered to the public;

(f) to promote the interests of consumers and to encourage licensees to operate efficiently;

(g) to publish information, reports or other documents;

(h) to carry out investigations and hold enquiries with respect to any matter in relation to its functions or duties under this Ordinance.

(i) to give advice and directions to a licensee with respect to anti-competitive practice or behaviour;

(j) to prescribe standards for the protection of consumers and the public;

(k) to instruct the Director General to conduct research into the quality and standard of service of a licensee, and into tariffs or any anti competitive behaviour;

(1) administer such of its own databases or other information or administrative or operational systems as it considers necessary in relation to the discharge of its functions; and

(m) to carry out such other functions as may be necessary for the purpose of discharging its functions under this Ordinance

(2) The Commission for purposes of carrying out investigations or holding an enquiry under subsection (1) or for the purpose of conducting any hearing or making any decision or order under this Ordinance -

(a) may receive and consider any material whether by way of oral evidence, written statements, documents or otherwise, notwithstanding that such material would not be admissible as evidence in a court of law in civil or criminal proceedings;

(b) may determine the manner in which such material shall be received and what persons or class of persons shall be permitted or required to give evidence;

(c) may require any person who wishes to give evidence before the Commission to submit a summary in writing of the evidence proposed to be given;

(d) may summon any person, in the prescribed form and manner, to attend to give evidence or to produce any article or document;

(e) may administer oaths and affirmations;

(f) may examine on oath, affirmation or otherwise any person attending before the Commission and require such person to answer all questions put by or with the consent of the Commission, and produce any article or document in his possession or under his control;

(g) may reimburse any private individual (which for the avoidance of doubt shall not include any commercial parties) attending before the Commission such compensation as in the opinion of the Commission represents the loss to that private individual occasioned by the time spent in such appearance before the Commission

(h) may prescribe rules which prohibit the disclosure or publication by any person attending before the Commission, or by any member or staff of the commission, of all or part of any material received by the Commission;

(i) shall determine the procedure to be followed at the inquiry and the form of any summons, warrant, or other document to be made or issued by the Commission;

(j) shall observe the principles of procedural fairness and natural justice; and

(k) shall publish in a local newspaper circulating in the Islands the procedure to be followed when making applications for licences under this Ordinance including any applicable licensing criteria.

(3) Any person whose conduct is the subject of an inquiry, or who is implicated or concerned in the subject matter of the inquiry, shall, subject to the provisions of section 5, be entitled to be represented by an Attorney at the inquiry.

(4) For the purpose of subsection (3), the Commission shall determine whether the conduct of any person is the subject of the inquiry or whether a person is in any way implicated or concerned in the subject matter of the inquiry.

(5) The Commission may delegate to any person including the Director General such of its investigating or reporting functions as the Commission may unanimously decide, except essential decision making functions including the making of orders.

(6) The Commission shall in the performance of its functions act in fair and impartial manner.

5. Conduct of inquiry
Without derogating from the generality of the power conferred under section 4(l)(i), the Commission may-

(a) order the manner in which any person shall give his oral evidence and may specify that this shall be by way of cross-examination without examination-in- chief; and

(b) determine who may address the Commission, on what matters and in what order.

…

4. Part III of the Ordinance was concerned with telecommunications network and services. The more relevant provisions in Part III are:

8.Licensing of telecommunications providers

(1) No person shall

(a) establish, own or operate a telecommunications network without a carrier licence issued in accordance with this Part;

(b) provide public telecommunications services, whether or not for compensation, to the public without a service provider licence issued in accordance with this Part.

(2) Subsection (1) shall not be contravened by -

(a) the operation of a telecommunications network or service in which messages are conveyed by light in a manner capable of being received or perceived by the eye alone;

(b) the non-commercial operation of telecommunications network or service by the Royal Turks and Caicos Islands Police Force or the Civil Aviation Department or any department of Government, provided that such telecommunications network or service is used exclusively for the purposes of the Force or the department and not used as a public telecommunications; or

(c) the operation of a telecommunication network or service used in a single household for its own purposes.

(3) Nothing in this section shall discharge a person from having to obtain a licence or additional licence under Part IV where the person establishes, operates or uses a radiocommunications station or installs, operates or uses radiocommunications apparatus.

(4) This section shall not apply to a person who was legally authorised to provide a public telecommunications service, on or before the coming into force of this Ordinance unless and until that person has been granted a licence under section 13.

(5) For the avoidance of doubt, no person shall engage in bypass operations.

…

13. Grant of licence

(1) An application for a licence under this part shall be made to the Commission which shall forward the application along with its recommendations to the Minister.

(2) Where the Minister is satisfied that an application for a licence complies with the provisions of this Ordinance in relation to the licence for which application is being made, the Minister, on terms and conditions as recommended by the Commission, may grant the licence to the applicant

(3) A licence granted under this Part shall continue in force for a period of fifteen years unless previously revoked in accordance with a condition contained in the licence or under this Ordinance.

(4) A licensee shall commence business not later than the end of the period specified for commencement by the Minister in the licence.

(5) A licensee shall comply with the terms and conditions of the licence and all applicable rules, orders, regulations or decisions of the Commission.

(6) Where the Minister refuses to grant a licence under this Ordinance, the reasons for the refusal shall be made known to the applicant on request.

14. Conditions in a licence

A licence granted under section 13 shall include conditions-

(a) which appear to the Commission to be appropriate;

(b) to prevent anti-competitive behaviour in telecommunications markets including-

(i) engaging in anti-competitive cross-subsidisation; and

(ii) not making available timeously to other licensees technical information about essential facilities and commercially relevant information which are necessary for them to provide telecommunication services;

(c) that, not later than the end of the period of three months beginning with the day after the end of its financial year, the licensee shall send each year to the Commission a report in such form and containing such matters as the Commission may prescribe during that financial year;

(d) regarding the provision of a universal service or making a prescribed financial contribution to the cost of a universal service;

(e) relating to the quality and availability of a telecommunications service or telecommunications network;

(f) relating to the surrender, suspension or revocation of the licence;

(g) relating to providing the Commission with copies of the licensees audited accounts; and.

(h) relating to the annual date of payment of licence fees and the date licence fees become due.

(2) Where a licence is granted after the date set for payment of the licence fee, the fee payable thereon shall be in the proportion to the period of the year remaining in which the licence will be in force.

…

Dominant Licence

16. Dominant licensee

(1) The Commission may make a determination that a licensee is dominant in relation to the establishment, operation or maintenance of a telecommunications network or service.

(2) Before making a determination under subsection (1)' the Commission shall -

(a) hold a meeting to consider the status of the licensee under this section;

(b) provide reasonable notice of the meeting to the licensee;

(c) provide the licensee with the opportunity to make submissions to the Commission regarding its status under this section; and

(c) provide the licensee with the reasons for any determination made with respect to that licensee under subsection (1).

(3) Where a licensee has been declared dominant by the Commission under subsection (1)' the licensee may subsequently apply to the Commission to be classified as not dominant.

17. Conditions in dominant licensee's licence

Where the Commission decides in accordance with section 16 that a licensee is dominant in relation to the provision of telecommunications service or the establishment, operation or maintenance of a telecommunications network, the Commission may include in the licence conditions -

(a) regulating the operations of the licensee;

(b) regulating the rates which may be charged by that licensee for telecommunications services or a telecommunications network in accordance with section 27;

(c) requiring the licensee to publish its rates for telecommunications services or in relation to a telecommunications network, in the market in which the licensee is dominant;

(d) that rates for services, or in relation to a telecommunications network provided, to all users shall not be discriminatory; and

(e) with respect to the provision of international services and the settling of accounts with respect to those services.

…

22. Interconnection

(1) Where the Commission under section 16 decides that a licence is dominant, the licensee shall provide an interconnection timeously to another licensee who requests the interconnection.

(2) A dominant licensee to whom a request for interconnection is made may refuse to provide such interconnection on grounds to be determined by the Commission for the protection of -

(a) the safety of a person;

(b) the security of a network; or

(c) the integrity of the network.

23. Instructions on interconnection

(1) In the implementation of section 22, the Commission may issue instructions to the dominant licensee, and without prejudice to that generality may issue instructions to the licensee -

(a) to make its procedures for interconnection publicly available;

(b) to make the terms, conditions and rates of either its standard interconnection agreement or its interconnection offer, publicly available; and

(c) to provide interconnection -

(i) under non-discriminatory terms, conditions (including technical standards and specifications) and rates and of a quality no less favourable than that provided by the licensee for its own like services or for like services of non affiliated service suppliers or for the licensees subsidiaries or other affiliates;

(ii) in a timely fashion on terms and conditions (including technical standards and specifications cost-oriented rates) that are transparent, reasonable, having regard to economic feasibility;

(iii) sufficiently unbundled so that the licensee requesting interconnection does not pay for telecommunications systems components that it does not require for the service be provided; and

(iv) at all technically feasible points.

(d) to impose time limits for completion of the interconnection;

(e) on an optimal point for interconnection and on the technical characteristics of the point of interconnection;

(f) in respect of collocation as may be prescribed by regulations;

(g) in respect of rates for interconnection;

(h) in respect of the accounting standards to be used;

(i) to ensure that high standards of service are maintained; and

(j) in respect of services to be provided in connection with or ancillary to the interconnection;.

(2) The terms, conditions and rates referred to in subsection (1) -

(a) in the case of a licensee's standard interconnection agreement or interconnection offer, shall not be discriminatory and shall be at a quality which is no less favourable than those provided in relation to the dominant licensee's own and an affiliate's services;

(b) shall be transparent and cost-oriented having regard to economic feasibility; and

(c) shall provide interconnection in such a manner that the licensee requesting interconnection does not pay for telecommunications network components which it does not require.

(3) This section shall not apply to an interconnection agreement or arrangement that contains rates, terms or conditions which are different from those established by the Commission pursuant to this section:

Provided that all parties to such agreement or arrangement have agreed to be bound by the terms of such agreement or arrangement.

24. Disputes

(1) The Commission may on its own motion or at the request of an interested party instruct licensees involved in an interconnection dispute to refer the dispute to it.

(2) The Commission shall take such measures as it deems fit to resolve disputes referred to it under subsection (1) and may issue instructions about the interconnection terms which shall apply.

(3) In carrying out its duties under this section the Commission may consider the difficult or costly technical and engineering nature of the interconnection.

25. Interconnection costs

(1) The costs of interconnection shall be borne equally by the licensee who is requesting interconnection and the provider. For the avoidance of doubt equal bearing of costs shall relate only to ongoing costs of inter-operability

(2) Non-recurring costs shall be recovered through non-recurring charges and recurring costs shall be recovered through recurring charges;

(3) Costs that do not vary with usage should be recovered through non-usage sensitive charges and costs that vary with usage shall be recovered through usage-sensitive charges;

(4) For calling party pays calls between networks, the terminating network shall receive a cost-oriented usage based rate based upon costs of the Licensee providing interconnection services.

25A. Access deficit charge

(1)The Commission may prescribe a charge to be known as the "access deficit charge" to be paid by carriers and service providers as the Commission sees fit.

(2) The Commission shall publish guidelines, following consultation for determining the amount of the access deficit.

…

Rates

27. Rates

(1) Rates for telecommunications services, except those regulated by the Commission in accordance with this section, shall be determined by providers in accordance with the principles of supply and demand in the market.

(2) The Commission may establish rates regulation regimes, which may be prescribed and which may include setting, reviewing and approving rates in any case where –

(a) there is only one licensee operating a telecommunications network or providing telecommunication service, or where one or more licensees have been determined to have a dominant position in the relevant market in accordance with section 16;

(b) a sole or dominant licensee operating a telecommunications system, network or providing a telecommunications service cross-subsidises another telecommunications service provided by such licensee; or

(c) the commission is satisfied that there is evidence of anti-competitive pricing or acts of unfair competition.

(3) Where the Commission finds that a provider of a regulated service is dominant in a relevant market in accordance with the procedure prescribed in this Ordinance, the Commission shall establish a mechanism for the setting of rates to be charged by the provider of a regulated service. The Commission shall use an incentive-based rated setting mechanism to establish the rates to be charged by such a provider of a regulated service.

(4) The incentive-based rate setting mechanism referred to under subsection (3) shall be established by the Commission in the manner prescribed and the Commission shall monitor and ensure compliance with the mechanism.

(5) In approving, disallowing or amending any regulated rate or tariff filed by the licensee, the aim of the Commission shall be to facilitate the policy of market liberalisation and competitive pricing.

(6) Subject to the provisions of subsection (5) which shall govern rate of tariff increase, in approving, disallowing or amending any regulated rate or tariff filed by the licensee, the Commission shall reply in writing to a request by the licensee within 28 days of receipt of the tariff filing, failing which, such filing shall be deemed approved by the Commission.

(7) In considering a rate or tariff decrease filed by the licensee, the Commission shall reply in writing to a request within 7 working days of receipt of the filing stating whether the filing is approved by the Commission as filed or whether it is conditionally approved.

(8) Conditional approval under subsection (7) means that the rate or tariff decrease is approved so that the licensee may immediately implement the decrease and the Commission may then take up to 180 days after the introduction of the rate or tariff decrease to assess whether the rates or tariff are anti-competitive through a determination of whether they are above an incremental cost price floor.

(9) If the Commission fails to reply to the request within 7 working days, the filing shall be deemed approved by the Commission as filed.

(10) The Commission shall keep confidential the fact that a filing has been made under this section and the contents of the rate or tariff decrease filing shall be confidential.

(11) Where the Commissions determines that a service is regulated service under this section, the rates for that service shall then only be subject to the rate regulation determined under this section.

(12) A service provider shall publish the rates, terms and conditions for its telecommunications services at such times and in such manner as the Commission shall specify and such rates, terms and conditions shall thereafter, subject to this Ordinance and the conditions of any licence, be the lawful rates, terms and conditions for such services.

28. Forbearance by Commission

(1)The Commission may make a determination to refrain in whole or in part and conditionally or unconditionally, from the exercise of any power or the performance of any duty under this Part to a telecommunications service provided by a licensee, where the Commission finds as a question of fact that to refrain would be consistent with the telecommunications policy objectives of the Island.

(2) Where the Commission finds as a question of fact that a telecommunications service provided by a licensee is or will be subject to competition sufficient to protect the interest of users, the Commission shall make a determination to refrain, to the extent that it considers appropriate, conditionally or unconditionally, from the exercise of any power or the performance of any duty under this Part in relation to the service.

(3) The Commission shall not make a determination to refrain under this section in relation to a telecommunications service if the Commission finds as a question of fact that to refrain would be likely to impair unduly the establishment or continuance of a competitive market for that service.

(4) The Commission shall declare that any provision of this Part does not apply to a licensee to the extent that the provision is inconsistent with a determination of the Commission under this section.

…

5. Part VII of the Ordinance dealt with investigation, appeals and enforcement. The more relevant provisions in Part VII are:

51. Securing compliance

(1) Where the Commission is satisfied that a licensee is not complying or has not

complied, with a condition or term of a licence, an instruction issued by the Commission or a provision of this Ordinance or its subordinate legislation, the Commission may issue to the licensee such directions as it considers necessary to bring the contravention to an end or ensure that the contravention is not repeated and make arrangements for the publication of the directions.

(2) A licensee to whom directions are issued by the Commission shall comply with the directions.

(3) Before issuing directions under this section, the Commission shall give notice to the licensee to whom the directions will be issued-

(a) stating that it proposes to issue directions and setting out their effect;

(b) stating the condition or term of the licence, instruction, requirement, specification, or provision of the Ordinance or subordinate legislation with which, in the opinion of the Commission the licensee is not complying or has not complied; and

(c) stating that the licensee or any other person may make representations not later than the end of the period of seven days beginning with the day after the date of issuing the notice.

(4) At the end of that period of seven days the Commission having had regard to representations made and not withdrawn may issue the directions.

(5) If after issuing directions a licensee fails to comply with a requirement of the directions, the Commission, after hearing the licensee, may-

(a) censure the licensee publicly;

(b) impose a penalty not exceeding three hundred thousand dollars and a further penalty not exceeding ten thousand dollars for each day on which the contravention continues; and

(c) enforce a remedy available to the Commission under the licence of the licensee including any remedy of suspension or revocation.

(6) Where the Commission imposes a penalty under subsection (5) the penalty shall be recoverable in the same manner as a fine imposed by the Magistrate's Court.

Revocation and Suspension

52. Suspension and revocation of licence

(1) Where the Commission has reason to believe that a licensee has contravened any provision of this Ordinance or the conditions of the licence, the Commission shall give to the licensee notice in writing-

(a) specifying particulars of such contravention;

(b) requiring the licensee to justify its actions to the Commission or otherwise take such remedial action as may be specified in the notice.

(2) Before the Commission issues any notice under subsection (1) the Commission shall first send a copy of the notice to the Minister for his decision.

(3) Where a licensee fails to comply with any requirements of a notice under subsection (1), the Commission may –

(a) on the first occasion of such failure suspend the licence for a period not exceeding three months; or

(b) if the failure occurs on any second or subsequent occasion, suspend the licence for such period as the Commission considers appropriate, or revoke the licence.

(4) Before suspending or revoking a licence under subsection (3), the commission shall notify the licensee accordingly and shall afford the licensee an opportunity to show cause why the licence should not be suspended or revoked.

(5) Subject to subsection (4), the Commission may suspend or revoke, a licence, as the case may be, if, on its own initiative or on representations made by any other person, the Commission is satisfied that the licensee has -

(a) knowingly made any false statement in an application for a licence or in any statement made to the Commission;

(b) knowingly failed to provide information or evidence that would have resulted in refusal to grant a licence;

(c) wilfully failed to comply with the terms and conditions of its licence;

(d) wilfully contravened any provision of this Ordinance or any rules or regulations made hereunder;

(e) provided services not authorized by its licence;

(f) operated a telecommunications network without a carrier licence;

(g) failed to make payments in a timely manner in connection with the provision of universal service obligation or in respect of the regulatory fees imposed pursuant to section 46.

(6) Before taking action under subsection (5) the Commission shall carry out such investigations as may be necessary and afford the licensee concerned an opportunity to be heard.

(7) For the purpose of this section, the Commission may -

(a) summon and examine witnesses;

(b) call for and examine documents;

(c) require that any document submitted be verified by affidavit;

(d) adjourn any investigation from time to time.

(8) If a person fails or refuses without reasonable cause, to furnish information to the Commission when required to do so, the Commission may apply to the Court for an order to compel the person to furnish the information to the Commission.

Review

53. Review of decisions

(1) The Commission may on application or on its own motion, review, revoke, cancel or vary, in whole or in part, any decision made by it, or may rehear any matter before the Commission.

(2) The Commission may make Rules for the purposes of subsection (1) and such Rules shall be published in the Gazette.

Appeals

54. Appeals

(1) The Minister, acting with the approval of the Executive Council, shall appoint a Telecommunication Tribunal to hear appeals under this Ordinance.

(2) The Telecommunications Tribunal shall consist of a President who shall be a Judge of any Commonwealth country or a person qualified for appointment as a judge, and two other members, one of whom must have experience in telecommunications.

(3) A member of the Tribunal may be appointed for a period of not less than five years; but may be removed by the Minister acting with the approval of Executive Council, if there is reasonable evidence that the member is guilty of misconduct or incompetence.

(4) A member of the Tribunal shall be eligible for re-appointment.

(5) The Governor acting with the approval of Executive Council shall set the payments and allowances for members of the Tribunal.

(6) An appeal lies to the Telecommunication Tribunal from any decision made by the Minister or the Commission, including any decision made with respect to the revocation, suspension, or modification of a licence or any term or condition of a licence granted under this Ordinance.

(7) Notice of appeal shall be given to the Commission or the Minister as the case may be and the Telecommunications Tribunal within 14 days of the making of the decision complained of and the Tribunal shall set down the appeal for hearing within 21 days after receiving the notice of appeal.

(8) On the hearing of an appeal, the appellant and his representative and a representative of the Commission or the Minister as the case may be are entitled to appear and be heard and to make written submissions and also to be represented by an attorney.

(9) Subject to this section, the Telecommunications Tribunal may regulate the procedure at the hearing of an appeal and shall make its decision in writing.

(10) Any person who is dissatisfied with any decision of the Telecommunications Tribunal under this section may apply to the Supreme Court for leave to review the decision of the Tribunal.

…

58. Powers of entry and search

(1) Where on information provided by the Commission, the Director General or other person, the court has reason to believe that a person is not complying with a condition of a licence, or instructions issued by the Commission or a provision of this Ordinance, the Court may issue a search warrant to a police officer to search the premises of that person.

(2) A warrant issued under this section shall authorise a police officer accompanied by a representative of the Commission-

(a) to enter the premises specified in the warrant;

(b) to search the premises and take possession of any apparatus, documents or equipment in accordance with the terms of the warrant or take in relation to such apparatus, documents or equipment, any other steps which appear necessary for their preservation or preventing interference with them;

(c) to take copies of or extracts from the documents or test the apparatus or equipment in accordance with the terms of the warrant; and

(d) to use reasonable force.

(3) Where under this section a police officer and representative of the Commission may take possession of apparatus, documents or equipment or take copies of or extracts from documents or test apparatus or equipment on premises, a person who is on or in charge of the premises shall give them such assistance as they may require in taking possession or extracts or copies or and the testing.

(4) In this section "court" means Magistrate's Court established under section 3 of the Magistrate's Court Ordinance.

59. Offence by body corporate
Where an offence under this Ordinance is committed by a body corporate and it is proved that the offence has been committed with the consent or connivance of or is attributable to neglect by, a director, manager, secretary or other officer of the body corporate or a person purporting to act in such capacity, the officer or person as well as the body corporate shall be liable to be proceeded against and punished accordingly.

6. There is no Part VIII!

7. Part IX of the Ordinance contains supplementary provisions and in particular a power in the following terms to make regulations:

64. Regulations
(1) The Governor, acting with the approval of Executive may make regulations for giving effect to the provisions of this Ordinance.
(2) Without derogating from the generality of the power conferred by subsection (I), such regulations may provide for-

(a) the matters which are required or permitted by this Ordinance to be prescribed or which appear to him to be necessary or desirable to be prescribed for the purpose of giving effect to this Ordinance;

(b) forms to be used for any purpose of this Ordinance;

(c) fees payable under this Ordinance;

(d) the application of any rule of the International Telecommunications Convention to any provision of this Ordinance;

(e) procedures to be followed under the Ordinance;

(f) interconnection agreements and dispute resolution process in relation to interconnection;

(g) specifying rights of subscribers including access by subscribers to information or data in relation to subscribers telephone bills;

(h) amending any Schedule of this Ordinance;

(i) the licensing of persons to distribute, lease, offer for sale, sell or import for sale any telecommunications apparatus or radiocommunications apparatus;

(j) the alteration and regulation of lines or works of a licensee where this is necessary for the building or widening of any street, road or highway;

(k) fees payable with respect to numbers;

(l) terms, conditions and all matters in relation to interconnection costs and access deficit charge; and

(m) any purpose which may be necessary or expedient for giving full effect to the provision of this Ordinance.

THE INTERCONNECTION AND ACCESS TO TELECOMMUNICATIONS FACILITIES REGULATIONS 2005

8. The Interconnection and Access to Telecommunications Facilities Regulations 2005 were in force at all material times. The Regulations apply to all carriers and to all service providers.

9. Regulation 2 contained the following definition of "interconnection agreement":

"interconnection agreement" means an agreement between two licensees setting forth their respective rights and obligations with respect to providing direct interconnection between their telecommunications networks and telecommunications services.

10. Regulation 3 set out certain general principles, as follows:

General principles
3. (1) Carriers and service providers are required to co-operate with each other in accordance with these Regulations, in order to enable them to provide integrated public telecommunications services throughout the Turks and Caicos Islands and to allow each end user of a public telecommunications network and public telecommunications service to communicate with any other end user of another public telecommunications network or public telecommunications service.
(2) Interconnection shall be established and provided in accordance with interconnection agreements negotiated and agreed between the parties, and submitted to the Commission, pursuant to the Act(sic) and these Regulations.

11. Regulation 4 provided that the functions of the Commission were to be as follows:

Functions of the Commission

4. (1) The Commission shall, consistent with the Ordinance and these Regulations, encourage and, where appropriate, ensure, the adequacy of interconnection between public telecommunications networks and public telecommunications services in such a way as to –

(a) promote efficiency;

(b) promote sustainable competition;

(c) give maximum benefit to end users; and

(d) provide that carriers and service providers are compensated for interconnection services.

(2) The Commission may, to the extent necessary to ensure end-to-end connectivity –

(a) impose the obligations on carriers and service providers as set forth in these Regulations, including, in justified cases, the obligation to interconnect their networks;

(b) establish technical or operational conditions to be met by carriers or service providers;

(c) resolve disputes with respect to the establishment of interconnection agreements and disputes regarding the interpretation and implementation of such agreements; and

(d) act on its own initiative or at the request of either of the parties involved in order to carry out the objectives of the Ordinance and ensure compliance with the Ordinance and these Regulations.

12. Part 2 of the Regulations dealt with the obligations of carriers and service providers. Part 2 comprised regulations 5, 6 and 7, in these terms:

Duty to interconnect

5. (1) Every carrier and service provider has a duty to interconnect with other carriers and service providers.

(2) For purposes of subsection (1), interconnection may either be direct or indirect, through the public telecommunications networks or public telecommunications services of other licensees.

(3) The duty to interconnect specified in subsection (1) obligates carriers and service providers to refrain from refusing, obstructing or in any way impeding, other than for the grounds set forth in section 22(2) of the Ordinance, as the Commission may determine, and justified in writing, the interconnection of another carrier or service provider entitled to obtain such interconnection.

(4) The duty to interconnect specified in subsection (1) includes the requirement that every carrier or service provider provide for the transmission and routing of the services of other carriers and service providers at any and all technically feasible points and that the facilities of the licensee requesting interconnection may be collocated with the facilities of the carrier or service provider required to offer interconnection, except to the extent that the Commission may otherwise determine.

(5) If both the carrier or service provider offering interconnection and the carrier or service provider seeking interconnection are not dominant in any market (including in voice termination), the licensees may agree to interconnect, with respect to networks or services in such market, on any mutually agreeable terms consistent with their obligations under the Act, these Regulations and their respective licences.

(6) Any agreement governing direct interconnection between licensees shall be embodied in a written interconnection agreement.

(7) The Commission may require that a carrier or service provider, in fulfilling its duty to interconnect, undertake specific obligations to ensure that the interconnection provided by such carrier or service provider is fair, reasonable and timely, including the following:
(a) each carrier or service provider that directly interconnects with another carrier or service provider shall take reasonable measures to ensure that the interconnection does not cause physical or technical harm to the other carrier's or service provider's telecommunications network;
(b) each carrier or service provider must provide to another carrier or service provider with which it interconnects information within its possession that is necessary to allow such other carrier or service provider to provide accurate and timely billing services to itself, its affiliates or other carrier or service providers;
(c) each carrier must make publicly available any protocols, key technologies or physical and logical interfaces of its network necessary to allow the development and interoperability of telecommunications services and, not less than six (6) months prior to deployment, any changes in logical or physical interfaces that could materially affect existing interconnection arrangements, unless otherwise exempted by the Commission;
(d) each carrier or service provider must provide specified services needed to ensure interoperability of end-to-end services to users, including facilities for intelligent network services or roaming on mobile networks;
(e) each carrier or service provider must, as determined by the Commission, provide access to operational support systems or similar software systems that are required to ensure interoperability of and fair competition in the provision of telecommunications services; and
(f) parties to interconnection agreements shall have a duty to co-operate in good faith and in a commercially reasonable manner in implementing the terms thereof.

Non-discrimination obligation

6. (1) Every carrier and service provider must offer to provide and provide interconnection, and the elements thereof, to other carriers and service providers on the basis of terms and conditions that are non-discriminatory, including with respect to rates and quality of service.
(2) At a minimum, the obligation set forth in subsection (1) requires that interconnection and the elements thereof be provided in a manner that is at least equal in both rates and quality to that provided by the carrier or service provider to its own business units or to any subsidiary or affiliate, or to any other party to which interconnection is offered or provided.
(3) Every carrier and service provider must offer to provide and provide interconnection on a timely basis not to exceed 90 days subject to section 8 , after requested by another licensee, and on the basis of terms and conditions that are transparent and reasonable, having regard to economic feasibility.
(4) Interconnection must be provided without regard to the types of users to be served or the types of services to be provided by the carrier or service provider requesting interconnection.
(5) Once a carrier or service provider concludes an interconnection agreement, or is subject to an interconnection agreement required or determined by the Commission

pursuant to section 10, it must (a) offer the terms and conditions of such an agreement to any other carrier or service provider requesting interconnection; and
(b) offer the terms and conditions of such an agreement, upon request, to any carrier or service provider with which it has an existing interconnection agreement, except to the extent that it can demonstrate to the Commission that
subsections (1) and (2) would not be violated by a refusal to offer such terms and conditions to such carrier or service provider.

Confidentiality obligations

7. (1) Except as permitted under the terms of an applicable interconnection agreement, every carrier and service provider must protect from disclosure any confidential, proprietary or competitive information (including, but not limited to, customer orders, market forecasts, plans for development of new services, network plans, current or proposed business plans, and new customers) provided by another carrier or service provider received in the course of negotiating or implementing an interconnection agreement.
(2) All information disclosed pursuant to subsection (1) must be kept in confidence by the receiving party and may, subject to such commercial conditions and exceptions as are set out in a non-disclosure or interconnection agreement between the parties, be used by such party, and shared with its
(and any of its affiliates') employees, agents and contractors, only for the provision of the specific services related to interconnection that have been requested.
(3) Every carrier and service provider receiving confidential or proprietary information pursuant to subsection (1) shall take appropriate measures to ensure that the information is not disclosed to affiliates or third parties, or used for the development or marketing of other telecommunications services or equipment by such carrier or service provider, or by its affiliates or third parties, other than as permitted by subsection (2).

13. Part 3 of the Regulations deals with the terms of the Reference Interconnection Offer. Part 3 consists of regulation 8 which is in these terms:

Requirement to publish a reference interconnection offer

8. (1) Every carrier or service provider requested subject to these Regulations must make publicly available its standard interconnection agreement or a reference interconnection offer and, in any event, shall, at a minimum, provide such offer within thirty (30) days of its receipt of a request for such offer from another licensee.
(2) Notwithstanding subsection (1), any dominant carrier or dominant service provider shall prepare and publish its reference interconnection offer within thirty (30) days of its grant of licence.
(3) A reference interconnection offer must be consistent with the Ordinance, these Regulations and the offeror's licence and, except as the Commission may instruct or authorize the Commission, shall contain the following information:
(a) The technically feasible points at which interconnection is permitted at no additional charge and the means by which interconnection will be achieved.
Every license will have to permit interconnection at the host switch as part of its basic interconnection service offering.

(b) The additional charges to the requesting party for interconnection at points other than those set out in clause (a).
(c) The elements of the interconnection service and its constituent elements, including signaling, transport, the transfer of calling line identification information and switching between the point of interconnection and end users.
(d) Rates or pricing formulae for each feature, function or facility that the offeror is required to offer pursuant to the Act, these Regulations and its licence.
(e) Other commercial terms and conditions applicable to the offering of the elements of the interconnection service.
(4) In addition to the information required by subsection (3), the reference interconnection offer of a dominant carrier or service provider must –
(a) list and describe the unbundled network elements and services that will be provided to interconnecting parties, as further specified in section 16;
(b) without limiting clause (a), unless the Commission, on application of such dominant carrier or service provider, determine to the contrary, offer access to local loops and to non-voice band frequency spectrum of a local loop, in the case of shared access to the local loop;
(c) include information concerning the locations of physical and logical access sites in specific parts of the network;
(d) as determined by the Commission, provide technical conditions relating to access and use of local loops, including the technical characteristics of the twisted metallic pair in any local loop;
(e) describe any operational and technical requirements with which an interconnecting party must comply in order to avoid harm to the offeror's network;
(f) as determined by the Commission, set out the ordering and provisioning procedures and any usage restrictions with respect to local loops and any other elements of the interconnection service;
(g) set out the conditions for access to operational support systems, information systems or databases for pre-ordering, provisioning, ordering, maintenance and repair requests and billing, unless the Commission, on application of such dominant or service provider, shall determine that such access is not required;
(h) describe how information will be provided (such as call type, duration and points of origination and termination) to allow the interconnecting party to bill for telecommunications services; and
(i) provide (1) the lead times for responding to requests for supply of services and facilities; (2) service level agreements, including with respect to fault resolution, procedures to return to a normal level of service and quality of service parameters; and (3) terms with respect to each of the foregoing.

14. Part 4 of the Regulations deals with the subject of interconnection agreements. The relevant provisions are:

Negotiating interconnection agreements

9. (1) Upon receipt of a request for interconnection, a carrier or service provider must provide its reference interconnection offer as provided in section 8.

(2) The reference interconnection offer shall be provided without charge to any carrier or service provider requesting interconnection.
(3) The party requesting interconnection shall, simultaneously with such request, notify the Commission of such request and shall provide to the Commission any additional information specified.
(4) The request from the party requesting interconnection shall include (a) reference to the requesting licensee's licence; (b) a technical description of the requested services; (c) the intended point of interconnection; the date on which interconnection is intended to commence; and (d) the projected quantity or volume of services required, based on a forecast of three (3) years or of some other period if the carrier or service provider is unable to provide such three (3)-year forecast.
(5) The party offering interconnection and the party requesting interconnection shall, promptly upon the offeror's receipt of the request, begin exchanging information and negotiating in good faith with the objective of concluding an interconnection agreement.
(6) Good faith negotiations require, at a minimum, adherence by the parties to the following timetables:
(a) Upon receipt of a request for interconnection, a carrier or service provider shall promptly consider and analyze each such request and shall acknowledge receipt within ten (10) days.
(b) If the information provided by the party requesting interconnection is deemed inadequate or insufficient by the offeror, then the offeror shall seek additional information from the requesting party as soon as commercially reasonable.
(c) Unless there are exceptional circumstances, the offeror shall notify the requesting party of such additional information as it requires within twenty (20) days of receipt of the initial request for interconnection.
(d) The offeror shall provide a complete response to the request for interconnection within thirty (30) days of the receipt of the later of the date of the initial request or such additional information as the offeror may have requested.
(e) In exceptional circumstances, the period specified in clause (d) may be extended for another thirty (30) days, provided that the offeror shall so notify the Commission.
(f) If the offeror is unable to respond to the request for interconnection by the end of such sixty (60)-day period, it shall provide, on the date on which such period expires, a written statement as to the reasons therefore to the Commission and to the party requesting interconnection.

Contents of interconnection agreements

10. (1) Pursuant to section 23 of the Ordinance, unless the parties to an interconnection agreement otherwise agree, such an agreement shall address the following matters:
(a) technical characteristics and location of the point(s) of interconnection;
(b) capacity levels;
(c) service levels;
(d) forecasting;
(e) ordering and provisioning;
(f) provision of network information;
(g) information handling and confidentiality;
(h) rates;

(i) payment procedures;
(j) fault detection and repair;
(k) provision for breaches;
(l) amendments; and
(m) suspension, termination and duration.

Disputes regarding interconnection and interconnection agreements

11. (1) Where one or both of the two parties to the negotiation conclude that a dispute has arisen between themselves with respect to any aspect of interconnection, then, pursuant to section 24 of the Ordinance, either party may request that such dispute be submitted to the Commission, or the Commission may instruct that the parties involved in the dispute refer the dispute to it, for resolution in accordance with the Administrative Procedure Rules or such other procedures as the Commission may adopt specifically for, and given the nature of, the particular dispute.
(2) A dispute, for purposes of subsection (1), may include, but is not limited to –
(a) a party's failure to respond to a request for interconnection or to negotiate in good faith, where a failure to negotiate in good faith includes, but is not limited to, any party taking a position with respect to a term and condition of interconnection that is not consistent with the Ordinance, these Regulations or its licence;
(b) any express or implied refusal to provide interconnection (including as specified in section 5(3) and section 6;
(c) a party's inclusion in a standard interconnection agreement or a reference interconnection offer of any terms and conditions that are inconsistent with the Ordinance, these Regulations or its licence;
(d) a disagreement with respect to the costs of interconnection, whether charges sought to be recovered in an interconnection agreement relate to ongoing costs of inter-operability, within the meaning of section 25(1) of the Ordinance, whether a cost is a non-recurring or recurring cost or a cost that varies with usage, and what constitutes a cost-oriented usage based rate based upon the licensee's costs of providing interconnection, within the meaning of section 25(4) of the Ordinance;
(e) a failure by the parties to conclude promptly an interconnection agreement; and
(f) a disagreement with respect to the price or any other technical, commercial or other term and condition for any element of interconnection that the parties have not been able to resolve within a commercially reasonable time.
(3) In submitting disputes to the Commission, the parties shall adhere to the following timetables:
(a) The party intending to submit the dispute shall notify the other party of its intention to do so fifteen (15) days prior to the date on which it makes its formal submission to the Commission.
(b) At the expiry of the period specified in clause (a), the submitting party shall lodge a petition with the Commission to resolve such dispute, with a copy of the petition delivered to the other party to the dispute.
(c) The petition to which clause (b) refers shall include a statement of facts, a summary of the issues in dispute, each party's position as to such issues in dispute, evidence that the parties have attempted to commercially resolve the dispute between them (including summaries of correspondence, minutes of meetings and other information) and a summary of issues that were previously

in dispute but have been resolved, including the resolutions thereto.
(d) Within fifteen (15) days of receiving one party's written petition and all accompanying evidence in support thereof (which period may be extended by the Commission for good cause shown upon application by the other party), the other party may lodge with the Commission a counterpetition containing arguments in its defense, including its views, if any, on why the Commission should not intervene to resolve the dispute, along with evidence in support thereof.
(e) The Commission will determine whether and to what extent it is appropriate to resolve the dispute and shall notify the parties whether it will or will not resolve the dispute.
(f) To facilitate investigation and resolution of the dispute by the Commission, either party may be asked by the Commission to provide additional information or explanations beyond the initial petition and counterpetition and any report or information required from one party by the Commission shall be provided to the other party.
(g) Information in a petition, counterpetition or otherwise submitted to the Commission shall be marked as confidential if the submitting party desires that such information not be disclosed to the other party and shall be subject to section 7 of the Ordinance.
(h) By no later than thirty (30) days after the receipt of the petition, the Commission shall endeavour to have completed its deliberation and render a Final Order, with the Commission having the discretion to extend such period in light of the complexity of the matter or where additional information is required.
(i) Notwithstanding paragraph (h), where appropriate, the Commission may issue a Preliminary Order setting out its preliminary determination and its decision on how matters in dispute shall be resolved.
(j) Either party to the dispute may, within fifteen (15) days of the issuance of the Preliminary Order, request that the Commission reconsider one or more elements of such Preliminary Order, setting forth its reasons as to why the Commission should modify its Preliminary Order.
(k) Within ten (10) days of a request for reconsideration submitted pursuant to clause (j), the other party to the dispute may respond and provide reasons as to why modification of the Preliminary Order is not required.
(l) The Commission may only modify the Preliminary Order in response to a request for reconsideration submitted pursuant to clause (j) if there are compelling reasons to do so.
(m) The Commission shall endeavour to issue a Final Order by no later than fifty (50) days after its Preliminary Order.
(n) In issuing a Preliminary Order and a Final Order, the Commission shall consider the information and arguments submitted by the parties, as well as any other matter that the Commission deems relevant.
(o) Where necessary, the Commission may require a party to provide or continue to provide the relevant service(s) under the reference interconnection offer, or the interconnection agreement, as the case may be, pending the issuance of a Final Order.
(p) The Commission shall publish a notice in the Gazette that it has issued a Preliminary Order or a Final Order and that, where the dispute involves a dominant carrier or service provider, such documents are, subject to section 7 of the Ordinance, available for public inspection, free of charge, at the offices of

the Commission.
(4) Any decision rendered by the Commission pursuant to this section 11 shall be binding on the parties.
(5) The procedures set forth in this section 11 are not intended to displace the dispute resolution procedures set forth in an interconnection agreement.
(6) Notwithstanding subsection (5), if the parties to an interconnection agreement agree to refer a dispute arising under such agreement to the Commission, the Commission may, at its discretion, mediate or render a binding determination with respect to the dispute in accordance with the procedures set forth in subsection (3), as such may be modified by the Commission or as the Commission may otherwise establish for such purpose.

Submission to the Commission

12. (1) Within twenty-eight (28) days after the parties to a negotiation regarding interconnection have concluded an interconnection agreement, the carrier or service provider that responded to the initial request for interconnection shall submit a copy of such agreement to the Commission.
(2) Where an interconnection agreement submitted pursuant to subsection (1) includes one party that is dominant, the Commission shall publish a notice in the Gazette of such receipt and that the agreement is available for public inspection, free of charge, at the offices of the Commission.
(3) Notwithstanding subsection (2), the Commission will not disclose information respecting the interconnection agreement for which disclosure is proscribed by section 7 of the Ordinance.
(4) To verify compliance with these Regulations, the Commission will review an interconnection agreement or any modification thereof that is submitted to it pursuant to subsection (1) or section 13 within thirty (30) days of such submission, which period may be extended for good cause.
(5) The Commission shall issue a Preliminary Order within twenty (20) days of submission to it of a notice with respect to one party's unilateral suspension or termination of an interconnection agreement, pursuant to section 13, authorising or declining to authorise such suspension or termination, which period may be extended for good cause.

Modification, suspension or termination of interconnection agreements

13. (1) The parties to an interconnection agreement may mutually agree to modify, suspend or terminate such agreement.
(2) Where modifications to an interconnection agreement are material, or where the interconnection agreement is to be suspended or terminated by mutual agreement, the parties shall notify the Commission and shall inform the Commission of the reasons for taking such action.
(3) If the interconnection agreement includes provisions pursuant to which its unilateral suspension or termination by one party would be permitted –
(a) the party seeking to suspend or terminate the agreement in accordance with such provisions shall so notify both the Commission and the other party no less than twenty (20) days prior to the effective date of such suspension or termination; and
(b) such suspension or termination will become effective in accordance with such

notice unless the other party applies to the Commission for relief prior thereto and the Commission issues a Preliminary Order preventing such suspension or termination.

15. Part 5 of the Regulations dealt with interconnection rates in these terms:

Interconnection rates

14. (1) Every carrier and service provider shall provide interconnection at rates that are arrived at in a transparent manner subject to the provisions of any interconnection agreement or the Ordinance regarding the confidentiality of costs or other commercial information.
(2) Rates for interconnection established by carriers and service providers that are not dominant shall not be subject to regulation, except as authorised or required by the Ordinance, these Regulations or as otherwise determined by the Commission.
(3) Every dominant carrier and dominant service provider shall provide interconnection at rates that are cost-oriented and, where expressly authorized by the Commission, that may permit the recovery of the costs of providing access.
(4) For purposes of these Regulations and for purposes of sections 23 and 24 of the Ordinance, rates are "cost-oriented" if the carrier's or service provider's charges for interconnection do not exceed the stand-alone cost of providing the service and are not lower than the long-run average incremental costs of providing the service, where–
(a) "stand-alone cost" means the cost of providing a service independently of providing any other service or services; and
(b) "long-run average incremental costs" means the costs incurred by providing a service in addition to other service or services already provided.
(5) No dominant carrier or service provider shall charge, for any combination of interconnection services, a price that exceeds the stand-alone costs of providing the combination of interconnection services or that falls below the sum of the individual interconnection services' long-run average incremental costs.
(6) Without regard to section 15, until such date as the Commission shall announce, a carrier or service provider that is dominant in the market for interconnection services as of the effective date of these Regulations may use a cost accounting method of its choosing for ensuring that its charges for interconnection are cost-oriented.
(7) Upon request of the Commission, a carrier or service provider shall supply its costs with respect to the network elements specified in and pursuant to section 17 for purposes of verifying that its rates for interconnection, and other contributions or charges levied or allowed by the Commission, comply with this section 14.

Interconnection rate methodology

15. (1) Except as provided in section 14(6), the Commission shall determine the methodology to be used for determining whether a carrier's or service provider's rates are cost-oriented.
(2) The Commission shall apply the following principles in establishing the methodology to which subsection (1) refers –
(a) costs shall be borne by the carrier or service provider whose activity caused such costs to be incurred, except that ongoing costs of inter-operability shall be borne equally by both the carrier or service provider offering interconnection and the

carrier or service provider seeking interconnection;
(b) non-recurring costs shall be recovered through non-recurring rates and recurring costs shall be recovered through recurring rates;
(c) costs that do not vary with usage should be recovered through non-usage sensitive rates and costs that vary with usage shall be recovered through usage-sensitive rates;
(d) rates shall permit the recovery of a reasonable rate of return for that carrier or service provider on the capital employed, all attributable operating expenditures, depreciation and a proportionate contribution toward such carrier's or service provider's fixed and common costs; and
(e) the burden of proof that rates are derived from costs shall lie with the carrier or service provider.

16. Part 6 of the Regulations imposes additional obligations on a dominant carrier or service provider. In particular, regulations 18 and 19 provide:

Rate offerings

18. Every dominant carrier or dominant service provider shall, at a minimum and as otherwise required by the Commission, offer to third parties unbundled, cost-oriented rates for terminating domestic and international calls on its domestic network, which network includes the elements listed in clauses (a)-(c) of section 17(1).

Mobile carrier termination

19. (1) A carrier that is licensed to own and operate a mobile telecommunications network is presumed to be dominant in the market for wholesale mobile voice termination services over such network, except insofar as the Commission, upon demonstration by such carrier, determines otherwise.
(2) Except as modified by the Commission, a carrier described in subsection (1) may not charge an interconnecting carrier or service provider a rate for terminating voice telephone calls on such carrier's mobile telecommunications network that exceeds U.S. $0.15 per minute (adjusted pro rata for units of less than a minute).
(3) In accordance with section 14, a carrier described in subsection (1) shall submit such information, including with respect to such carrier's costs, as the Commission may request demonstrating that any rates that such carrier charges for wholesale mobile voice termination services over its own mobile telecommunications network are cost-oriented –
(a) if and as such carrier has more than a 33% share of the users in the retail mobile voice services market; and
(b) whenever the Commission may otherwise request.
(4) Any carrier or service provider that believes that a carrier described in subsection (1) is charging it a rate for terminating voice telephone calls on such carrier's mobile telecommunications network that does not comply with section 14(3) and that is unable to negotiate a cost-oriented rate with such carrier may submit the dispute to the Commission in accordance with section 11.
(5) Notwithstanding any other requirements of the Ordinance or the Regulations, a service provider may, in establishing rates charged to an end user, take into account the costs of payments made directly or indirectly to other carriers or service providers

for interconnection services, including the rates charged by such other carriers or service providers for wholesale mobile voice termination services, and it may vary the rates it charges to an end user to the extent that there are, and in proportion to, differences in the rates that such provider directly or indirectly pays to any carrier described in subsection (1) for interconnection to such carrier's mobile telecommunications network.

THE LICENCES

17. On 25th January 2006, the Government of the Turks and Caicos Islands granted to CWWI a non-exclusive licence to operate a fixed network and a mobile network in the Turks and Caicos Islands for a term of 15 years from the 25th January 2006. By clause 9.1 of the Licence, CWWI was declared dominant in relation to those networks.

18. Clause 13 of the Licence dealt with non-discrimination and fair trading. Clause 13.2 deals specifically with non-discrimination in providing Licensed Services. Clauses 13.4 and 13.5 prohibit certain anti-competitive practices and refer to intended Regulations and Guidelines for the purpose of specifying or describing relevant matters for this purpose.

19. Clause 14 provided that the regulator may determine that there may be an Access Deficit Charge.

20. Clause 15 dealt with interconnection. Clause 15.1 cross-refers to section 22 of the Telecommuniations Ordinance. Clause 15.2 deals with the case of a dominant licensee and refers to the possibility of instuctions given under section 23 of the Ordinance.

21. Clause 16 refered to mobile termination charges and cross refers to the Interconnection Regulations. Annex C imposes a price cap regime and refers to the licensee's Fully Allocated Cost model.

22. On 31st March 2006, the Government of the Turks and Caicos Islands granted to Digicel TCI a non-exclusive licence to operate a mobile network in the Turks and Caicos Islands for a term of 15 years from the 25th January 2006.

23. Clauses 4.3 and 4.5 dealt with the time by which Digicel TCI was to have launched its network in TCI.

24. By clause 11.1, Digicel TCI was presumed to be dominant in the market for mobile wholesale voice telephony services on its licensed network.

25. Clause 16 dealt with the possibility of an Access Deficit Charge.

26. Clause 17 dealt with interconnection and cross-referred to the Ordinance and the regulations.

THE FACTS

27. The first area of fact which is material concerns CWWI's stance in January 2006 in relation to a TN-1C MUX which Digicel TCI had available to it. This was before the

parties had entered into the MOU referred to above and, indeed, before Digicel TCI obtained its licence on 31st March 2006.

28. Digicel TCI made two offers in January 2006 to make a MUX available to CWWI. Digicel TCI requested interconnection with CWWI in a letter which was sent on 11th , and again on 14th , January 2006. In an attachment to this request, Digicel TCI stated that it had acquired a second Nortel TN-1C MUX and Digicel TCI was prepared to provide the same along with installation services, to be performed by Nortel, to CWWI free of charge, to be used for CWWI's side of the interconnection.

29. Following the request for interconnection, there was a meeting between the parties on 25th January 2006. The persons attending on behalf of CWWI were Mr Nelson, Mr Vandendries and Mr Chantrelle. The parties agree that at this meeting, Digicel TCI offered to provide to CWWI at no charge a MUX which was described as being a spare TN-1C MUX. CWWI's response was to decline the offer "for now". CWWI stated that if it became a critical item for the purposes of arranging interconnection, CWWI would reconsider the offer.

30. The 2004 Ordinance and the 2005 regulations contained detailed provisions as to interconnection between telecommunications operators. Digicel TCI accepts that those provisions did not apply in January 2006 because at that time Digicel TCI did not have a licence in TCI. It acquired its licence on 31st March 2006. However, Digicel TCI points to section 13(5) of the Ordinance which provides that a licensee must comply with the terms and conditions of its licence. Digicel TCI refers to the licence granted to CWWI, coincidentally, on 25th January 2006. Clauses 13.4 and 13.5 of that licence contain certain provisions prohibiting certain anti-competitive behaviour. Digicel TCI argues that CWWI's stance at the meeting on 25th January 2006 was anti-competitive behaviour in breach of the licence and therefore in breach of section 13(5) of the Ordinance. I have already held that the provisions prohibiting certain forms of anti-competitive behaviour contained in clauses 13.4 and 13.5 of the licence did not place on CWWI obligations in relation to interconnection when the specific legislation dealing with the question of interconnection, namely, the 2004 Ordinance and the 2005 regulations did not place any interconnection obligations on CWWI. In other words, in circumstances where the Ordinance and the regulations did not require CWWI to make progress towards interconnection in January 2006, I do not interpret the prohibitions on anti-competitive behaviour contained in the licence as imposing interconnection obligations on CWWI. For these reasons, whatever was the reason for CWWI's stance at the meeting on 25th January 2006, that stance was not a breach of any duty owed to Digicel TCI.

31. Notwithstanding the above conclusion, I will deal relatively briefly with certain matters of fact which were disputed in relation to the TN-1C MUX, which was the subject of the offer in January 2006. At the meeting on 25th January 2006, there was no discussion as to whether the MUX was new or second-hand. Digicel TCI did not say one way or the other and CWWI did not ask. Digicel TCI in its closing submissions asked me to find that the MUX in question was brand new. In fact, the documents show clearly that the MUX was not brand new. The position is described in some emails of 14th, 15th and 16th September 2005 and in particular an email of 15th September 2005 from a Mr Dabreo to Mr Wilson. These are internal Digicel emails. The position appeared to be that the MUX in question was powered and wired up as a back up MUX in SVG.

32. At the trial, CWWI called various witnesses to express their reasons for not being ready to accept the MUX when offered in January 2006. One of those reasons concerned the availability of a direct warranty from Nortel, the original supplier of the MUX, to CWWI. Again, the documents show some information relevant to this question. An email of 10th May 2006 from Mr Henry of Nortel to Maeve Collins of Digicel TCI describes the position about Nortel warranties in relation to this MUX. This email shows that the MUX was out of warranty some time before 10th May 2006 and there were other difficulties in relation to the provision of a warranty to CWWI. Ms Collins summed up the position in an internal Digicel TCI email of 11th May 2006 to the effect that the warranty issue was "resolvable but bit of a nightmare". Whilst this was the factual position as to the warranty, these matters were not known to CWWI in January 2006.

33. Beyond making those findings of fact, in view of my conclusion that CWWI was not in breach of any duty in relation to its stance in January 2006, it is not necessary or appropriate for me to discuss the various reasons which were put forward in the evidence at the trial as to whether CWWI's stance was justified or, indeed, whether the reasons put forward at the trial were the actual reasons which motivated the relevant individuals in January 2006.

34. The Claimants' next allegation is that CWWI delayed in ordering the optical equipment for interconnection with Digicel TCI. The Claimants say that this delay gave rise to a breach by CWWI of the MOU and also involved a breach of the 2004 Ordinance and the 2005 regulations.

35. I can deal straightaway with the allegations that any delay by CWWI in ordering optical equipment was a breach of the 2004 Ordinance and of the 2005 regulations. Digicel TCI did not obtain a licence in TCI until 31st March 2006. Until that date CWWI did not owe any duty to Digicel TCI under the Ordinance or the regulations. Further, I have held that the Ordinance and the regulations did not oblige CWWI to order equipment before the parties had entered into an interconnection agreement. On the facts, CWWI ordered the optical equipment on 6th April 2006. There was no interconnection agreement by that date. The actual interconnection agreement was made on 30th June 2006 (and executed on 7th July 2006). Although the Claimants say that there was delay in the parties entering into an interconnection agreement, they do not assert that the interconnection agreement ought to have been made before 6th April 2006. For these reasons, there is no case for saying that CWWI committed a breach of duty under the Ordinance and/or the regulations by reason of the alleged delay in ordering the optical equipment. Accordingly, the discussion which follows as to whether CWWI was in breach of a duty owed to Digicel TCI, as a result of the time taken for it to order the optical equipment, is exclusively dealing with the case that CWWI was in breach of the MOU in those respects.

36. As explained, the MOU was recorded in a letter from CWWI dated 23rd February 2006. This letter was counter-signed by Digicel TCI on or about 24th February 2006 and the signed copy was emailed to CWWI on 25th February 2006. The deposit cheque was provided to CWWI on Monday 27th February 2006. The last paragraph of the MOU refers to Digicel TCI counter-signing the letter and paying the deposit in order for the parties to proceed with physical and technical interconnection. In these circumstances, either the MOU did not become contractually binding until Digicel TCI paid the deposit on 27th February 2006 or, if the MOU became contractually binding on 25th February 2006, CWWI was not obliged to take action under it until 27th February 2006.

37. Before I embark on a recital of the detailed facts as to the ordering of equipment in TCI, I will make my finding as to what was "the required interconnect equipment" which CWWI was obliged by the terms of the MOU to order. In the main judgment, I have expressed my conclusion as to the meaning of the phrase "the required interconnect equipment" in the MOU. Applying that meaning to the evidence in this case, I find as follows: (1) the required equipment included a MUX and associated cabling; (2) the required equipment also included switching and signalling equipment to satisfy the forecast provided by Digicel TCI to CWWI; (3) this forecast required there to be 8 E1 (switching) ports and 2 LIU7 (signalling) ports; (4) this was the position when CWWI placed its order on 6th April 2006, referred to below, and at any earlier date when CWWI ought to have placed an order, for "the required interconnect equipment". I also find that later, in the second half of April 2006 and at the beginning of May 2006, Digicel TCI indicated that instead of waiting for all of this equipment to arrive, it would be prepared to launch with less switching and signalling equipment, using only 4 E1s and 1 LIU7. After that point, if it had been relevant to ask as to the extent of the "required interconnection equipment", it would have been appropriate to reflect the reduced requirement on the part of Digicel TCI.

38. I now consider the question of spare equipment available to CWWI in TCI and the effect, if any, of the availability of such equipment on the obligations of CWWI under the MOU. There was no reliable evidence that CWWI had at any relevant time spares which would have met the requirements of Digicel TCI's original forecast for 8 E1s and 2 LIU7s. However, as the events showed, CWWI had available to it sufficient switching and signalling equipment so that it was able to provide 4 E1s and 1 LIU7 in accordance with the revised forecast put forward by Digicel TCI in the second half of April and early May 2006.

39. I have also held in the my main judgment that on the true construction of the phrase "required interconnection equipment", CWWI was entitled to take the time which it reasonably needed to acquire from Nortel not only the MUX and associated cabling but also other components relating to switching and signalling needed to effect interconnection without drawing on components in stock. Thus if, in due course, I hold that CWWI was in breach of the MOU in that it failed to order "the required interconnect equipment" at the proper time, then I will need to compare the actual time when physical interconnection was concluded (using spare E1s and a spare LIU7) with the time when physical interconnceciton would have been concluded if CWWI had performed the MOU in all respects by ordering a MUX and associated cabling and 8 E1s and 2 LIU7s, waiting for the arrival of that equipment and then installing and testing it.

40. I will now deal with the detailed events in relation to the ordering of equipment in TCI. In developing their case that there was a breach by CWWI of the MOU, the Claimants have asked me to consider certain matters that took place before the end of February 2006. On 18th January 2006, Mr Barnes of carrier services, who had some involvement with the proposed interconnection in TCI, prepared a business case for the purpose of seeking capital expenditure approval. He sent this business case to a number of other persons who, as I understand it, were also at carrier services. In the covering email, Mr Barnes referred to the business case as being "the first draft". He asked a Mr Jonothan Edwards to help with certain financial information and he asked Mr Chantrelle to confirm with the CWWI personnel in TCI the estimates which Mr Barnes had made for certain

interconnection costs. I will not set out the entirety of his email which was technical and detailed. However, I comment on the fact that Mr Barnes identified a number of matters which needed to be checked, in particular checked with CWWI in TCI. Mr Barnes explained that he had not obtained quotations from suppliers for the purposes of his figures as to costs but he had based his estimates on quotations received in other jurisdictions in the preceding six months. Mr Barnes stated that his costs were based on the assumption that there was no need for a significant expansion of the network fabric in TCI and he did not expect his estimates to change substantially if this assumption was correct.

41. In view of submissions made to me, I need to refer in a little more detail to the contents of this business case. The business case obviously follows a standard format. The document prepared in January 2006 is some 12 pages long. The document consists of a number of boxes, which are to be completed by the author. Box 1, to the extent that it is completed, referred to the need to expand the CWWI network in TCI as regards switching, signalling and transmission equipment to facilitate interconnection with Digicel. There were a number of figures left blank in box 1. In case it may be material, I draw attention to the answers in box 9. Those answers set out a specimen timetable. On the basis that the business case was approved on 31st January 2006, the timetable involved a purchase order for the equipment being issued on 8th February 2006. Insofar as the business case describes the equipment which was to be purchased, it refers to an optic terminal at US $25,000, to an expansion to the switch at US $60,000, to signalling units at US $10,000 together with freight and labour charges. Boxes 26, 26a and 27 contain a large number of detailed figures designed to set out the financial consequences of the proposal. So far as I can tell from the documents placed before me and other evidence, this first draft of 18th January 2006 did not receive any detailed attention until after the MOU was entered into at the end of February 2006.

42. At the meeting between the parties on 25th January 2006, CWWI informed Digicel TCI that CWWI would need to order "additional equipment from Nortel" in order to achieve interconnection. The note of the meeting on 25th January 2006 does not indicate what additional equipment was envisaged. It seems likely that the equipment being referred to was more than simply a TN-1C MUX together with associated cabling, as the MUX is dealt with separately in the meeting note. When the parties entered into the MOU at the end of February 2006, the MOU contained a term that when CWWI had ordered the interconnection equipment, it would inform Digicel TCI of the type of such equipment. That is consistent with the parties not being fully aware at the end of February 2006 of precisely what equipment needed to be ordered.

43. Following the signature of the MOU, representatives of Digicel TCI pressed CWWI for information as to the progress being made towards ordering the required interconnection equipment. An example of that is an email of 1st March 2006 from Mr de Goeij to the carrier services team. Mr de Goeij asked to be told what the status of ordering equipment was. On the same day, Mr Nelson of carrier services told Mr de Goeij that he would update him on 7th March 2006. Mr de Goeij replied on 2nd March 2006 asking for much more specific information. Mr Nelson said he would get back to Mr de Goeij and Mr de Goeij indicated that that was not good enough.

44. On 1st March 2006, there were internal CWWI emails between Mr Barnes and Mr Edwards. Mr Edwards had a difficulty with the figures in boxes 26 and 27 of the first

draft business case of 18th January 2006. Mr Barnes suggested that the figures had come from a business case dealing with an entirely different matter. On 4th March 2006, Mr Nelson of carrier services emailed Mr Gibbs of CWWI in TCI suggesting a meeting on 6th March 2006 at 2:30pm to discuss equipment requirements and civil works. Mr Gibbs later agreed to that meeting. A project plan, which seems to have been prepared by CWWI around this time, showed CWWI ordering signalling and switching equipment on 28th February 2006 and ordering the TN-1C MUX on 8th March 2006.

45. On 4th March 2006, Mr Edwards sent to Mr Seymour, the chief executive of CWWI in TCI, a draft business case for review and submission for capital expenditure approval. On 6th March 2006, Mr Barnes sent an email to other members of the carrier services team referring to the fact that CWWI was awaiting business case approval. Mr Barnes suggested that CWWI in TCI should commence work on any other aspect of the project that could be put in hand. One example was the civil works. Mr Barnes also recommended to Mr Chantrelle that CWWI should give Nortel an early warning of the impending TN-1C MUX order in advance of a purchase order. Also on 6th March 2006, Mr Seymour sent the business case for approval to Mr Mangan who was the appropriate financial officer of CWWI.

46. The Claimants submitted that the business case which was sent for approval was the same as the first draft business case of 18th January 2006. It is certainly true that the business case of 6th March 2006 repeats much of the contents of the first draft. However, there are important differences. The figures in box 1 have been filled in. The timetable in box 9 is different although that may be simply consequential upon a different start date for the timetable. The equipment and the estimated costs in box 20 appear to be the same. The figures in boxes 26, 26a and 27 are radically different from the figures in the first draft.

47. On 6th March 2006, Mr Mangan raised certain questions about the business case. He was concerned about the financial year in which the expenditure would fall. Later on 6th March 2006, Mr Mangan reported that a Mr Macfee, whose approval was needed, had approved the business case. Mr Mangan asked Mr Seymour to proceed immediately with ordering the equipment so that the expenditure would fall in the year to 31st March 2006. It was plainly considered important by the financial officers of CWWI that the equipment was ordered promptly and indeed delivered promptly for this purpose.

48. At around 2:30pm on 6th March 2006, Mr Nelson of carrier services met Mr Gibbs of CWWI in TCI. Their discussion in relation to equipment ordering referred to a period of 6 to 8 weeks and referred to two possibilities. One was to order a TN-1C MUX and the other was to use the unit offered by Digicel TCI, in particular, at the meeting on 25th January 2006. The discussion on 6th March 2006 also referred to the civil works being completed by the end of March 2006, if they were started on 20th March 2006. Later on 6th March 2006, Mr Seymour, having obtained approval to the business case, emailed Mr Gibbs instructing him to proceed with the ordering of the equipment referred to in the business case.

49. The next morning, 7th March 2006, there were internal communications within Nortel which showed that, by that stage, CWWI had requested a quote for interconnection equipment. The internal Nortel documents indicate that CWWI had requested a quote for more than simply a MUX and associated cabling. The documents referred to a PDTC "fully configured". There was considerable discussion at the trial as to what a fully

configured PDTC was. A distinction was made between a cabinet, a frame (comprising two shelves) and one shelf. I will not describe all of that evidence as it was accepted by Mr Gibbs on behalf of CWWI that he was not clear about the detail of those matters and that he had requested a quotation from Nortel for more equipment than was needed to effect an interconnection with Digicel. The Nortel documents of 7th March 2006 indicated that Nortel was working to a timetable pursuant to which it would get a quotation back to CWWI by 21st March 2006.

50. Also on 7th March 2006, the parties met and CWWI provided a copy of this project plan to Digicel TCI. CWWI said that digging the trench for the civil works would take place on 20th March 2006 and the works would take three weeks to complete. The meeting note does not refer to any specific discussion about the date for ordering the TN-1C but there was discussion about the time for Nortel to deliver the equipment. The discussion appears to have been on the basis that CWWI was intending to order the TN-1C the following day.

51. On 8th March 2006, an internal Nortel email referred to Nortel needing more information from CWWI in relation to the request for a quotation. Ms Nora Winje indicated that she was proposing to go to TCI and would contact Mr Gibbs. It seems that Ms Winje met Mr Gibbs in TCI a day or so later and discussed with him the question of the equipment for which the quotation was sought.

52. On 9th March 2006, Mr Barnes of carrier services emailed Mr Gibbs seeking information as to when the purchase order for the requisite equipment to facilitate interconnection would be sent to the supplier. There does not appear to have been an answer from Mr Gibbs to that question. CWWI prepared a project plan around this time which showed CWWI ordering the TN-1C equipment on 8th March 2006.

53. There were email exchanges between Mr Chantrelle of carrier services and Mr Gibbs of CWWI on 10th and 14th March 2006. On 10th March 2006, Mr Chantrelle refered to a discussion with Mr Gibbs to the effect that CWWI would wish to order a TN-1C, equipped to handle 11 E1s. Mr Chantrelle inquired of Mr Gibbs as to the delivery time for that equipment. He asked a similar question of Mr Gibbs on 14th March 2006. On 14th March 2006, Mr Gibbs stated that CWWI was "finalising the engineering" with Nortel and he would provide an update as soon as possible.

54. On 14th and 15th March 2006, there were internal emails within Nortel discussing requests for quotations from CWWI. The emails referred to three different works numbers suggesting three different requests for quotations. Much of the text in the emails no doubt made sense to Nortel but it is difficult for an outsider to interpret. Doing the best I can, it seems that two of the requests for quotations dealt with a GSM network expansion or a GSM capacity expansion. It is known from other documents that CWWI did wish to do works to a GSM network in TCI around this time. The other request for a quotation appears to involve a MUX (although it refers to a TN-1X and not a TN-1C) and a PDTC. One of the Nortel emails, referring to this request for a quotation suggests that Nortel was waiting for a reply from CWWI. Whilst not fully clear, these documents suggest that Nortel was being held up in dealing with the request for the quotation for the MUX and other equipment as it was waiting for information from CWWI.

55. On 15th March 2006, Ms Collins of Digicel TCI emailed Mr Chantrelle of carrier services. Her email refered to an order relating to a switch and a TN-1C. That indicates that Digicel TCI understood that the equipment being ordered was the MUX and some switching equipment. Ms Collins asked Mr Chantrelle whether the equipment had been ordered "last Friday", which would have been 10th March 2006. Mr Chantrelle replied on 15th March 2006 stating that the MUX order had been placed "since that is an off the shelf item". He added that the switching equipment engineering details had not yet been concluded with Nortel. Mr Chantrelle did not give evidence at the trial. The Claimants emphasised Mr Chantrelle's reference to the MUX being an off the shelf item but other witnesses for CWWI suggested that this description was over simplified. At any rate, Mr Chantrelle was describing a situation where the MUX order was placed separately from the switching equipment because there was a need for ongoing discussion about the engineering of the switching equipment. In fact, by 15th March 2006, CWWI had not placed any order with Nortel.

56. Around this time, a Mr Buigas of Nortel had sent an email to CWWI requesting information about the relevant equipment. Mr Buigas had written that he required the information the next day in order to get the proposal completed as soon as possible. The form in which the document has been put before the court does not reveal the date of Mr Buigas' email. The reply was sent on 16th March 2006 by a Mr Gardiner, a switch engineer in CWWI. The reply was copied to Mr Gibbs. The reply stated that CWWI wanted a PDTC cabinet. Mr Gibbs later annotated the email to refer to a frame and not a cabinet. Mr Gardiner's answer also referred to a "fully loaded PDTC frame". It is not necessary to itemise the other answers which Mr Gardiner gave to Nortel.

57. On 17th March 2006, Mr Nelson of carrier services emailed Mr de Goeij of Digicel TCI stating that an update to the project plan would be sent out on the 20th March 2006 and updated weekly thereafter. On 20th March 2006, Mr Gibbs replied to Mr Chantrelle's email of 14th March 2006 which had sought an update on the project plan as to interconnection. Mr Gibbs stated that CWWI was still discussing its requirements with Nortel. There had been a telephone call at 10 am on 20th March 2006 and there was to be another call on 21st March 2006. Mr Gibbs hoped that CWWI would get a proposal from Nortel on 21st March 2006.

58. On 22nd and 23rd March 2006, representatives of Digicel TCI complained to CWWI's carrier services that Digicel TCI had not been given weekly updates as to what was happening. On the same day, Mr Chantrelle of carrier services replied to Digicel TCI stating that there had been no real changes to the original project plan. He attached another copy of the plan and stated that the attached plan indicated the tasks that had been completed. The attached plan referred to CWWI having ordered the TN-1C equipment on 8th March 2006. In fact there had been no such order. Mr Chantrelle's email on 23rd March 2006 stated that Nortel had not confirmed a delivery date for the switching or transmission equipment. Whether read together with the project plan or separately from it, this statement suggests that an order had been placed but confirmation of the delivery date was outstanding. Mr Chatten, the Chief Executive of Digicel TCI, understood it that way as appears from his email in reply. On 27th March 2006, Mr Chatten wrote to Mr Nelson of carrier services asking for an update in relation to the equipment which had been ordered.

59. On 30th March 2006, Ms Collins of Digicel TCI emailed Nortel quoting dates for delivery and installation of the TN-1C and asking Nortel whether these dates were correct. The reply from a Mr Henry of Nortel was that he did not have the information.

60. On 31st March 2006, Digicel TCI was granted a licence to operate a telecommunications network in TCI. Also on 31st March 2006, Nortel sent to Mr Gibbs its proposal for what it described as the trunking expansion for interconnection. The proposal referred to a TN-1C with 32 E1s capacity to fulfil the transmission requirements. In addition, further equipment was identified to fulfil signalling requirements and trunking requirements. The copy of the proposal which I have seen does not include prices. However, on the same day, CWWI prepared a draft purchase order for certain equipment where the total cost was approximately US $315,000. In view of what happened later, I need to refer to some of the make up of this figure. The cost for "optical equipment" is given as US $8,939.66 and the cost for "optical equipment – spares" is given as US $6,875.00. The greatest part of the cost of US$315,000 was for TDM-equipment, at a figure in excess of US $256,000.

61. Mr Gibbs gave evidence about the Nortel proposal. He said it was for the figure of US $315,536.83. That figure is slightly different from the figure in the purchase order. Mr Gibbs told me that he had noticed the proposal included 2 fully loaded PDTC shelves rather than the one required for Digicel's interconnection. He thought that CWWI had made a mistake by requesting a fully loaded PDTC frame on 16th March 2006. Mr Gibbs said that he asked Nortel to amend the proposal and he sought advice from a Nortel contractor, a Mr Ashdown, on how to reduce the cost of the proposal. He asked for advice because he did not think that he, or anyone else at CWWI in TCI, had the necessary expertise.

62. Mr Gibbs also said that he placed an order on 31st March 2006 for the equipment at a cost of just under US $315,000, in accordance with an unsigned purchase order which has been disclosed. Expenditure of some US $315,000 had not been authorised within CWWI. The capital expenditure approved on 6th March 2006 was US $150,000. Mr Seymour the Chief Executive of CWWI in TCI did not have authority to approve expenditure of US $315,000. The authority of Mr Macfee was needed for expenditure of that amount. There is no sign that Mr Macfee, or anyone else, was ever asked to authorise expenditure of US $315,000. Indeed, documents from early April 2006 make it clear that expenditure of that amount would not have been authorised. Mr Gibbs says that he placed the order on 31st March 2006 fully intending to follow it up with a Job Change Order ("JCO") to amend the order when he had negotiated a revised proposal from Nortel. He thought that would save time rather than obtaining a new proposal and only then placing an order. I am not able to accept Mr Gibbs' evidence on this point. The contemporaneous documents are inconsistent with an order having been placed on 31st March 2006. A copy of the order which has been produced appears to be a draft of an order as no one has signed in the appropriate place to authorise the order. I think it is inherently improbable that Mr Gibbs would have placed the order without any authority. I am also not impressed by Mr Gibbs' suggestion that he placed the order in order to save time. I treat this, and other parts, of Mr Gibbs' evidence with considerable reserve. It seems to me that Mr Gibbs did not co-operate with Digicel TCI and did not even co-operate with CWWI's carrier services for the purpose of facilitating interconnection with Digicel. As regards Digicel TCI, it was put to Mr Gibbs, on the basis of certain emails, that he was hostile to Digicel TCI. The emails did powerfully suggest that that was so

and I was unimpressed by Mr Gibbs' denial. As regards his lack of co-operation with CWWI's carrier services, his own witness statement complained about the way in which, as he saw it, carrier services were making unreasonable demands on him and others at CWWI in TCI.

63. In early April 2006, there are internal emails within CWWI indicating that Mr Mangan and Mr Macfee were not approving expenditure of some US $315,000. On 3rd April 2006, Mr Seymour emailed Mr Mangan of CWWI, with a copy of the email going to Mr Gibbs, seeking to blame Nortel for the delay in producing the quotation. Mr Seymour asked for "feedback" on how to proceed with the interconnection equipment. This suggests to me it is most unlikely that Mr Gibbs had placed an order on 31st March 2006 for US $315,000 worth of equipment.

64. On 3rd April 2006, Ms Collins of Digicel TCI prepared an internal update. The update showed that Ms Collins believed that CWWI had ordered a MUX on 10th March 2006 and that CWWI was to have ordered the switch equipment by 17th March 2006.

65. By 4th April 2006, Mr Gibbs appears to have gone back to Nortel seeking a revised quotation. This came to the attention of Mr Barnes. Mr Barnes became concerned at the steps which Mr Gibbs had taken and on 5th April 2006 wrote a detailed email setting out his technical view as to what was needed. He recommended that CWWI order a TN-1C straight away and consider ordering further signalling and switching equipment thereafter. He suggested that CWWI facilitate interconnection with Digicel TCI by using spare signalling and switching equipment and install further signalling and switching equipment whenever it arrived.

66. Mr Gibbs gave evidence that matters could not have proceeded in the way described by Mr Barnes. I will refer in due course to what actually did occur in relation to ordering equipment and achieving interconnection with Digicel.

67. I find that a considerable time in March 2006 was taken up by reason of Mr Gibbs of CWWI failing to make clear what equipment he wanted Nortel to quote for, delaying in giving information to Nortel, later giving information to Nortel which either he did not understand or which was the wrong information and then when he obtained a quotation from Nortel, realising that he did not need all of the equipment the subject of the quotation and he would not be authorised to place an order in accordance with that quotation.

68. Having been requested to submit a revised quotation on or about 4th April 2006, Nortel sent a revised quotation to CWWI on 5th April 2006. The quotation shows that it was a revision of the quotation sent on 31st March 2006. The equipment listed in the quotation of 5th April 2006 was essentially a TN-1C and associated cables. The cost for the optical equipment was US $8,939.66 and the cost for optical equipment-spares was US $6,875.00.

69. On 6th April 2006, CWWI placed an order with Nortel for this equipment. The purchase order of 6th April 2006 was authorised by Mr Seymour whose signature appears in the appropriate place on the purchase order. Thus, when Mr Gibbs requested a quotation from Nortel for a MUX and associated equipment, on or about 4th April 2006, he obtained a quotation on 5th April 2006 and a purchase order was placed on 6th April 2006. No

doubt, those steps were able to be taken within a very short time scale because they had been preceded by the other events in March 2006. However, the evidence supports the conclusion that it was a simpler and faster thing to seek a quotation for, and then place an order for, some US $16,000 worth of optical equipment and spares rather than seeking a quotation for, and then placing an order for, the more elaborate equipment the subject of Nortel's quotation of 31st March 2006.

70. It is relevant to refer to certain comments made within CWWI around this time. On 6th April 2006, Mr Chantrelle reported that CWWI in TCI were showing "no particular urgency… to complete this project in record time". Mr Barnes pointed out that that attitude was not consistent with the obligations that CWWI was under, by which he meant the obligations in the MOU.

71. On 7th April 2006, Mr Chantrelle of carrier services sent to Mr de Goeij an updated project plan for interconnection in TCI. The updated plan continued to show that CWWI had ordered TN-1C equipment on 8th March 2006. Mr Chantrelle stated that CWWI was having difficulty obtaining a delivery schedule from Nortel and there were "issues" with Nortel's equipment pricing. On 10th April 2006, Ms Collins of Digicel TCI replied to Mr Chantrelle stating that she had learnt that the switch equipment had not been ordered and asked how that affected the project plan. I have not been shown a response to her question.

72. On 28th April 2006, CWWI placed an order for further equipment costing some US $96,000. The evidence was not clear as to what precisely was included in this order. However, the equipment which was ordered did include switching and signalling equipment and, in particular, some E1s and some LIU7s. There was no precise evidence as to when the equipment ordered on 28th April 2006 arrived but it clearly had not arrived when CWWI installed the MUX which had been ordered on 6th April 2006 and installed 4 E1s and 1 LIU7 taken from CWWI's spare equipment.

73. In due course, the TN-1C MUX and the other equipment ordered on the 6th April 2006 was delivered and installed. Although Digicel had stated in its original forecast that it required 8 E1s and 2 LIU7s on day one of launching its service, it in fact launched with the use of only 4 E1s and 1 LIU7 and this equipment was provided by CWWI from spare components which it held. Physical interconnection was completed by 3rd July 2006.

74. Having set out the detailed history of CWWI placing an order for interconnection equipment, I can now turn to the criticisms made by the Claimants. The Claimants say that CWWI delayed in seeking approval for capital expenditure. It will be remembered that CWWI obtained capital expenditure approval on 6th March 2006. It does not appear that they started the process of seeking that approval immediately following 27th February 2006, the date on which the obligations in the MOU became effective. The Claimants also say that CWWI delayed in seeking a proposal from Nortel. The first point made is that CWWI could have sought a proposal from Nortel immediately following 27th February 2006 as CWWI did not need to wait for approval to the capital expenditure being obtained on 6th March 2006. The Claimants say that the quotation which should have been sought from Nortel was a quotation for a TN-1C MUX and associated equipment, but not for the equipment desired to expand switching and signalling capacity. Further, the Claimants say that even if some switching and signalling expansion in TCI was needed in order to accommodate interconnection with Digicel, CWWI could have

installed the MUX and carried out interconnection testing using just one interface card and could then have installed extra switching and signalling later. The Claimants also complain that the equipment for which a quotation was sought from Nortel in March 2006 was excessive as regards switching and signalling compared with Digicel's original forecast. The Claimants point to the fact that Digicel TCI was prepared to launch in TCI with only 4 E1 switching ports rather than 8 E1 ports and CWWI had sufficient capacity to accommodate interconnection at that level without the need to expand switching and signalling further at the point of interconnection. The Claimants also say that CWWI delayed providing sufficient information for Nortel to prepare the proposal it sent on 31st March 2006. The Claimants build on these allegations by submitting that the delays were not accidental or due to incompetence or misunderstanding but were part of a preconceived deliberate strategy. The Claimants also complain about the lack of information and, indeed, the misinformation which CWWI gave Digicel TCI during this process.

75. I can now state my conclusions. I will begin with the provision of information from CWWI to Digicel TCI in the period from 27th February 2006 to 6th April 2006. The MOU required CWWI to keep Digicel TCI informed of the current location of the interconnection equipment and its intended date of delivery to TCI. In my judgment, CWWI broke that obligation time and time again. First of all, it did not provide regular updates. Its defence was that there was nothing to report. I hold that CWWI was in any event required to describe the state of affairs at regular intervals. Secondly, CWWI wrongly stated the facts on more than one occasion. It follows that CWWI was in breach of contract in this respect. Digicel TCI does not point to any loss which flowed from these breaches and I hold that Digicel TCI has failed to prove that it suffered damage as a result of these breaches of contract. Accordingly, Digicel TCI is entitled to only nominal damages for these breaches of contract.

76. I next deal with the allegation that the way in which CWWI handled the ordering of equipment from 27th February 2006 to 6th April 2006 was part of a preconceived deliberate strategy to cause delay. I do not make that finding. So far as the members of the carrier services team at CWWI who were dealing with interconnection in TCI's concern, the internal documents of CWWI indicate that they were trying to make timely progress in relation to ordering equipment. I think the carrier services team were frustrated by the apparent inability of Mr Gibbs to make that progress. As regards Mr Gibbs he did fail to co-operate with the carrier services team. He appears to have thought that he was being asked to do too much by the carrier services team and he was not well disposed to Digicel TCI. He also appears to have lacked the technical expertise himself and he did not have sufficient technical expertise within CWWI in TCI to call upon to enable him to handle the matter competently. In fact he dealt with the matter most incompetently.

77. In my judgment, there was delay between 27th February 2006 and 6th April 2006 in CWWI placing an order for a TN-1C MUX and associated cabling. I hold that CWWI did delay, in breach of the MOU, in not seeking a quotation from Nortel prior to 7th March 2006, say, on or about 1st March 2006, which was a Wednesday. It was not necessary to wait for capital expenditure approval before seeking a quotation. CWWI was also in breach of the MOU by incompetently losing time during March 2006 in liaising with Nortel. Further time was unnecessarily taken in obtaining a quotation from Nortel by asking Nortel for a quotation for more extensive and more complicated equipment.

78. Having held that CWWI was in breach of the MOU by placing a purchase order as late as 6th April 2006, I now need to consider what should have happened if CWWI had complied with its obligations under the MOU. I do not think that CWWI would have been at fault if it had asked Nortel to provide a quote for a MUX, and associated cabling, by Wednesday, 1st March 2006. It may not have been possible for CWWI to have prepared a request for a quote by that date for the additional switching and signalling equipment required for interconnection with Digicel TCI. It may therefore have been necessary for CWWI to have made two requests for quotes. CWWI was entitled pursuant to the terms of the MOU to request a quote for equipment which complied with Digicel TCI's forecast which required 8 E1s and 2 LIU7s. If CWWI had requested a quote for a MUX on or about 1st March 2006 and had requested a quote for switching and signalling equipment on 1st March 2006 or, possibly, a little later, then the best estimate I can make as to when Nortel might have provided such quotes would have been, say, within 3 weeks of 1st March 2006, that is, by 22nd March 2006.

79. The case for saying that CWWI delayed up to 6th March 2006 in obtaining capital expenditure approval is somewhat borderline. If that had been the only matter, I might have hesitantly come to the view that capital expenditure approval could have been obtained one or two days earlier. In any case, capital expenditure approval, based on estimated figures, could have been obtained long before 22nd March 2006 (the date which I have selected, as explained in the last paragraph above). No one has suggested to me that if capital expenditure approval based on estimated figures had been obtained before 22nd March 2006, there would have been any need to go back for further capital expenditure approval following a quotation on or about 22nd March 2006.

80. If Nortel had provided a quote or, if relevant, two quotes by 22nd March 2006, then CWWI, in order to comply with the MOU, ought to have placed a purchase order with Nortel by the end of that week, say on 24th March 2006. The difference between that date of 24th March 2006 and 6th April 2006, when CWWI ordered a MUX and associated cabling, but not the necessary switching and signalling equipment, is some 13 days, i.e. just under 2 weeks.

81. The Claimants do not criticise the steps which were later taken in relation to installing and testing the necessary equipment after 6th April 2006. The MUX which was ordered on 6th April 2006 in due course arrived. Digicel TCI indicated that it was prepared to launch with fewer E1s and LIU7s than it had originally forecasted that it needed. CWWI supplied the smaller number of E1s and a LIU7 from its stock even though it was not contractually obliged to do so. The equipment was installed and tested and physical interconnection was completed by 3rd July 2006.

82. In order to determine whether CWWI's breach of the MOU (in ordering part of the equipment on 6th April 2006 rather than all the "required interconnect equipment" on 24th March 2006) caused delay to the completion of physical interconnection, I must consider what would have happened if CWWI had performed the MOU. If CWWI had performed the MOU, it would have ordered the MUX and the switching and signalling equipment on 24th March 2006. It would then have been entitled to wait until that equipment arrived and then to install it and complete physical interconnection. Although CWWI did not wait until the switching and signalling equipment (which it ordered on 28th April 2006) arrived, as it used its spare equipment, it was not contractually obliged to resort to its

spare equipment. The question then becomes: when would the switching and signalling equipment needed to provide interconnection with Digicel TCI have arrived?

83. The best evidence as to the expected delivery time of the switching and signalling equipment, as compared with the delivery time for the MUX and associated cabling, is shown by two project plans which were prepared by CWWI at the relevant time. The first of these project plans was sent under cover of an email from Mr Chantrelle of CWWI to Digicel TCI on 15th May 2006. The second was sent under cover of an email from Mr Nelson of CWWI to Digicel TCI on 29th May 2006. In the first project plan, the delivery time for a MUX was stated to be 28 days and the delivery time for switching and signalling equipment was stated to be 46 days, a difference of 18 days. In the second project plan, the comparable figures were 46 days and 30 days, a difference of 16 days. In a supplemental note prepared by the parties following the conclusion of oral argument, the parties agreed that the lead time for the relevant switching/signalling equipment was longer than the lead time for a MUX and they specifically referred to these two project plans.

84. Thus, if CWWI had ordered a MUX and the relevant switching and signalling equipment on 24th March 2006 (13 days earlier than the actual order of a MUX on 6th April 2006) then the lead time for the delivery of all of the equipment ordered on 24th March 2006 would have been likely to have been some 16 or 18 days longer than the lead time for the lesser equipment actually ordered on 6th April 2006. This would mean the equipment notionally ordered on 24th March 2006 would have arrived some 3 to 5 days later than a MUX ordered on 6th April 2006 would have arrived. In the event, CWWI did not wait for the delivery of additional switching and signalling equipment (which had actually been ordered on 28th April 2006) as it drew on its spare equipment. But its contractual obligations under the MOU did not require it to do this. It was entitled to wait until the notionally ordered switching and signalling equipment arrived.

85. Based on the above comparison, my conclusion is that the Claimants have not shown that the actual events which led to completion of physical interconnection on 3rd July 2006 involved a delay in completion of physical interconnection as compared with what would have happened if CWWI had performed its obligations under the MOU, ordered the MUX and the switching and signalling equipment on 24th March 2006, did not use its own spare equipment and then installed and tested all the equipment needed for the interconnection with Digicel TCI. The result is that Digicel TCI is entitled to nominal damages only for CWWI's breach of its obligation to order equipment in accordance with the MOU.

86. I have not overlooked the Claimants' submission that a different approach might have been adopted to testing the interconnection before the arrival of, and the installation of, the switching and signalling equipment that was on order. I was asked to consider evidence given by Mr Gibbs and by Mr Fisher when cross-examined. Having considered that evidence, I conclude that I have not been given the necessary material to enable me to make an assessment of what time would have been taken in total by proceeding to test the interconnection before the arrival of the switching and signalling equipment which was on order and then completing all other stages necessary to allow physical interconnection with 4 E1s and 1 LIU7. Further, although I asked the parties, following the conclusion of the hearing, to provide information as to when the actual testing was carried out, the parties agreed that the evidence did not provide a clear answer to that

question. Thus, I am not able to compare what actually happened with the course of action which the Claimants suggest could have been followed.

87. The Claimants also say that CWWI was in breach of the MOU in that it failed to undertake the civil works associated with installation of and testing of fibre links between the switch sites, such works to be undertaken at the same time as CWWI ordered the interconnection equipment. CWWI actually ordered the interconnection equipment on 6th April 2006 but I have held that it ought to have done so about two weeks earlier, on or about 24th March 2006.

88. Before considering whether CWWI did or did not commit a breach of the MOU in relation to civil works, I will consider whether any such breach caused any delay in any relevant respect. The Claimants have not identified in their closing submissions the date which they say is the date when the civil works were complete. The Claimants do not say that the time for completion of the civil works held up interconnection. Amongst the various references in the documents to which I was taken, the reference which identifies the latest date for completion of the civil works is a statement in an email of 15th May 2006 from Mr Chantrelle to Miss Collins. The email suggests to me that it was predicted that the civil works would be completed on 18th May 2006. As that date was only a few days after the date of the email, there is reason to think that the prediction in the email was accurate at the time and shows what probably did then happen. There is no other evidence from CWWI that the civil works were completed before the predicted date referred to by Mr Chantrelle. The Claimants have not called any evidence to show that the civil works were completed later than 18th May 2006. Accordingly, I infer from Mr Chantrelle's email that the civil works were completed on 18th May 2006.

89. Because physical interconnection was not complete until 3rd July 2006, for reasons which were not connected with the completion of the civil works, it follows that any delay in completion of the civil works on 18th May 2006 did not hold up completion of physical interconnection. That means that the Claimant's claim in relation to the civil works is, at best, a claim for nominal damages. It does not seem to me to be appropriate to devote much time to considering the evidence as to whether there was or was not a breach in relation to civil works when, first, the claim would be limited to a claim for nominal damages only and, secondly, the evidence called by the Claimants is so exiguous on the subject.

90. On the poor quality evidence I have been given, my findings in relation to the civil works are that on 3rd March 2006 CWWI appointed a contractor to do the civil works. CWWI agreed with the contractor that it would begin the civil works later in March 2006, when it had completed an earlier job. The earlier job was not finished in time and the contractor was delayed in beginning the civil works. The civil works were completed on 18th May 2006. The Claimants have not identified any criticisms as to the way in which the civil works were done from the time they began until they were completed. On those findings, I hold that CWWI did not commit a breach of the MOU in relation to the civil works and is not liable to pay nominal damages.

91. I now turn to the complaints made by the Claimants in relation to the progress of negotiations for contractual interconnection in TCI. It will be remembered that Digicel TCI obtained its licence in TCI on 31st March 2006. The obligation owed by CWWI under the 2004 Ordinance and the 2005 regulations (subject to the regulation dealing with

a RIO to which I refer below) were owed to licensees and were therefore not owed to Digicel TCI before 31st March 2006.

92. CWWI had earlier obtained its own licence on 25th January 2006. Clause 13 of that licence imposed obligations on CWWI which prohibited certain anti-competitive behaviour. Section 13(5) of the 2004 Ordinance provided that a licensee must comply with the terms and conditions of its licence. Accordingly a breach of the licence was a breach of the 2004 Ordinance. However, contrary to the submission of Digicel TCI, I have held that the prohibitions on anti-competitive behaviour in clause 13 of the licence did not add to the specific obligations owed by CWWI in relation to interconnection which, as I have said, were owed only to another licensee and therefore were only owed to Digicel TCI with effect from 31st March 2006.

93. Digicel TCI relied on regulation 8(2) which exceptionally imposed an obligation on CWWI in relation to the period before 31st March 2006. Regulation 8(2) provided that a dominant carrier must prepare and publish its reference interconnection offer (RIO) within 30 days of its grant of licence. Regulation 8(3) required a RIO to contain certain information and, in particular, regulation 8(3)(d) refered to the question of rates or pricing formulae. As CWWI obtained its licence on 25th January 2006, the 30 day period referred to in regulation 8(2) expired on 24th February 2006. CWWI provided a draft RIO to Digicel TCI on 10th February 2006. That document followed the format used by the C&W companies in other jurisdictions and I have previously described that format. In TCI, the document extended to some 136 pages. The document included a tariff schedule but no figures for the proposed tariffs were inserted in the document provided on 10th February 2006. Those figures were later provided to Digicel TCI on 20th March 2006. Because 20th March 2006 was outside the 30 day period permitted by regulation 8(2) it follows that CWWI did not comply with regulation 8(2).

94. In order to assess whether non-compliance with regulation 8(2) caused loss to Digicel TCI, it is necessary to put this matter into its context. Although Digicel TCI did not obtain its licence until 31st March 2006, it had requested, on various earlier occasions, interconnection with CWWI. It requested interconnection in 2005 but, more relevantly, it requested interconnection on the 11th and 14th January 2006. The parties met on 25th January 2006. They discussed a draft interconnection agreement, which they called a RIO. CWWI stated that it would provide Digicel TCI with a draft RIO by 10th February 2006. CWWI stated that the rates would not be included in the draft RIO. As I have indicated, CWWI did provide the draft RIO without rates or tariffs on 10th February 2006.

95. The parties met again on 7th March 2006. That meeting was described by Mr de Goeij in an internal Digicel TCI document on 8th March 2006. He said that the meeting had been "an extensive meeting" and a great number of issues on the draft RIO had been resolved and that CWWI had agreed to present Digicel TCI with its tariffs. He described the meeting as "fair" and that there was "real progress". A note of the meeting recorded that Mr Nelson of CWWI agreed to send the tariffs to Digicel TCI by 17th March 2006. On 17th March 2006, Mr Nelson emailed Mr de Goeij apologising for the fact that he was unable to send the tariffs to Digicel TCI that day. Internal CWWI documents from that time show that CWWI was working on finalising the tariffs and was encountering certain complications which continued until 20th March 2006. The parties agreed that the tariffs were sent to Digicel TCI on 20th March 2006.

96. Thus, by the time that Digicel TCI obtained its licence on 31st March 2006, Digicel TCI was in possession of a full draft RIO including a tariff schedule and, indeed, had made progress in discussing parts of the RIO, even before CWWI came under an obligation owed to Digicel TCI to negotiate the terms of the RIO. Thus, although CWWI did not perform its obligation under regulation 8(2), I do not see how that breach caused any loss to Digicel TCI. That finding is supported by another specific matter to which I now refer.

97. When Digicel TCI obtained CWWI's rates on 20th March 2006, it considered them and considered them completely unacceptable. On 22nd March 2006, Mr de Goeij prepared a memo for the Chief Executive of Digicel TCI. The memorandum contained Mr de Goeij's recommendation as to the way forward. The recommendation was that Digicel TCI should push for completion of technical interconnection and "keep the issue of pricing until the last moment". Mr de Goeij gave similar advice internally in Digicel TCI on 24th March 2006. He recommended that Digicel TCI should not respond to CWWI's tariffs for reasons of strategy. On 21st April 2006, Mr de Goeij gave a presentation within Digicel TCI. He recommended that Digicel TCI should push for technical interconnection first and prepare for dispute resolution proceedings on the question of rates. As this was Digicel TCI's strategic response following 31st March 2006, when CWWI had an obligation under the regulations to negotiate with Digicel TCI, I cannot see that Digicel TCI would have been any better off, or further advanced, if the rates which were put forward on 20th March 2006 had been put forward earlier in a draft RIO on 24th February 2006.

98. The Claimants make other complaints about the slow rate of progress in negotiations prior to 31st March 2006. A meeting between the parties had been arranged for 28th February 2006 and was then cancelled. Mr Nelson of CWWI gave evidence that this meeting clashed with another meeting. There was no satisfactory evidence either way to corroborate that statement. I suspect that CWWI did not give meetings with Digicel TCI any priority at this stage, which was before Digicel TCI had obtained the licence and therefore before CWWI owed any obligations to it. Because CWWI did not owe any obligation to Digicel TCI at this stage, there cannot have been a breach of duty by cancelling the meeting, whatever the reason for the cancellation might have been. Further, emails from the time show that Digicel TCI was relatively unconcerned about the cancellation of the meeting on 28th February 2006.

99. The Claimants also complained that there was no face to face meeting between the parties between 7th March 2006 and 19th April 2006 and this was a breach by CWWI of its obligations to negotiate with Digicel TCI. Of course, until 31st March 2006, CWWI did not have an obligation to negotiate with Digicel TCI. Notwithstanding that there was no face to face meeting in this period, there were many communications by email as to the terms of the draft interconnection agreement. In particular, I refer to emails on 9th, 14th, 17th and 31st March 2006 and 18th April 2006. On 18th April 2006, CWWI sent to Digicel TCI its comments on a list of issues which had gone backwards and forwards concerning the terms of the RIO. At that time there were some 91 issues that were being discussed. The first 84 of these issues did not concern tariffs. The last 7 issues related to the subject of tariffs but Digicel did not put forward any counter proposal as to rates.

100. A note of the meeting on 19th April 2006 refers to the issues list in respect of the draft RIO. The parties agreed certain of these issues and left others for further deliberation. Digicel TCI also requested a mobile to mobile interconnection service, which was

different from the interconnection service they had earlier requested and which was the subject of the discussions. A mobile to mobile interconnection service would have avoided the transit of Digicel TCI's calls across CWWI's fixed network and would have eliminated the need to agree a transit rate. In the event, when the parties settled the terms of an interconnection agreement, it was not for mobile to mobile interconnection. At this meeting, Digicel TCI did not make a counter proposal to the rates put forward by CWWI. Instead, Digicel TCI asked CWWI to make a revised proposal. In my judgment, it is not necessary to explore whether the parties should have had a meeting after 31st March 2006 and before the actual meeting on 19th April 2006 because I am not able to find that a meeting in that period would have produced a result different from the position the parties were in at the end of the meeting on 19th April 2006.

101. The Claimants next complain about the time taken after the meeting on 25th January 2006 to negotiate and settle the terms of the MOU which was sent by CWWI to Digicel TCI on 23rd February 2006. As all of this period was before Digicel obtained its licence on 31st March 2006, it is not necessary to examine this matter in detail. If CWWI had been under an obligation to progress the matter, then it is entirely possible that the matter could have proceeded with more urgency. However, given the absence of an obligation on CWWI, it is not meaningful to judge whether the rate of progress did or did not conform to the non-existent obligation.

102. In this context, Digicel TCI stresses the importance of an email sent by Mr Vandendries of CWWI carrier services to Mr McNaughton on 8th February 2006. The background to this email was that on 8th February 2006, Mr Vandendries had sent a marked up version of the draft MOU to Mr de Goeij. Mr de Goeij's email server sent an automatic message that he was currently out of the office and would return on 10th February 2006. The message stated that if the matter was urgent, contact could be made with Mr Gorton of Digicel. On receipt of that automatic message, Mr Vandendries emailed Mr McNaughton pointing out that the email would not be read by Mr De Goeij and stating that "the helpful thing" to do would be to forward the email to Mr Gorton. Conversely, "the delaying tactic" would be to do nothing. In fact, Mr Vandendries forwarded the email to Mr Gorton on 9th February 2006. This little episode shows that as at 8th February 2006, certain members of the carrier services team were, at least, considering the desirability of time passing without progress being made, in other words, delaying the progress of negotiations. In the event, the carrier services team did not take advantage of the opportunity to introduce an element of delay. This was at a time when CWWI was not under an obligation to progress negotiations. The episode indicates that CWWI, or at least some members of the carrier services team, did not have interests of their own to bring forward the conclusion of negotiations. As against that indication, it is clear that CWWI did take steps which it was not obliged to take, such as entering into the MOU and ordering equipment in advance of an interconnection agreement. Further, even if the conclusion I drew from the email of 8th February 2006 was that CWWI was disinclined to do things which it was not obliged to do, that attitude on 8th February 2006 does not necessarily describe the attitude which CWWI took, following 31st March 2006, when CWWI was under certain obligations under the Ordinance and the regulations.

103. The remaining allegations made by the Claimants about the progress of the negotiations for contractual interconnection in TCI all concern the negotiating positions adopted by the parties in relation to rates. There were three rates in dispute between the parties. The first was the mobile termination rate (MTR). The second was the fixed termination rate (FTR).

The third was the transit rate. Before describing the course of the negotiations on rates in TCI, I need to refer to the provisions of the 2004 Ordinance and the 2005 regulations which are potentially relevant. Section 22 of the 2004 Ordinance obliged CWWI to provide interconnection timeously to Digicel TCI. As regards the regulations, the subject of rates is dealt with in regulations 14, 15 and 19.

104. In summary, regulation 14 specifies what can be agreed as the basis of the charge for interconnection. Regulation 14 deals with a party "providing" interconnection or charging for interconnection. Accordingly, regulation 14 is concentrating upon the rate which is ultimately agreed between the parties. Regulation 14 does not therefore directly deal with the negotiating positions of the parties. If in the course of negotiations, a negotiating party put forward a rate which could not pass the test of regulation 14 then whether that stance was contrary to the regulations would depend on what the regulations elsewhere provided. For example, if the regulations said that a party must negotiate in good faith then a party who knowingly put forward a rate which did not conform to regulation 14 might be said to be acting otherwise than in good faith. Conversely, if a party put forward a rate which did not conform to regulation 14 in circumstances where that party genuinely believed the rate did conform to regulation 14, then in my judgment, that party would not be acting otherwise than in good faith.

105. Regulation 14(1) provides that the rate at which interconnection is provided must be a rate arrived at in a transparent manner. That does not necessarily mean that the position in negotiations must always involve transparency. Regulation 14(3) provides that a dominant carrier must provide interconnection at rates that are "cost-oriented". Regulation 14(4) defines "cost-oriented". The definition refers to the stand-alone costs of providing the service and also to the long-run average incremental costs of providing the service. Regulation 14(6) provides, in the ordinary case, that a dominant carrier may use a cost accounting method of its choosing for ensuring that its charges for interconnection are cost-oriented.

106. Regulation 15 is headed "interconnection rate methodology". Regulation 15 describes what the regulator may do if it is required to determine whether a particular rate, which has been agreed between the parties, is or is not cost-oriented. Regulation 15 does not deal with the methodology to be adopted by a carrier in fixing the rate for the provision of interconnection and, much less, for determining the negotiating stance that can be adopted in relation to rates. A carrier may take the view that if there is to be a challenge to a rate and if that challenge went to the regulator for determination and if that regulator were to adopt the principles set out in regulation 15, it might be sensible for the carrier in the first instance to adopt the same methodology. However, regulation 15 does not impose that methodology as such on the carrier.

107. Regulation 19(1) states that a carrier that is licensed to own and operate a mobile telecommunications network is presumed to be dominant in the market for wholesale mobile voice termination services over such networks, except insofar as the regulator, upon demonstration by the carrier, determines otherwise. As will be seen, Digicel TCI wrote to the regulator on 22nd May 2006 making its case that it was not dominant within regulation 19(1), but the regulator did not formally deal with that request. Regulation 19(2) provides that a carrier described in regulation 19(1) may not charge an interconnecting carrier or service provider an MTR that exceeded 15 cents per minute. This applied to the rate which CWWI could charge Digicel TCI. It also applied to the rate

which Digicel TCI could charge CWWI unless the regulator were to accept that the presumption of dominance did not apply to Digicel TCI (see regulation 19(1)) or unless the regulator modified the operation of regulation 19(2).

108. Regulations 14, 15 and 19 do not deal with the negotiating stance that may be adopted by a carrier. Other regulations do deal with the approach which may be adopted to negotiations. Regulation 9(5) requires a carrier to negotiate in good faith with the objective of concluding an interconnection agreement. I have already given the example of a case where a carrier would not be acting in good faith if it knowingly put forward a rate which, if it were to be agreed, would not conform to regulation 14.

109. In their closing submissions on the question of the rates being negotiated in TCI, the Claimants place heavy reliance on regulation 6(3). Regulation 6(3) provides:

> "Every carrier and service provider must offer to provide and provide interconnection on a timely basis not to exceed 90 days subject to section 8, after requested by another licensee, and on the basis of terms and conditions that are transparent and reasonable, having regard to economic feasibility."

110. Amongst their submissions, the Claimants say that regulation 6(3) deals not only with the agreed terms for interconnection but also the terms on "offer", that is, on offer in the course of negotiations. I accept that submission. The Claimants assume that the reference to "terms and conditions" in regulation 6(3) includes rates. I am not wholly persuaded that that is so. In one sense, a term as to a rate is part of the terms and conditions as to interconnection. However, regulations 14 and 15 deal specifically with rates and it may be that the right reading of regulation 6(3) is that it is dealing with terms and conditions other than rates. Regulation 6(3) refers to the terms and conditions being "reasonable". If regulation 6(3) is dealing with rates, amongst other things, and if rates therefore have to be reasonable, it seems to me that if a party in the course of negotiations puts forward a rate which does not infringe regulation 14 then that position would not be open to challenge on the basis that the rate was in some other way not reasonable. Regulation 6(3) directs one to have regard "to economic feasibility" when considering whether terms and conditions are reasonable. If regulation 6(3) is dealing with rates, amongst other things, then I do not think that one can use the reference in regulation 6(3) to economic feasibility to override the direction as to cost-oriented rates in regulation 14. For example, it would not be open to a provider of an interconnection service to say that a cost-oriented rate is not economically feasible for it so that it wanted to charge more. Similarly, if an interconnection provider puts forward a rate which is cost-oriented and which conforms to regulation 14, it would not be open to the party requesting interconnection to assert that that rate was not reasonable because it was not an economically feasible rate from the point of view of the party requesting interconnection.

111. It will be remembered that CWWI first put forward its rates to Digicel TCI on 20th March 2006. The relevant rates were a reciprocal MTR of 15 cents and a FTR of 6.4 cents and a transit rate of 6.2 cents. The FTR of 6.4 cents was sub-divided into a call setup charge of 2.7 cents and a call duration charge per 60 seconds of 3.7 cents. The transit charge of 6.2 cents was sub-divided into a call setup charge of 2.7 cents and a call duration charge per 60 seconds of 3.5 cents. The first question to address is the derivation of these rates. There is no dispute about the fact that CWWI had a costs model which it had available to use to determine the rates appropriate in TCI. Mr Forrest of CWWI gave

evidence that the rates put forward on 20th March 2006 were the product of introducing certain inputs into the cost model. There was no evidence to contradict Mr Forrest's direct evidence to this effect.

112. I referred earlier to the definition of "cost-oriented" rates in regulation 14. I was not given any material which would enable me to make any findings as to what rate would be a cost-oriented rate. I was not given any evidence as to whether a cost-oriented rate can only be one precise figure or whether there could be a range of possible rates, which could all reasonably be said to be cost-oriented rates. I was not given any evidence as to how the cost model used by CWWI worked. No criticism of the cost model was put forward by Digicel TCI. Neither party called any expert evidence on the question whether the rates put forward by CWWI on 20th March 2006 were or were not "cost-oriented" within the meaning of regulation 14.

113. The Claimants did rely on certain matters with a view to asking me to find that the rates were not reasonable having regard to economic feasibility, for the purposes of regulation 6(3). I have already indicated that if the rates were cost-oriented so as to satisfy regulation 14, then one ought not to read regulation 6(3), if it is dealing with rates at all, so as to outlaw a rate which conformed to regulation 14.

114. The Claimants compared the rates in TCI with rates in other Caribbean countries. However, in my judgment, that takes one nowhere. There is every reason to believe that the costs in different countries will, or might, be different so that cost-oriented rates in different countries will, or might, be different. The Claimants retort that the rates in TCI were much higher than elsewhere but if, as I hold, I cannot use a rate from another country as a comparator for a rate in TCI, then I am not able to form any view by reference to whether the rate in TCI is a little different or a lot different from another rate in another country.

115. The Claimants also refer to internal CWWI emails of 17th and 20th March 2006 which discuss a limited part of the way in which the rates were calculated. However, the discussion is of such a limited part of the process that I am not able to draw any useful conclusion as to the way in which the rest of the process operated.

116. The Claimants also say that the rates proposed on 20th March 2006 were different from the rates later agreed. It is right that CWWI later agreed to accept a lower FTR and a lower transit rate and agreed a higher MTR. It is clear, however, that the figures ultimately agreed were the result of very tough bargaining under pressure from the government and the regulator, both of whom were trying to drive the parties to make a financial settlement. The government and the regulator seem to me to have been more intent on getting an agreement between the parties that would not operate against the public interest rather than paying close attention to what a costs model did, or might, justifiably show as a cost-oriented rate.

117. The Claimants also rely on evidence from Mr Barrins who was himself involved in the negotiations on the rates in TCI. Mr Barrins is an economist but he was not called as an expert witness. He was involved in negotiations where passions ran very high and I do not think I can regard Mr Barrins as a wholly objective commentator on this point. Mr Barrins has never seen the CWWI costs model so his views as to what such a costs model could, or could not, properly show are of very little help to me. Further, Mr Barrins

concentrated on the words "economically feasible" and discussed the impact of CWWI's rate on the position of Digicel TCI. As I have explained, I would not regard the words "economically feasible" as entitling Digicel TCI to insist on a rate which worked economically for it and to allow it to reject a rate which otherwise conformed to regulation 14. Further, in any event, the Defendants relied with some force on internal Digicel TCI documents which showed levels of return for Digicel TCI which called into question some of Mr Barrins' evidence as to what was economically feasible. In these circumstances, in the absence of any explanation of how the costs model worked and in the absence of any expert evidence on the subject and in the light of the other considerations to which I have referred, I regard it as virtually impossible for me to hold that the rates put forward by CWWI in TCI were not cost-oriented rates.

118. Further, even if the rates were, on some objective measure, not cost-oriented rates, it would not follow that CWWI had breached the regulations which deal with the stance which may be taken in negotiations. CWWI would only be guilty of bad faith in relation to the negotiations, in a case like the present, if it knew that the rates could not be justified and the rates were being put forward to delay the progress of the negotiations. Similarly, CWWI would not be guilty of a breach of an obligation to act in a timely manner unless it could be shown that the rates were put forward with a view to dragging out the negotiations. On the evidence before me, I am not able to find that the Claimants have established any of those matters in relation to CWWI's stance in the negotiations.

119. Having reached these conclusions, I will describe the progress of the actual negotiations in order to enable me to deal with certain submissions made by the Claimants that the negotiations could have reached a conclusion earlier than they actually did.

120. I have already referred to the rates put forward on 20th March 2006 and Mr de Goeij's recommendation of a strategy of holding back a counter proposal from Digicel TCI. The parties met on 19th April 2006. Digicel TCI did not put forward a counter proposal. It asked CWWI to make a further proposal but there is no record of CWWI having agreed to do so.

121. On 28th April 2006, CWWI reported to the regulator on the status of the negotiations. On the 1st May 2006, Digicel TCI wrote to the regulator in a way which was very critical of the rates put forward by CWWI. On 2nd May 2006, the regulator wrote to the parties requesting further information. The regulator stated that it would consider that further information on an expedited basis and might conduct formal face to face discussions with the parties. On 8th May 2006, Digicel TCI replied to the regulator referring in various ways to what had happened in other countries. On 10th May 2006, CWWI wrote to the regulator. Its letter was some 19 pages long and went into a large number of points arising in the negotiations at that stage. In that letter, CWWI dealt with the state of the negotiations as to rates.

122. CWWI and Digicel TCI met on 10th and 11th May 2006. I have a note of these meetings. The parties discussed the rates. Digicel TCI asked to be told the location of CWWI's mobile switch. That is because Mr Barrins understood from a discussion on 25th April 2006 that the mobile switch was not in TCI, but was in Barbados. Mr Barrins thought that the location of the switch might be material to the transit rate. It is agreed that CWWI did not give an answer to Mr Barrins on or after 10th May 2006. At these meetings, Mr Barrins proposed a non-reciprocal MTR, that is, a situation where the rate

which CWWI would pay to Digicel TCI and the rate which Digicel TCI would pay to CWWI would be different rates. Mr Barrins proposed that CWWI would pay Digicel TCI the rate of 25 cents while Digicel TCI would pay CWWI a rate of below 15 cents. There is a dispute as to whether Mr Barrins specified what the rate below 15 cents would be. Mr Barrins says that he offered 10 cents; that is disputed by CWWI. There is also a dispute whether any such offer was open or without prejudice. In the end, it does not seem to me to matter.

123. There was a further meeting on 31st May 2006 attended by CWWI, Digicel TCI and the regulator. Mr Vandendries of CWWI carrier services made a presentation on the legal issues and Mr Forrest of CWWI carrier services made a presentation relating specifically to rates. There is an issue as to whether the regulator said anything, and if so what, at the meeting 31st May 2006 about regulation 19. I have already described the operation of regulation 19. Regulation 19(1) refers to a presumption of dominance on the part of an operator. Digicel TCI had written to the regulator on 22nd May 2006 making its case that it was not dominant within regulation 19(1) but the regulator did not formally deal with that request. Regulation 19(2) provided that a carrier described in regulation 19(1) could not charge an interconnecting carrier or service provider an MTR that exceeded 15 cents per minute. This applied to the rate which CWWI could charge Digicel TCI. It also applied to the rate which Digicel TCI could charge CWWI unless the regulator accepted that the presumption of dominance did not apply to Digicel TCI (see regulation 19(1)) or unless the regulator modified the operation of regulation 19(2).

124. On the evidence before me, I think that the most accurate statement as to what the regulator said at the meeting on 31st May 2006 is reflected in the evidence of Mr Vandendries, to the effect that the regulator indicated to the parties that they should approach the negotiations on the basis that the 15 cent cap might be lifted, without confirming that it would be lifted. In other words, the regulator who was keen to see the parties arrive at a commercial deal, wanted the parties to explore the possibility of a commercial deal at a rate above 15 cents. Of course, even if there was no statutory prohibition on a charge above 15 cents, it does not necessarily follow that a party who continues to put forward a rate of 15 cents in negotiations is somehow breaking the regulations as to permissible negotiating stances.

125. On 1st June 2006, Digicel TCI wrote to the regulator complaining about the stance taken by CWWI on 31st May 2006. Digicel TCI did not wish to refer a dispute to the regulator because it was concerned that the time limits in the regulations for dispute resolution were too lengthy. Instead, Digicel TCI wished the regulator to declare a dispute of its own motion and then to take steps to resolve it. The regulator did not respond to that invitation. There is an internal CWWI email of 2nd June 2006 in which Mr Nelson refered to the regulator having stated that it was inclined to do nothing until after June 30th. That date was approximately 90 days after the grant of the licence to Digicel TCI and the date of a valid request from Digicel TCI for interconnection. Regulation 6(3) refers to interconnection being provided on a timely basis "not to exceed 90 days". It is not clear whether the commission had this period in its mind when referring to a possible deadline of 30th June 2006. That note of 2nd June 2006 is potentially of some significance when considering what stance the regulator might have taken in certain hypothetical circumstances, to which I will later refer.

126. On 3rd June 2006, Digicel TCI wrote to the regulator referring to a financial and accounting model concerning the costs of interconnection services on the Digicel TCI network. The letter referred to an MTR rate required to sustain Digicel's business. The regulator did not make a substantive reply to that letter.

127. On 7th June 2006, there was a further meeting attended by CWWI, Digicel TCI and the regulator. CWWI made substantial concessions in relation to the FTR and the transit rate, offering to accept substantially reduced rates. I accept Mr Nelson's evidence about the meeting as regards the role of the regulator. The regulator wished to see the parties come to a commercial deal. He regarded the negotiations as being "all about money" rather than about points of principle on the interpretation of the regulations. Indeed, the regulator probably misunderstood what was involved in interconnection as he suggested a transit rate to be paid by CWWI to Digicel TCI whereas Digicel TCI had no fixed network on which such a transit would take place.

128. Between 7th June 2006 and 30th June 2006, there were detailed to-ings and fro-ings on the question of rates. The rate which caused particular difficulty in this period was the MTR. Eventually the matter was agreed on the 30th June 2006. The parties agreed a FTR of 3 cents and a transit rate of 1.5 cents. They agreed an MTR of 19 cents for an initial 18 month period and an MTR of 15 cents after the initial 18 months. The rate of 19 cents was to drop to 15 cents unless an expert consultant appointed by the regulator, and mutually acceptable to the parties, determined that another reciprocal charge, based on costs, should apply instead. The terms of reference of such a consultant and the rate study exercise format which he was to adopt were to be mutually agreed by the parties within a specified time. In the event, the 19 cent MTR applied for the initial 18 months and the MTR then did drop to 15 cents, as neither party operated the provisions as to an independent expert consultant fixing an alternative rate.

129. The Claimants say that the FTR proposed by CWWI on 20th March 2006 was not cost-oriented and/or was not reasonable having regard to economic feasibility and/or was anti-competitive. I have essentially given my reasons for rejecting these submissions. In summary, the Claimants have not shown that the original FTR proposal was not cost-oriented and that CWWI's putting forward of that rate in negotiations was in breach of the regulations. Even if regulation 6(3) applied to the subject of a rate, rather than other terms and conditions, if the rate put forward was cost-oriented and compatible with regulation 14, it is not in my judgment open to attack on grounds of reasonableness or economic feasibility. Similarly, if the rate is not contrary to any requirement of the regulations, it cannot be attacked as being anti-competitive, within the general provisions about anti-competitive behaviour in CWWI's licence.

130. The Claimants make the same allegations in relation to the transit rate and I reject those allegations for the same reasons as in relation to the FTR. The Claimants also say that the transit rate proposal was not transparent because CWWI did not answer the question raised on 10th May 2006 as to the location of CWWI's mobile switch. Even if CWWI was obliged under regulation 6(3), or some other regulation dealing with the conduct of negotiations, to answer the question about the mobile switch, I do not see that the failure to answer this question was of any real significance as regards the later development of the negotiations.

131. The Claimants' criticism in relation to the quoted MTR of 15 cents is restricted to the period beginning 31st May 2006. The Claimants say that the regulator directed the parties to negotiate at rates above 15 cents and CWWI failed to comply with that direction. I have already made a finding as to what the regulator said on 31st May 2006 and the legal effect of that statement. I reject the submission that CWWI's stance that the appropriate MTR should be a reciprocal rate of 15 cents was in breach of the regulations.

132. Similarly, the negotiating positions adopted by CWWI in June 2006 before agreement was finally reached on 30th June 2006 were open to CWWI and did not place it in breach of the regulations.

133. The result of the above conclusions is that CWWI was not in breach of any duty owed to Digicel TCI by reason of the stance which it took in the course of the negotiation on rates in TCI.

134. The Claimants had a further submission. They said that even if I were to find (as I have) that CWWI was not in breach in relation to the progress of the negotiations, that I ought to find that any breach by CWWI in relation to the progress of physical interconnection would have had a consequence for the pace of the contractual negotiations. In summary, Digicel TCI says that if the pace of physical interconnection had been much more rapid, as they say it should have been, then the regulator would have seen that the matter which was really holding up interconnection in TCI was the pace of contractual negotiations and the regulator would have put much more pressure on CWWI to capitulate in those negotiations. The Claimants then say that CWWI would have capitulated and contractual interconnection would have been achieved long before 30th June 2006.

135. In view of my earlier conclusion that CWWI's breach of the MOU did not cause a delay in completion of physical interconnection, and that CWWI was not otherwise in breach of duty in relation to physical interconnection, the Claimants do not establish the premise of their submission, that is, that physical interconnection would have been completed long before 30th June 2006. Even if I had held the delay of 13 days in ordering equipment on 6th April 2006, rather than on the earlier date of 24th March 2006, had caused 13 days of delay in physical interconnection, I would not have held that completion of physical interconnection 13 days before 3rd July 2006 would have had any impact on the pressure which would have been applied to CWWI in relation to contractual interconnection.

136. Further, I find that Digicel TCI's evidence at the trial overstated the amount of pressure which the regulator was willing to apply. Digicel TCI initially gave evidence that the regulator had sent a number of letters in early June 2006 which strongly backed up Digicel TCI's stance. However, Digicel TCI had to retract that evidence when it was clear that the regulator had somewhat sat on the fence in those respects. The letters in question were no more than drafts prepared by Digicel TCI. Further, I have the note from Mr Nelson of a statement made by the regulator that the regulator saw 30th June 2006 as the deadline.

137. The result of my findings on both physical and contractual interconnection can now be stated. Contractual interconnection was completed on 30th June 2006. CWWI was not in breach of duty in relation to the progress of contractual interconnection. Physical

interconnection was completed on 3rd July 2006. Although CWWI was in breach of the MOU, that breach did not delay completion of physical interconnection as compared with what would have happened if CWWI had performed its obligations under the MOU. This was essentially because although CWWI was in breach of its contract, it also did something which it was not contractually obliged to do, namely it made available its spare switching and signalling equipment and that speeded up the completion of physical interconnection. Digicel TCI is entitled to nominal damages by reason of CWWI's breaches of the MOU by failing to order the required interconnection equipment as soon as reasonably practicable and by failing to keep Digicel TCI informed as it promised that it would.

ANNEX H

ACTIONABILITY OF BREACHES OF STATUTORY OBLIGATIONS: THE LEGAL PRINCIPLES

1. In this Annex, references to statutory obligations or to statutory duties are references to obligations or duties imposed by primary or second legislation, such as the Acts and regulations being considered in this case.

2. The parties do not significantly disagree as to the general legal principles which apply for the purpose of answering the question whether a breach of a statutory duty is actionable. The parties differ as to the emphasis they place on the various considerations in play. I will refer to some of the more important authorities on this question and I will then identify the various matters to which attention needs to be given when one examines the individual statute or the regulations in question.

3. In terms of authority, it is not necessary to go further back than Cutler v Wandsworth Stadium Limited [1949] AC 398. That case concerned the duty imposed on the occupier of a licensed dog-racing track by section 11(2)(b) of the Betting and Lotteries Act 1934. By section 11(2)(b) the occupier of a licensed track was placed under a duty to take such steps as were necessary to secure that, so long as a totalisator was being lawfully operated on the track, there was available for bookmakers space on the track where they could conveniently carry on bookmaking in connection with dog-races run on the track on that day. A contravention of this duty was a criminal offence. Section 30 of the Act set out the penalty which could be imposed on conviction. Section 29 provided that where a person convicted of such an offence was a body corporate, every person who at the date of the commission of the offence was a director or officer of the body corporate should also be deemed to be guilty of that offence, unless he proved that the offence was committed without his knowledge.

4. In Cutler, the House of Lords held that a breach of the duty imposed by section 11(2)(b) did not give to a bookmaker, who suffered loss as a result of the breach of duty, a right to claim damages against the occupier of the track. At page 407, Lord Simonds stated that "the only rule" which applied for the purposes of asking whether a breach of duty was actionable was that the answer depended on a consideration of the whole Act and the circumstances, including the pre-existing law when the Act was enacted. There were "indications" which pointed with more or less force to one answer or the other. If a statutory duty was prescribed but no remedy by way of penalty, or otherwise, for its breach was imposed, it was to be assumed that a right of civil action accrued to the person damnified by the breach; otherwise the statute would be but "a pious aspiration". But where an Act created an obligation and enforced the performance in a specified manner, the presumption was that performance could not be enforced in any other manner. The general rule was subject to exceptions so that even where a specific remedy was provided by the Act, a person injured by the breach could have a personal right of action in addition. Lord Simonds cited from the speech of Lord Kinnear in Black v Fife Coal Company Limited [1912] AC 149 at 165. That case concerned a miner who suffered personal injury by reason of his employer's failure to perform a statutory duty, aimed at safeguarding the safety of miners. In Cutler at page 408, Lord Simonds stated that the imposition of a

criminal penalty emphasised that the statutory obligation was imposed for the public benefit and that a breach of duty was a public and not a private wrong. At page 409, Lord Simonds referred to "the primary intention of the Act". If the consequence of the statutory duty being observed was that some bookmakers would be *benefitted*, that did not mean that the Act was passed for the benefit of bookmakers, in the sense in which the Factories Acts were considered to have been passed in favour of workmen in factories. At page 409, Lord Simonds considered the argument that the penalty provided by the Act was inadequate. He rejected that argument commenting that the penalties were severe. He added that conviction for an offence could lead to the disastrous result of a licence, held by the occupier of the track, being revoked.

5. In Cutler, at page 410 Lord Du Parcq made a plea, which has been often repeated since, to the effect that legislators should state expressly what their intention is in relation to the private actionability of a statutory duty. At page 412, Lord Normand emphasised the point that the duty in question could not have been intended to give every bookmaker a right of action and it was difficult to spell out a narrower class of bookmaker on whom a right of action might have been intended to be conferred. At page 413, when referring to the purpose of the statute, he referred to "the predominant purpose". At page 414 he referred to "the overriding purpose". Also at page 414, he referred to the provisions of section 29 under which a director or officer of a body corporate might be convicted of an offence, and also the power to withhold or revoke a licence required for the operation of a racing track, as being important sanctions being imposed by the statute. At page 416, when seeking to identify for whose benefit the provision was intended, Lord Reid referred to the "primary intention".

6. In Lonrho Limited v Shell Petroleum Co Limited (No. 2) [1982] AC 173, the House of Lords was concerned with the provisions of the Southern Rhodesia (Petroleum) Order 1965 which made it a criminal offence to supply oil to Southern Rhodesia. The plaintiff alleged that the defendant had broken this prohibition and this had caused loss in various ways to the plaintiff. The House of Lords held that the breach of duty was not actionable by the plaintiff. At page 183G, Lord Diplock stated that it was well settled that the question as to the actionability of a breach of statutory duty was a question of construction of the legislation. At pages 185B to 186C, Lord Diplock summarised the general principles applicable. He referred to the presumption of actionability where the Act did not provide for any sanction for breach or other means of enforcement. Conversely, he referred to the presumption against actionability where the only means expressly provided in the statute for sanctioning a breach was prosecution for a criminal offence. This presumption was subject to two classes of exceptions. The first was where it was apparent on the true construction of the statute that the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals; Lord Diplock referred to the Factories Acts and Butler (or Black) v Fife Coal Company Limited [1912] AC 149. Lord Diplock's second exception was where the statute created a public right and a particular member of the public suffered "particular, direct, and substantial" damage "other and different from that which was common to all the rest of the public". The Claimants relied heavily on this authority. In particular, they submitted that the duties on which they relied were passed for the benefit of operators, such as themselves, who requested interconnection to an existing fixed network and, further, they suffered particular and direct damage, different from any damage suffered by the public generally. I will examine those matters when I complete my review of the authorities but I will note at this point that

the exceptions referred to by Lord Diplock are exceptions to the operation of a certain presumption and, as Lord Diplock points out, and as is a consistent theme of all the authorities, the answer to the questions requires an examination of the legislation as a whole in order to determine the intention of the legislator on the matter.

7. The Claimants drew my attention to Rickless v United Artists Corporation [1988] QB 40. In that case, the Court of Appeal held that a performer had a statutory right of action for breach of section 2 of the Dramatic and Musical Performers' Protection Act 1958. The principal judgment was given by Sir Nicolas Browne-Wilkinson V-C. At pages 51-52, he referred to a number of factors which pointed strongly against the Act creating anything other than a criminal offence. However, at page 52 he pointed out that the Act had been passed to comply with the Rome Convention for the protection of performers, producers of phonograms and broadcasting organisations and he deduced the intention of Parliament to confer on a performer a civil right to obtain an injunction and, in consequence, a right to damages.

8. In R v Deputy Governor of Parkhurst Prison ex parte Hague [1992] 1 AC 58 the House of Lords considered whether a breach of the Prison Rules gave rise to a private law claim for damages. The argument of counsel for Mr Hague is summarised in the speech of Lord Jauncey at page 168C-E. Counsel stressed that the absence of a statutory remedy or penalty for breach of the duty pointed to actionability. Lord Jauncey reviewed the authorities and stated at pages 170H-171A that it was always a matter for consideration whether the legislature intended that private law rights of action should be conferred upon individuals in respect of breaches of the relevant statutory provision. The fact that a particular provision was intended to protect certain individuals was not of itself sufficient to confer private law rights of action upon them and something more was required to show that the legislature intended such a conferment.

9. In X v Bedfordshire County Council [1995] 2 AC 633, the House of Lords considered various statutory duties under legislation relating to childcare education. It was held that the various breaches of statutory duty which were alleged were not actionable per se. Lord Browne-Wilkinson said at 731C-G:

> "The principles applicable in determining whether such statutory cause of action exists are now well established, although the application of those principles in any particular case remains difficult. The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indicators. If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those

means and not by private right of action: Cutler v Wandsworth Stadium Limited [1949] AC 398; Lonrho Limited v Shell Petroleum Co Limited (No. 2) [1982] AC 173. However, the mere existence of some other statutory remedy is not necessarily decisive. It is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy. Thus the specific duties imposed on employers in relation to factory premises are enforceable by an action for damages notwithstanding the imposition by the statutes of criminal penalties for any breach: see Groves v Wimborne (Lord) [1898] 2 QB 402."

10. Lord Browne-Wilkinson then referred to the fact that the House of Lords was concerned with regulatory or welfare legislation and such legislation was not to be treated as being passed for the benefit of individuals, but for the benefit of society in general, even though the legislation did provide protection to individuals particularly affected by the relevant activity.

11. The authorities were reviewed by Knox J in Mid Kent Holdings Plc v General Utilities Plc [1997] 1 WLR 14 which concerned the actionability, or enforceability by the plaintiff, of an undertaking given by the defendant to the Secretary of State. The relevant legislation was the Fair Trading Act 1973, as amended by the Companies Act 1989. The judge commented on sections 93 and 93A of the 1973 Act. Section 93(1) provided that no criminal proceedings could be brought for contravention of an order made by the Secretary of State. By section 93(2), it was stated that section 93(1) did not limit the right of any person to bring civil proceedings in respect of such contravention. It was held that this did not confer a right to bring civil proceedings but left unaffected any right to bring such proceedings which might exist in some other way. Section 93(2) also provided for a contravention to be enforceable by civil proceedings by the Crown and, by inference, not by others. Section 93A which referred to "any person" bringing civil proceedings in respect of a breach of an undertaking was construed so that "any person" did not refer to anyone other than the Crown. This construction was arrived at to promote consistency between section 93 and Section 93A. The judge then considered the general law governing the availability of a civil remedy for a breach of a statutory provision. He summarised the law at page 36B - E. He stated that where a procedural remedy for a breach was provided by the statute, whether by way of a criminal sanction or other particular procedure (such as a civil action, only to be brought by a minister or other public officer) that was an indication that it was that procedural remedy alone that was intended by Parliament to be available as a sanction. This indication was, of course, subject to exceptions. The judge held that a breach of an order or a breach of an undertaking was not actionable at the suit of the plaintiff. At page 37D, he relied on the fact that if a breach of the order or of an undertaking was enforced by the Secretary of State, as it could be, matters of discretion and policy would enter into the action taken by the Secretary of State and those matters were not suitable for determination by a court, if a breach of the order or undertaking had been actionable.

12. In Todd v Adams and Chope, "The Maragetha Maria" [2002] 2 Lloyds L R 293, the Court of Appeal considered the Fishing Vessel (Safety Provisions) Rules, 1975. In that case, it was alleged that a fishing vessel did not comply with these safety rules. The vessel capsized and sank with the loss of all its crew. The question was whether a

breach of the regulations was actionable. Neuberger J (sitting in the Court of Appeal) referred to a passage in the 18th edition of Clark & Lindsell on Torts at para. 11 – 02 which lamented the fact that legislation often failed to give express guidance as to the actionability of a breach of duty. It was said that determining Parliament's intention was a haphazard process and although the courts relied on a number of presumptions, there were so many conflicting presumptions with variable weightings, making the result of a particular case unpredictable. At [16], Neuberger J restated that the question depended upon the construction of the particular statutory provision bearing in mind the language and purpose of the provision and all other relevant circumstances. He suggested that it was difficult, even dangerous, to attempt to lay down any rules of general application. He referred to the well known authorities in this area of the law. For reasons which were highly specific to the regulations in question in that case, the Court of Appeal held that a breach of the duty was not actionable.

13. The Claimants also relied on the decision of the ECJ in Courage Limited v Crehan [2002] QB 507. That case concerned breaches of article 81 of the EC Treaty, which prohibited contracts which were liable to restrict or distort competition. It was held that Mr Crehan had a right to sue Courage Ltd for damages when Courage Ltd and Mr Crehan had entered into a contract which infringed article 81. The reasoning of the ECJ did not involve the kind of reasoning which is appropriate when considering the actionability of a breach of a statutory duty. Instead, the ECJ concentrated on whether the ability to claim damages for a breach of article 81 would add to the effectiveness of the competition rules in article 81 and, if so, then such a remedy ought to be available. The ECJ commented upon the relevance of a claim to damages for breach of article 81 in paragraphs 26 and 27 of its judgment. It stated that the full effectiveness of article 81, and the practical effect of the prohibition laid down in article 81, would be put at risk if it were not open to any individual to claim damages for loss caused to him by conduct liable to restrict or distort competition. The existence of a right to claim damages strengthened the working of the competition rules and discouraged agreements or practices, which were frequently covert, which were liable to restrict or distort competition. In this way, actions for damages before the national courts could make a significant contribution to the maintenance of effective competition in the community.

14. Having reviewed the authorities, when I come to examine the individual statute or the individual regulations in question, I consider that I should address myself to the following principal considerations:

(1) for whose benefit was the statute or the regulations passed?

(2) if the statute or regulations were passed to benefit public and private interests, which was the primary object?

(3) for whose benefit was the particular provision enacted?

(4) if the particular provision was passed to benefit both public and private interests, which was the primary object?

(5) has the duty been expressed in terms which make it suitable for actionability?

(6) what is the class of persons who might suffer harm as a result of a breach of duty?

(7) does the expected harm take the form of economic loss or damage to the person or damage to property?

(8) on what type of person is the duty imposed – is it a public authority or a private entity?

(9) does the statute or the regulations impose a sanction for breach of duty: the sanction may be a criminal sanction or something else, such as the suspension or revocation of a benefit?

(10) how adequate is the sanction imposed?

(11) does the statute or the regulations provide a means of enforcement of the duty?

(12) if so, does the omission to provide for a right to claim damages point to an intention not to allow a claim to damages?

(13) do the means of enforcement raise questions of discretion or policy with the result that actionability in the courts would or might proceed on a different basis?

(14) how adequate are the means of enforcement?

(15) overall, having regard to the above and any other relevant matters, what did the legislature intend as regards actionability of a breach of duty?

ANNEX I

CONSPIRACY: THE LEGAL PRINCIPLES

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THE TORT OF CONSPIRACY

1. The tort of conspiracy has two branches. They were defined in Kuwait Oil Tanker v Al Bader [2000] 2 All ER (Comm) 271 at 311, as follows:

> "A conspiracy to injure by lawful means is actionable where the claimant proves that he has suffered loss or damage as a result of action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him, where the predominant purpose of the defendant is to injure the claimant. (2) A conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so."

2. The Claimants say that the conspiracy in the present case was a conspiracy to injure by unlawful means. They do not allege a predominant intention to injure. The necessary ingredients of the conspiracy alleged are: (1) there must be a combination; (2) the combination must be to use unlawful means; (3) there must be an intention to injure a claimant by the use of those unlawful means; and (4) the use of the unlawful means must cause a claimant to suffer loss or damage as a result. I will examine three of these ingredients in the following order: unlawful means, combination and intention to injure. When I have considered the question of intention to injure, I will consider an argument put forward by the Defendants that they did not have the necessary intention because they had an honest belief that they were acting lawfully.

UNLAWFUL MEANS

3. The conspiracy which is alleged in the present case is a conspiracy to injure "by unlawful means". The phrase "unlawful means" has two elements. The first is a requirement that the acts involved are "unlawful". The second is a requirement that the unlawful acts were the means of inflicting harm on a claimant.

UNLAWFUL ACTS

4. There is a major dispute between the parties as to what constitutes "unlawful acts" for this purpose. In summary, the Claimants submit that unlawful acts include torts, crimes, breaches of contract, breaches of a telecommunications licence and breaches of duties imposed by statutes or regulations, even where such a breach of duty is not independently actionable. The Defendants submit that the only acts which are "unlawful acts" are: (1) acts which are independently actionable, such as torts, but not breaches of contract, and (2) some crimes, but not all crimes.

5. Before attempting to resolve this difference between the parties, I will refer to the matters in each jurisdiction which the Claimants assert amount to unlawful acts.

6. In SLU, SVG, Grenada, Cayman and TCI, the claimants allege that there were breaches of statutes and regulations. I have already held that any such breaches of the statutes or regulations in those jurisdictions were not actionable breaches of statutory duty, and therefore were not torts. With the exception of a breach of the regulations in Cayman, those breaches were not crimes.

7. In Cayman, regulation 30 of the Information and Communications Technology Authority (Interconnection and Infrastructure Sharing) Regulations 2003 provided that the contravention of any provision of the regulations constituted an offence.

8. In addition to the above allegedly unlawful acts, the Claimants say that a breach of the Memorandum of Understanding in TCI, i.e. a breach of contract, is an unlawful act for the purposes of the common law tort of conspiracy to injure by unlawful means.

9. The Claimants also rely upon alleged breaches of the telecommunications licences held by the various Defendants.

10. In Barbados, the Claimants' case is based, first, on breaches of sections 25 and 28 of the Telecommunications Act 2001. Section 73 of that Act provides that a person who suffered financial loss as a result of another person's contravention of any of the obligations or prohibitions imposed by the Act is entitled to ask the court to award a reasonable amount in compensation. The Defendants accept that this makes a breach of section 25 or section 28 of the Act actionable and therefore an unlawful act for the purpose of the common law tort of conspiracy to injure by unlawful means. However, it is not necessary for the Claimants to establish the common law tort of conspiracy to injure by unlawful means (i.e a breach of sections 25 or 28 of the Act) because section 73 (e) provides that a person who suffers financial loss as a result of another person's conspiring with any other person to contravene any provision of the Act, is also entitled to claim a reasonable amount from the person involved in the conspiracy referred to in section 73 (e). The Claimants have a second case in Barbados which is based on sections 16, 34 and 44 of the Fair Competition Act 2002. Section 44 of the 2002 Act makes actionable a breach of sections 16 or 34 of the 2002 Act. The Defendants accept that an actionable breach of sections 16 or 34 of the 2002 Act is an unlawful act for the common law tort of conspiracy to injure by unlawful means. Section 44(1) also expressly provides that a conspiracy to contravene sections 16 or 34 is actionable, but section 44(2) imposes a limitation period of 3 years. The interrelationship between the statutory torts of conspiracy and any alleged common

law tort of conspiracy has given rise to various issues in relation to Barbados and I have referred to those issues when considering the claim in Barbados.

11. In T & T, the surviving claim is made against TSTT only and there is no allegation of a conspiracy in T & T.

12. When the Claimants commenced these proceedings, the law as to what constituted unlawful acts in the present context was not settled, but the then governing decisions of the Court of Appeal, in Powell v Boladz [1998] Lloyds's Rep Med 116 and Revenue and Customs Commissioners v Total Network [2007] 2 WLR 1156, were to the effect that unlawful acts in the present context were confined to acts that were independently actionable. The Claimants now submit that following the decision of the House of Lords in Revenue and Customs Commissioners v Total Network. [2008] 1 AC 1174 ("Total Network"), the law has been clarified and the category of "unlawful acts" has been significantly extended so that it now embraces all of the acts on which the Claimants wish to rely in this case.

13. The Claimants' detailed submissions are as follows. They submit that "unlawful acts" for the purposes of the unlawful means conspiracy need not be privately actionable against one or more of the alleged conspirators. It is open to the court to adopt this approach, following the decision of the House of Lords in Total Network in which it was held that the common law crime of cheating the revenue amounted to "an unlawful act", despite not being privately actionable at the suit of the revenue. The House of Lords in Total Network overruled the decision of the Court of Appeal in Powell v Boladz. The result is that there is now no binding authority which requires the court to conclude that breaches of statutory duty, which are neither criminal nor tortious, are incapable of constituting "unlawful acts" for the purposes of the unlawful means conspiracy. Similarly, there is no binding authority which requires the court to conclude that breaches of contract are incapable of constituting "unlawful acts." The Defendant's stance of confining unlawful acts to actionable torts, and some crimes, should be rejected on the basis of both authority and principle. It would be arbitrary to treat criminality as a necessary precondition of non-actionable unlawful acts. With some criminal offences, at the lower end of the scale of seriousness, the distinction between criminal and non-criminal breaches of statutory duty is not necessarily of great significance, particularly as regards the potential impact of any breach on private individuals. The Claimants contend that if it is felt that a control mechanism is called for to keep the scope of liability in check, the control mechanism is not to be found in the definition of "unlawful acts" but is instead to be found in the requirement of "instrumentality ", i.e. the requirement that the unlawful acts are the means of inflicting harm and in the required mental element for an unlawful means conspiracy. As regards the mental element, the court should select a test for intention, which is a more strict test for intention than was adopted by the House of Lords in OBG Ltd v Allen [2008] AC 1 dealing with the tort of wrongful interference with contractual relations.

14. The Claimants relied on Mogul Steamship Company Ltd v Mc Gregor, Gow & Co [1892] AC 25 and Sorrell v Smith [1925] AC 704 for descriptions of the tort of conspiracy and the sub-division of what they say is a single tort into two branches, one involving a conspiracy to injure by the use of unlawful means, and the other being a conspiracy to injure by the use of lawful means, with a predominant intention to injure. The requirement of a predominant intention to injure, where the means used

are lawful, is relaxed and replaced with a lesser mental element, where the means used are unlawful. It would be illogical to hold that a breach of statutory duty or a breach of contract were "lawful" acts requiring a claimant to satisfy the stricter test of intention, i.e. a predominant intention to injure. The Claimants also rely upon the analysis of Davis J in Mbasogo v Logo Ltd [2005] EWHC 2034 (QB).

15. Mogul Steamship Company Ltd v Mc Gregor, Gow & Co (1889) 23 QBD 598 (Court of Appeal) and [1892] AC 25 (House of Lords) was a landmark case which considered the extent of any limits imposed by the law on freedom of competition. The facts as described by Lord Halsbury LC [1892] AC 25 at 35 were as follows: an associated body of traders tried to get the whole of a limited trade into their own hands, and out of the hands of their competitors, by offering exceptional and very favourable terms to customers who would deal exclusively with the body of traders. The terms were so favourable that they would not have been offered save for the purpose of keeping the trade to themselves and away from the competition. If that action had been taken by one trader acting alone, then it could not be said that such a trader had done anything which would give a competitor the right to bring an action. However, it was argued that the combination of the traders meant that their conduct was an unlawful conspiracy. The argument provoked a division in the Court of Appeal with powerful judgments being given by the majority (Bowen and Fry LJJ) and Lord Esher MR dissenting. An appeal to the House of Lords was heard by a panel of seven Law Lords.

16. In the Court of Appeal and in the House of Lords, the judges pointed out that there was nothing (apart from the allegation of a conspiracy) which amounted to an unlawful act. The judges put the matters in different ways. For example, Bowen LJ in the Court of Appeal stated that the defendants had not done anything which was "unjustifiable in law": (1889) 23 QBD 598 at 611. He later referred to things which a trader could not lawfully do (see at 614); his discussion was not for the purpose of defining what were unlawful means for the tort of conspiracy but to indicate what was unlawful for a trader acting alone. He held that the fact of a combination to do things, which were otherwise lawful, did not make them actionable where the intention was to enhance the traders' business albeit at the expense of the competition. At 616 – 617, Bowen LJ considered whether there was a conspiracy to do an unlawful act or a lawful act by unlawful means. Having already held that the acts complained of were not unlawful if done by an individual trader, he held that the combination to commit those acts was not a conspiracy to do an unlawful act or to use unlawful means.

17. The Claimants rely on the speeches of Lord Halsbury LC and of Lord Bramwell in the House of Lords in the Mogul Steamship case: [1892] AC 25. At page 37, Lord Halsbury stated that intimidation, violence, molestation or the procuring of people to break their contracts were unlawful acts so that a combination to procure people to do such acts would be a conspiracy and unlawful. At page 39, Lord Halsbury considered the argument that the combination was in restraint of trade and therefore "unlawful". It was held that a contract in restraint of trade was void but was not "unlawful". In this context, it was stated that "unlawful" meant "contrary to law". Lord Bramwell at page 44 stated that the plaintiffs in that case did not complain of any trespass, violence, force, fraud, or breach of contract, nor of any direct tort or violation of any right of the plaintiffs, like the case of firing to frighten birds for a decoy; nor of any act, the ultimate object of which was to injure the plaintiffs, having its origin in malice or ill-

will to them. Again, this list of matters of which the plaintiffs could have complained was not for the purpose of defining what were "unlawful acts" for the tort of conspiracy but to explain that the plaintiffs had no cause of action unless it could be said that a combination to carry out such acts was unlawful and actionable.

18. The Claimants relied on the statement of Lord Cave LC in Sorrell v Smith [1925] AC 704 at 712, where he said:

> "I deduce as material for the decision of the present case, two propositions of law, which may be stated as follows:- (1) A combination of two or more persons wilfully to injure a man in his trade is unlawful and, if it results in damage to him, is actionable. (2) If the real purpose of the combination is, not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues. The distinction between the two classes of case is sometimes expressed by saying that in cases of the former class there is not, while in cases of the latter class there is, just cause or excuse for the action taken".

19. At page 714 in Sorrell v Smith, Lord Cave added that the second proposition assumed the absence of means which were in themselves unlawful, such as violence or the threat of violence of fraud.

20. Although not strictly relevant to the present debate, Sorrell v Smith is memorable for two remarks made in the speeches. In that case, the plaintiff had struck the first blow in the battle and the defendant then defended himself, whereupon the plaintiff sued him. This led Lord Cave to quote (at page 715) the French saying: "cet animal est très méchant; quand on l'attaque, il se défend". Further, at page 716, Lord Dunedin referred to the plea from the Court of Appeal in that case, echoing the prayer of Ajax: "reverse our judgment an it please you, but at least say something clear to help in the future". Perhaps that last sentiment is not entirely out of place in the present case.

21. In Rookes v Barnard [1964] AC 1129 at 1209, Lord Devlin referred to "the numerous dicta" as to what constituted "unlawful means" in the action of conspiracy. He stated that some of the dicta suggested the means must be criminal or tortious and in others that they included a breach of contract. He stated that whether a breach of contract was within the scope of "unlawful means" in this context "remain[ed] to be decided".

22. The Claimants also relied on the following statement by Eveleigh LJ in the Court of Appeal in Lonrho Ltd v Shell Petroleum Co Ltd (No.2) [1981] Com LR 74:

> "The tort of conspiracy as the law has developed today, consists of the agreement of two or more persons to act in combination in order to injure the plaintiff without justification, and where in pursuance of that object something is done whereby the plaintiff suffers damage. Justification may be found in self-protection or in the advancement of the personal interests of the defendants where such is the predominant object of the

combination. However, justification cannot be established where the defendants agree to resort to an unlawful act."

23. The speech of Lord Diplock in the House of Lords in Lonrho Ltd v Shell Petroleum Co Ltd (No.2) [1982] AC 173 has been much analysed in later authorities and I need not analyse it afresh. It is, I think, relevant to refer to the approach adopted by Lord Diplock, with the agreement of the other members of the House. He was not prepared to extend the tort of conspiracy in the way suggested by the appellant, which was to dispense with the need for an intention to injure in a case where the defendant had committed a criminal offence : see at 189 D-G.

24. The Claimants also rely on statements by Stuart-Smith LJ in the Court of Appeal in Associated British Ports v T.G.W.U. [1989] 1 WLR 939 at 965. That case concerned an application for an interim injunction and whether the plaintiff had shown that its claim involved a serious issue to be tried. The case did not involve an allegation that there was a conspiracy to injure by unlawful means; the tort which was discussed was described as the tort of interfering with the trade of business of the plaintiff with the intention to injure him by the use of unlawful means. The discussion in the Court of Appeal concerned whether a breach of statutory duty, which was not independently actionable, could be unlawful means for that purpose. Neill and Butler-Sloss LJJ thought that it was arguable that a non-actionable breach of statutory duty could be unlawful means for that purpose. Stuart-Smith LJ was more positive in favour of the proposition that the breach of statutory duty did not have to be actionable by the plaintiff; he also stated that a breach of contract which was not enforceable by the plaintiff could also be unlawful means for this purpose. That case went to the House of Lords, who reversed the Court of Appeal on the ground that there was no issue to be tried as to the alleged breach of statutory duty. I derive no assistance from this case. What constitutes unlawful means for the tort being considered in that case has now been authoritatively considered by the House of Lords in OBG Ltd v Allen and the test for unlawful means for that tort is not the same as the test for unlawful means for the tort of conspiracy.

25. In Powell v Boladz [1998] Lloyds Rep Med 116, a claim for damages for conspiracy to injure by unlawful means was struck out on various grounds including the ground that the unlawful act relied upon had to be, but in this case was not, actionable at the suit of the plaintiff. Stuart-Smith LJ said at 126 that it was not sufficient that the act complained of amounted to a crime or a breach of contract with a third party. This decision was overruled by the House of Lords in Total Network, at least as regards the possibility that crimes, or some crimes, can be unlawful acts for the purposes of this tort. But the reversal of this decision does not necessarily mean that it is now the law that all crimes and all breaches of contract are unlawful acts for the purposes of this tort.

26. The Claimants also relied on the decision of the Court of Appeal in Douglas v Hello! Ltd (No. 3) [2006] QB 125 in connection with the test which should be applied as to the necessary intention to injure for the purpose of the tort of conspiracy to injure by unlawful means. OK! had relied on the tort of unlawful interference with its business as well as the tort of conspiracy to injure by unlawful means. The latter tort was held to add nothing to a claim based on the underlying unlawful means which were

themselves tortious. Therefore, the Court of Appeal concentrated on the tort of unlawful interference although it then went on to consider the question of intention by reference to authorities which included authorities as to the tort of conspiracy to injure by unlawful means: see [152] and [178] – [193]. The argument before the Court of Appeal had identified five possible tests as to the requisite intention (see at [159]) and the court gave its conclusions at [223] – [224]. In my judgment, the most significant thing about the decision of the Court of Appeal on the issue of intention is that the House of Lords did not agree with that decision and, as will be seen, adopted a different approach.

27. The Claimants also referred to various passages in the Court of Appeal decision in Douglas v Hello! Ltd in relation to unlawful means: see the discussion at [227] – [228]. However, as with the discussion as to the test for intention, these comments by the Court of Appeal were not adopted when that case reached the House of Lords.

28. In Mbasogo v Logo Ltd [2005] EWHC 2034 (QB), Davis J at first instance had to grapple with the question whether a crime, which was not an actionable tort, constituted unlawful means for the purposes of the tort of conspiracy to injure by unlawful means. In the event, he held that he was bound by Powell v Boladz to hold that it was not. The case went to the Court of Appeal. The parties appear to have fully argued the issue about the meaning of unlawful means. However, when the court came to give its decision, it held that the claim by the Government of the Republic of Equatorial Guinea based on an alleged conspiracy was not justiciable and the claims by Mr Mbasogo, the President of the Republic of the Equatorial Guinea failed for other reasons. In those circumstances, the court declined to consider the issues as to unlawful means for the tort of conspiracy: see at [102] – [104].

29. Before the decision of the House of Lords in Total Network, the analysis of Davis J in Mbasogo v Logo Ltd was extremely helpful in collecting the conflicting authorities and setting out the well reasoned views of the judge on the matters arising. Since the decision of the House of Lords in Total Network, one naturally looks to that authority rather than the discussion in Mbasogo. Nonetheless, I was asked to consider certain passages in the judgment of Davis J. The relevant passages are at [72] of the judgment. Davis J found it unattractive, and almost arbitrary, that an unlawful means conspiracy depended on the "virtual happenstance" of whether or not the unlawful means were actionable at the suit of the claimant and that the question whether the crime or the breach of a statute was independently actionable should determine whether the acts were unlawful means for the tort of conspiracy. He added that it appeared to be widely accepted that where the unlawful means involved a breach of contract, it did not need to be a contract enforceable by the claimant.

30. Various economic torts were considered in great detail by the House of Lords in OBG Ltd v Allan [2008] 1 AC 1. The House considered the secondary liability involved in the tort of inducing a breach of contract. It considered the primary liability involved in the tort of causing loss by unlawful means. The speeches in the House of Lords provide a detailed analysis of the legal principles which apply to those torts. In several respects, the decision is a new departure for these torts and earlier distinctions and analyses were put aside. However, the House did not have to consider the tort of conspiracy to injure by unlawful means. Nonetheless, it is relevant to see what was said about unlawful means for the tort of causing loss by unlawful means. Later in this judgment, I will refer to what was said about the test for the requisite intention in

relation to that tort and the different test for intention or knowledge in relation to the tort of inducing a breach of contract.

31. As to what were unlawful means for the tort of causing loss by unlawful means, Lord Hoffmann said:

> 49. In my opinion, and subject to one qualification, acts against a third party count as unlawful means only if they are actionable by that third party. The qualification is that they will also be unlawful means if the only reason why they are not actionable is because the third party has suffered no loss. In the case of intimidation, for example, the threat will usually give rise to no cause of action by the third party because he will have suffered no loss. If he submits to the threat, then, as the defendant intended, the claimant will have suffered loss instead. It is nevertheless unlawful means. But the threat must be to do something which would have been actionable if the third party had suffered loss. Likewise, in National Phonograph Co Ltd v Edison-Bell Consolidated Phonograph Co Ltd [1908] 1 Ch 335 the defendant intentionally caused loss to the plaintiff by fraudulently inducing a third party to act to the plaintiff's detriment. The fraud was unlawful means because it would have been actionable if the third party had suffered any loss, even though in the event it was the plaintiff who suffered. In this respect, procuring the actions of a third party by fraud (dolus) is obviously very similar to procuring them by intimidation (metus).
>
> …
>
> 56 Your Lordships were not referred to any authority in which the tort of causing loss by unlawful means has been extended beyond the description given by Lord Watson in Allen v Flood [1898] AC 1 , 96 and Lord Lindley in Quinn v Leathem [1901] AC 495 , 535. Nor do I think it should be. The common law has traditionally been reluctant to become involved in devising rules of fair competition, as is vividly illustrated by Mogul Steamship Co Ltd v McGregor Gow & Co [1892] AC 25. It has largely left such rules to be laid down by Parliament. In my opinion the courts should be similarly cautious in extending a tort which was designed only to enforce basic standards of civilised behaviour in economic competition, between traders or between employers and labour. Otherwise there is a danger that it will provide a cause of action based on acts which are wrongful only in the irrelevant sense that a third party has a right to complain if he chooses to do so. …
>
> 57. Likewise, as it seems to me, in a case like Lonrho Ltd v Shell Petroleum Co Ltd (No 2) [1982] AC 173, it is not for the courts to create a cause of action out of a regulatory or criminal statute which Parliament did not intend to be actionable in private law.

32. Lord Hoffmann also considered a submission that a wider meaning might be given to unlawful means and the tort could be kept within reasonable bounds by insisting on a highly specific intention which targets the claimant. Lord Hoffmann thought that approach was arbitrary and illogical and he did not accept it: see at [59] – [60].

33. Lord Walker, Baroness Hale and Lord Brown agreed with Lord Hoffmann: see at [266], [269], [270] per Lord Walker, [302] per Baroness Hale and [320] per Lord Brown. Lord Walker favoured "a fairly cautious incremental approach" to extending the width of the tort beyond the existing authorities: see at [270].

34. The approach taken by the majority in OBG Ltd v Allan required an act which was actionable by a third party. An act which was not actionable by a third party was not wrongful. Actionability was the all important requirement as to what was wrongful. Where an act was actionable by a third party and the defendant intended his act to injure the claimant, then the act was actionable by the claimant also, if the other requirements of this tort were satisfied.

35. Lord Nicholls was in a minority. He said:

> "149 Although the need for "unlawful means" is well established, the same cannot be said about the content of this expression. There is some controversy about the scope of this expression in this context.
>
> 150 One view is that this concept comprises, quite simply, all acts which a person is not permitted to do. The distinction is between "doing what you have a legal right to do and doing what you have no legal right to do": Lord Reid in Rookes v Barnard [1964] AC 1129, 1168– 1169. So understood, the concept of "unlawful means" stretches far and wide. It covers common law torts, statutory torts, crimes, breaches of contract, breaches of trust and equitable obligations, breaches of confidence, and so on.
>
> 151 Another view is that in this context "unlawful means" comprise only civil wrongs. Thus in Allen v Flood itself Lord Watson described illegal means as "means which in themselves are in the nature of civil wrongs": [1898] AC 1, 97– 98. A variant on this view is even more restricted in its scope: "unlawful means" are limited to torts and breaches of contract.
>
> 152 The principal criticism of the first, wider view is that it "tortifies" criminal conduct. The principal criticism of the second, narrower view is that it would be surprising if criminal conduct were excluded from the category of "unlawful" means in this context. In the classical "three-party" form of this tort the defendant seeks to injure the claimant's business through the instrumentality of a third party. By this means, as Lord Lindley said, the claimant is "wrongfully and intentionally struck at through others, and is thereby damnified": Quinn v Leathem [1901] AC 495, 535. It would be very odd if in such a case the law were to afford the claimant a remedy where the defendant committed or threatened to commit a tort or breach of contract against the third party but not if he committed or threatened to commit a crime against him. In seeking to distinguish between acceptable and unacceptable conduct it would be passing strange that a breach of contract should be proscribed but not a crime. In Rookes v Barnard [1964] AC 1129, 1206– 1207, Lord Devlin noted it was "of course" accepted that a threat to commit a crime was an unlawful threat and continued:
>
> "It cannot be said that every form of coercion is wrong. A dividing line must be drawn and the natural line runs between what is lawful and

unlawful as against the party threatened."

153 These different views are founded on different perceptions of the rationale underlying the unlawful interference tort. On the wider interpretation of "unlawful means" the rationale is that by this tort the law seeks to curb clearly excessive conduct. The law seeks to provide a remedy for intentional economic harm caused by unacceptable means. The law regards all unlawful means as unacceptable in this context.

154 On the narrower interpretation this tort has a much more limited role. On this interpretation the function of the tort of unlawful interference is a modest one. Its function is to provide a claimant with a remedy where intentional harm is inflicted indirectly as distinct from directly. If a defendant intentionally harms a claimant directly by committing an actionable wrong against him, the usual remedies are available to the claimant. The unlawful interference tort affords a claimant a like remedy if the defendant intentionally damages him by committing an actionable wrong against a third party. The defendant's civil liability is expanded thus far, but no further, in respect of damage intentionally caused by his conduct.

155 In my view the former is the true rationale of this tort. The second interpretation represents a radical departure from the purpose for which this tort has been developed. If adopted, this interpretation would bring about an unjustified and unfortunate curtailment of the scope of this tort.

156 On either interpretation complications may arise in the application of this tort in certain types of cases, notably where the civil rights of a third party infringed by the defendant are statute-based. The existence of these perceived complications is not a pointer in favour of either interpretation.

157 Take the case of a patent. A manufacturer seeks to steal a march on his rival by employing a novel, patented process. In order to sell his product more cheaply, he does so without paying any licence fee to the owner of the patent. By means of this patent infringement he undercuts his law-abiding rival. He has damaged his rival's business by an unlawful means. But this conduct, however reprehensible, cannot afford the rival manufacturer a cause of action for damages for interference with trade by unlawful means. Parliament has specified the nature and extent of the remedies available for infringement of patents. Remedial relief for infringement of a patent is available to patentees and exclusive licensees. It would be inconsistent with the statutory scheme if the common law tort were to afford a remedy more widely.

158 Thus in Oren v Red Box Toy Factory Ltd [1999] FSR 785, 800, para 42, Jacob J said in the context of a claim for unlawful interference with contractual relations:

"the right to sue under intellectual property rights created and governed by statute are inherently governed by the statute concerned. Parliament in various intellectual property statutes has, in some cases, created a right to sue, and in others not. In the case of the [Copyright, Designs and Patents Act 1988] it expressly re-conferred the right on a copyright exclusive licensee, conferred the right on an exclusive licensee under the new form

> of property called an unregistered design right … but did not create an independent right to sue on a registered design exclusive licensee. It is not for the courts to invent that which Parliament did not create."
>
> 159 The difficulties here are more apparent than real. The answer lies in keeping firmly in mind that, in these three-party situations, the function of the tort is to provide a remedy where the claimant is harmed through the instrumentality of a third party. That would not be so in the patent example.
>
> 160 Similarly with the oft-quoted instance of a courier service gaining an unfair and illicit advantage over its rival by offering a speedier service because its motorcyclists frequently exceed speed limits and ignore traffic lights. The unlawful interference tort would not apply in such a case. The couriers' criminal conduct is not an offence committed against the rival company in any realistic sense of that expression.
>
> 161 Nor am I persuaded that the effect of the broader interpretation of "unlawful means" is to impose civil liability on a defendant simply because he reached his victim through an agent rather than directly. I am far from satisfied that, in a two-party situation, the courts would decline to give relief to a claimant whose economic interests had been deliberately injured by a crime committed against him by the defendant.
>
> 162 For these reasons I accept the approach of Lord Reid and Lord Devlin and prefer the wider interpretation of "unlawful means". In this context the expression "unlawful means" embraces all acts a defendant is not permitted to do, whether by the civil law or the criminal law. "

36. I have set out that passage from the speech of Lord Nicholls as it expounds the rationale of the different points of view as to the width of "unlawful means" for the purposes of the tort there being considered. Lord Nicholls identified the two points of view in [150] and [151]. The wider view, in [150] is said to cover a wide range of matters. Lord Nicholls refered to torts and "statutory torts"; he did not include breaches of statute that are not torts. The wide view included breaches of contract. With one exception, all of the matters in the list were matters where a person could go to a civil court to seek a remedy. The exception is the case of a crime. The narrower class, in [151], is all civil wrongs. That again would exclude non-actionable breaches of statute and would also exclude crimes. Lord Nicholls refers at [156] to a case where the civil rights which are infringed are "statute-based". That reference is explained in [157] – [160]. He had in mind, for example, statutes dealing with intellectual property rights where it would be inconsistent with the statutory scheme for the courts to grant a remedy to someone other than the person entitled to a remedy under the scheme. He also mentioned a breach of a criminal statute dealing with road traffic: see at [160]. A crime under such a statute would not be unlawful means under his wider test because the crime was not committed "against" the claimant.

37. With the tort of causing loss by unlawful means, the defendant is liable to be sued by a third party for breach of a duty owed to that third party. Where the other requirements of the tort are satisfied, the claimant is also permitted to sue the defendant. In that way, the tort exposes the same defendant to a claim by an additional party. The tort of conspiracy to injure by unlawful means operates in a different way.

One way in which it clearly operates is as follows: the claimant is entitled to sue a defendant (D1) for breach by D1 of a duty owed to the claimant. Where D1 has combined with another (D2) to commit that breach of duty, then subject to the other requirements of the tort being satisfied, the claimant can also sue D2. Thus, the tort allows a claimant to sue an additional party. It is also clear that the claimant can sue D1 and D2 even without an actionable breach of duty, if D1 and D2 had a predominant intention to injure the claimant. What is controversial is whether (without a predominant intention to injure the claimant) there are circumstances in which the claimant would not have been entitled to sue D1 if D1 had acted alone but because D1 and D2 have combined to injure the claimant by their actions, C is then entitled to sue both D1 and D2.

38. It is now established by the decision of the House of Lords in Total Network, that it will be possible for the claimant to sue D1 and D2 where the claimant has suffered injury as a result of D1 and D2's combination to commit a crime (or possibly only some crimes) with an intent to injure the claimant. The issue in the present case is: how far has Total Network changed the pre-existing law? If crimes, or some crimes, are unlawful acts, what about non-actionable acts which are not crimes?

39. There is no escape from a detailed consideration of Total Network. I start with the facts. The case concerned an unfortunately common form of fraud known as a carousel fraud, or missing trader intra-community fraud in relation to VAT. A number of persons combined together to produce a result that the Revenue paid to one of them a substantial sum by way of reimbursement of input tax allegedly paid by that person and recoverable under the VAT legislation and in circumstances where the Revenue's right to recover VAT from another participant in the scheme was worthless, either because that other had disappeared or was insolvent. It was accepted that the person claiming and receiving reimbursement of input tax had committed the common law offence of cheat of the Revenue. The case was argued on the basis that even if the Revenue did not have an independent cause of action against any one of the conspirators, and even if the conspirators did not have the predominant intention of injuring the Revenue (as distinct from the predominant intention of benefiting themselves) the commission of the offence of cheat constitued "unlawful means" for the tort of conspiracy to injure by unlawful means and the conspirators could be sued by the Revenue to recover the sums it had paid out.

40. It is relevant to refer to some of the arguments of counsel. Mr Martin QC appeared for the Revenue. His primary submission was that unlawful means included crimes, where the crime was used against the claimant with an intent to injure and the crime was not merely incidental: see 1205 E-G. He made a secondary submission at 1206 A-D. This involved looking at the specific crime and inquiring as to the purpose of the creation of the offence and whether the claimant had suffered damage peculiar to itself. These matters are an echo of the matters which are relevant when asking whether a breach of a statutory duty is actionable. Indeed, at 1206F, counsel cited X v Bedfordshire CC [1995] 2 AC 633, at 731. Mr Flint QC who appeared for the defendant in Total Network submitted at 1216 B – C:

> To extend the scope of unlawful means in the tort of conspiracy by unlawful means to any statutory offence would conflict with the long-established principle, applied in Cutler v Wandsworth Stadium Ltd [1949] AC 398 and Lonrho Ltd v Shell Petroleum Co Ltd (No 2), that whether a

statutory offence gives rise to a claim for damages is a matter of construction of the statute; it should not be determined by the coincidence of whether the offence is committed alone or in concert with others.

41. Mr Flint's further submissions on this topic are at 1218H – 1219A and 1219H – 1220D.

42. Lord Hope dealt with the scope of "unlawful means" at [34] – [45]. At [40], he said that textual analysis of earlier cases was an incomplete answer to the problem. At [41], he referred to Crofter Hand Woven Harris Tweed Co Ltd v Veitch, in the Court of Session, [1940] SC 141, where crimes and torts were treated in the same way. At [42], he pointed out that the unlawful means chosen by the conspirators in Total Network, were intended to secure the result of obtaining money from the Revenue and that result could not have been achieved by either conspirator acting alone. At [434], he distinguished OBG Ltd v Allan on the ground that that case was considering the principle to be applied where the act in question was actionable by a third party and the claim by the claimant was parasitic on the third party's claim. At [44] – [45], Lord Hope said this:

> "44 The situation that is contemplated is that of loss caused by an unlawful act directed at the claimants themselves. The conspirators cannot, on the commissioners' primary contention, be sued as joint tortfeasors because there was no independent tort actionable by the commissioners. This is a gap which needs to be filled. For reasons that I have already explained, I do not accept that the commissioners suffered economic harm in this case. But assuming that they did, they suffered that harm as a result of a conspiracy which was entered into with an intention of injuring them by the means that were deliberately selected by the conspirators. If, as Lord Wright said in Crofter Hand Woven Harris Tweed Co Ltd v Veitch [1942] AC 435, 462, it is in the fact of the conspiracy that the unlawfulness resides, why should that principle not apply here? As a subspecies of the tort of unlawful means conspiracy, the case is virtually indistinguishable from the tort of conspiracy to injure. The fact that the unlawful means were not in themselves actionable does not seem, in this context at least, to be significant. As Professor Joe Thomson put it in "An island legacy-The delict of conspiracy", Comparative and Historical Essays in Scots Law, ed Carey Miller and Meyers (1992), p 148, the rationale of the tort is conspiracy to injure. These factors indicate that a conspiracy is tortious if an intention of the conspirators was to harm the claimant by using unlawful means to persuade him to act to his own detriment, even if those means were not in themselves tortious.
>
> 45 I would hold that the decision of the Court of Appeal in Powell v Boladz [1998] Lloyd's Rep Med 116 was erroneous and that it should be overruled. I would also hold, in agreement with all your Lordships' that criminal conduct at common law or by statute can constitute unlawful means in unlawful means conspiracy. …"

43. At [56], Lord Scott said:

> "My Lords, in agreement with my noble and learned friends and for the

reasons they have given I too would hold that criminal conduct can constitute unlawful means for the purposes of a tortious conspiracy to injure by unlawful means: see para 95 of Lord Walker's opinion. It must, in my opinion, be kept in mind that the whole of this branch of the law of tort is the result of a step-by-step development by judges of the action on the case. We were taught at law school that the action on the case was the means whereby our judicial forbears allowed tortious remedies in damages where harm had been caused in circumstances where the conduct of the authors of the harm had been sufficiently reprehensible to require the conclusion that they ought to be held responsible for the harm. The law whereby harm caused by negligence can be remedied by an action in tort for damages results from a development of the action on the case. The law enabling an action for tortious damages to be brought where two or more persons have joined together with the predominant intention of injuring another person and have successfully carried out their intention is another, and for present purposes highly relevant, example of a judicial development of the action on the case. This is the so-called "lawful means" conspiracy which is tortious notwithstanding that the means employed to cause the harm are themselves neither criminal nor tortious. The essential ingredient of this type of action is the combination of people all intent on causing harm to the victim, not on the type of means employed for doing so. As it was put by Viscount Simon LC in Crofter Hand Woven Harris Tweed Co Ltd v Veitch [1942] AC 435 , 445:

" If that predominant purpose is to damage another person and damage results, that is tortious conspiracy. If the predominant purpose is the lawful protection or promotion of any lawful interest of the combiners (no illegal means being employed), it is not a tortious conspiracy, even though it causes damage to another person."

Where, however, unlawful means are employed by the conspirators to achieve their object and their object involves causing harm to the victim, the intent to cause that harm does not have to be the predominant purpose of the conspiracy. This difference between the torts of lawful means conspiracy and unlawful means conspiracy is sometimes described as anomalous. In my opinion it is not. The difference reflects and demonstrates the essential flexibility of the action on the case. It is not all conduct foreseeably likely to cause, and that does cause, economic harm to another that is tortious. Nor should it be. The circumstances must be such as to make the conduct sufficiently reprehensible to justify imposing on those who have brought about the harm liability in damages for having done so. Bearing that in mind, the proposition that a combination of two or more people to carry out a scheme that is criminal in its nature and is intended to cause economic harm to some person does not, when carried out with that result, constitute a tort actionable by that person is, in my opinion, unacceptable. Such a proposition is not only inconsistent with the jurisprudence of tortious conspiracy, as Lord Walker has demonstrated and explained, but is inconsistent also with the historic role of the action on the case."

44. Lord Walker at [77] referred to "the intense focus, in the tort of conspiracy, on intention". He also mentioned that the fraud in that case could not have been carried out otherwise than by a number of persons acting in concert. At [89] – [96], Lord Walker said:

> "89 My Lords, faced with this confusion in the recent case law, the House must, I suggest, go back to the general principles to be derived from the older cases in which the economic torts have been developed. It is however necessary to bear in mind that their development has been a long and difficult process, and may not yet be complete, as Lord Templeman observed (with the concurrence of the majority) in Lonrho plc v Fayed [1992] 1 AC 448 , 471. A particular difficulty is that it has been generally assumed, throughout the 20th century cases, that "unlawful means" should have the same meaning in the intentional harm tort and in the tort of conspiracy. A good deal of legal reasoning in the speeches and judgments (as to the ingredients of one or other of these torts) has been based on the assumption that the meaning must be the same in both. That assumption is however challenged, if the commissioners are correct, by the speech of Lord Hoffmann in OBG Ltd v Allan [2008] 1 AC 1 (with which the majority concurred). I shall have to come back to that difficulty.
>
> 90 In searching for general principle I start with a very simple, even naïve point. The man in the street, if asked what an unlawful act was, would probably answer "a crime". He might give as an example theft, obtaining money by false pretences, or assault occasioning actual bodily harm. He might or might not know that each of these was also a civil wrong (or tort) but it is unlikely that civil liability would be in the forefront of his mind.
>
> 91 The reaction of a lawyer would be more informed but it would not, I suggest, be essentially different. In its ordinary legal meaning "unlawful" certainly covers crimes and torts (especially intentional torts). Beyond that its scope may sometimes extend to breach of contract, breach of fiduciary duty, and perhaps even matters which merely make a contract unenforceable, but the word's appropriateness becomes increasingly debatable and dependent on the legal context. In the very important criminal case of R v Clarence (1888) 22 QBD 23 (in which a question of law on sections 20 and 47 of the Offences against the Person Act 1861 (24 & 25 Vict c 100) was argued before a court of 13 judges, several of whom later gave their opinions to the House in Allen v Flood [1898] AC 1) Stephen J expressed the view, at p 40, that:
>
> " the word 'unlawfully' must here be construed to mean ' unlawfully' in the wide general sense in which the word is used with reference to acts which if done by conspirators are indictable, though not if they are done by individuals. This general sense may, I think, be said to be 'immoral and mischievous to the public'. I do not agree with the doctrine that the word 'unlawfully' is used here in this wide sense. The use of the word in relation to conspiracy appears to me to be exceptional."
>
> What was exceptional about it was its extension downwards in the scale of blameworthy conduct. The unlawfulness of criminal conduct was at the top end of the scale, and too obvious to call for mention.
>
> 92 The inquiry how far downwards to go seems to me to be a feature

common to all the leading cases in which the tort of unlawful means conspiracy has been developed. Until Lord Diplock's speech in Lonrho Ltd v Shell Petroleum Co Ltd (No 2) [1982] AC 173 there was never a clear issue as to whether the alleged unlawful means must be actionable (as a separate tort) at the suit of the plaintiff. Lord Diplock himself acknowledged this, at p 189. His attention may have been drawn to the point by his earlier disapproval, at p 187, of some wide observations made by Lord Denning MR in an interlocutory appeal in Ex p Island Records Ltd [1978] Ch 122.

93 In the long period during which this issue did not arise for decision there is, unsurprisingly, little discussion of it in the authorities. They concentrate on the issue of intention (which was also at the heart of question 5(b) in Lonrho Ltd v Shell Petroleum Co Ltd (No 2)). But all the statements of general principle in the classic cases seem to me to be consistent with the proposition that unlawful means, both in the intentional harm tort and in the tort of conspiracy, include both crimes and torts (whether or not they include conduct lower on the scale of blameworthiness) provided that they are indeed the means by which harm is intentionally inflicted on the claimant (rather than being merely incidental to it). I do not want to multiply citations but I would instance Lord Watson in Allen v Flood, at p 96 (emphasising " illegal means directed against that third party"); Viscount Cave LC in Sorrell v Smith [1925] AC 700, 714 (" means which are in themselves unlawful, such as violence or the threat of violence or fraud"); Lord Wright in Crofter Hand Woven Harris Tweed Co Ltd v Veitch [1942] AC 435, 462 (quoted in para 75 above, and instancing some statutory offences); Lord Devlin in Rookes v Barnard [1964] AC 1129, 1209 (" In some of the dicta [on conspiracies] the language suggests that the means must be criminal or tortious and in others that breach of contract would do; but in no case was the point in issue"; in the earlier much-discussed sentence at p 1204 I would not give much weight to the position that the word " usually" occupies in the sentence); and Lord Denning MR and Russell LJ in Daily Mirror Newspapers Ltd v Gardner [1968] 2 QB 762 , 783, 785 (though that decision is questionable: see AG Guest and LH Hoffmann, " When is a boycott unlawful" (1968) 84 LQR 310).

94 From these and other authorities I derive a general assumption, too obvious to need discussion, that criminal conduct engaged in by conspirators as a means of inflicting harm on the claimant is actionable as the tort of conspiracy, whether or not that conduct, on the part of a single individual, would be actionable as some other tort. To hold otherwise would, as has often been pointed out, deprive the tort of conspiracy of any real content, since the conspirators would be joint tortfeasors in any event (and there are cases discussing the notion of conspiracy "merging" into some other tort, but I need not go far into those: Surzur Overseas Ltd v Koros [1999] 2 Lloyd's Rep 611; Kuwait Oil Tanker Co SAK v Al Bader [2000] 2 All ER (Comm) 271).

95 In my opinion your Lordships should clarify the law by holding that criminal conduct (at common law or by statute) can constitute unlawful means, provided that it is indeed the means (what Lord Nicholls of

Birkenhead in OBG Ltd v Allen [2008] 1 AC 1, para 159 called " instrumentality") of intentionally inflicting harm. In Lonrho Ltd v Shell Petroleum Co Ltd (No 2) [1982] AC 173 the sanctions order against Southern Rhodesia was part of the story, but it was not the instrument for the intentional infliction of harm. With great respect to Lord Hoffmann (in OBG, at para 57) it is in my view what Shell and BP did not intend, rather than what Parliament did not intend, that is most relevant to that decision.

96 Having said that I would accept that the sort of considerations relevant to determining whether a breach of statutory duty is actionable in a civil suit (Cutler v Wandsworth Stadium Ltd [1949] AC 398) may well overlap, or even occasionally coincide with, the issue of unlawful means in the tort of conspiracy. But the range of possible breaches of statutory duty, and the range of possible conspiracies, are both so wide and varied that it would be unwise to attempt to lay down any general rule. What is important, to my mind, is that in the phrase "unlawful means" each word has an important part to play. It is not enough that there is an element of unlawfulness somewhere in the story. "

45. At [101] - [104] Lord Walker explained that the tort of conspiracy to injure by unlawful means imposed a primary liabilityon a conspirator; it was not a case of a conspirator having a secondary liability where another was primarily liable.

46. Lord Mance said at [116] and at [119] – [120]:

116 In agreement with the reasoning of Lord Walker and Lord Neuberger, I consider that the history and jurisprudence relating to this type of conspiracy point clearly to the conclusion that at least some criminal acts, not amounting to torts, may suffice to ground the tort. Lord Wright's speech in Crofter Hand Woven Harris Tweed Co Ltd v Veitch [1942] AC 435, cited by Lord Walker, contains particularly clear support for the view that this type of conspiracy is not to be regarded as a purely secondary form of liability, limited (apart from the possibility that the wrongful means might consist of breach of contract) to duplicating liability that the conspirators would anyway have as joint tortfeasors. The decision in Lonhro Ltd v Shell Petroleum Co Ltd (No 2) [1982] AC 173 proceeded, as explained in Lonhro plc v Fayed [1992] 1 AC 448, on the basis that a purely criminal act, consisting of Shell's alleged breach of the United Kingdom's sanctions orders making it a criminal offence to supply oil to Rhodesia, could constitute relevant unlawful means for the purposes of the tort of conspiracy by unlawful means. The conclusion that no tort had been committed derived from the absence— admitted by counsel for Lonhro Ltd [1982] AC 173, 180 b– c — of any allegation of any intention at all to injure Lonhro Ltd. (It was also the fact that the sanctions orders were "not passed for the protection of any particular section of the public and [gave] rise to no special duty to [Lonhro]": see the concession at p 179 b-c .

…

119 Caution is nonetheless necessary about the scope of the tort of conspiracy by unlawful means. Not every criminal act committed in order

to injure can or should give rise to tortious liability to the person injured, even where the element of conspiracy is present. The pizza delivery business which obtains more custom, to the detriment of its competitors, because it instructs its drivers to ignore speed limits and jump red lights (Lord Walker in OBG Ltd v Allan [2008] 1 AC 1, para 266) should not be liable, even if the claim be put as a claim in conspiracy involving its drivers and directors. And—as in relation to the tort of causing loss by unlawful means inflicted on a third party— there is a legitimate objection to making liability " depend upon whether the defendant has done something which is wrongful for reasons which have nothing to do with the damage inflicted on the claimant" : per Lord Hoffmann in OBG Ltd v Allan, at para 59.

120 But the same concern does not apply where, as here, the offence exists in its very nature to protect the revenue; where its commission is necessarily, directly and intentionally targeted at and injurious to the revenue; and where its intended result is the wrongful non-payment of VAT by Redlaw and Lockparts of statutorily recoverable VAT or the payment to Alldech of a VAT credit not properly due under the 1994 Act. Like others of your Lordships, I think that there would be an evident lacuna if the law did not respond to this situation by recognising a civil liability.

47. Lord Neuberger said at [219] – [224]:

"219 Accordingly, it appears to me that your Lordships' House is free to decide the issue as it sees fit. However, we should plainly resolve the issue on a principled basis, in so far as that is possible in this very tricky area.

220 At para 57 of his opinion in OBG Ltd v Allan [2008] 1 AC 1 , Lord Hoffmann (expressing the majority view in this House) said that the fact that the means involve a crime, without also involving a civilly actionable wrong, was insufficient to establish a claim for loss caused by unlawful means. Given the obvious desirability of consistency and coherence as between the economic torts, it can fairly be said that the same rule should apply to a claim in unlawful means conspiracy. Further, the point made by Lord Hoffmann that "it is not for the courts to create a cause of action out of a … criminal statute which Parliament did not intend to be actionable in private law" can fairly be said to be as applicable to unlawful means conspiracy as to causing loss by unlawful means.

221 On the other hand, it appears that the law of tort takes a particularly censorious view where conspiracy is involved. Thus, a claim based on conspiracy to injure can be established even where no unlawful means, let alone any other actionable tort, is involved. That tort is therefore frequently described as anomalous; yet its existence is very well established. Its centrally important feature is that the conspiracy must have as its primary purpose injury to the claimant. [In] my judgment, given the existence of that tort, it would be anomalous if an unlawful means conspiracy could not found a cause of action where, as here, the means "merely" involved a crime, where the loss to the claimant was the obvious and inevitable, indeed in many ways the intended, result of the sole

purpose of the conspiracy, and where the crime involved, cheating the revenue, has as its purpose the protection of the victim of the conspiracy. The difference between intending to make a profit at the claimant's expense and intending to cause injury to the claimant is pretty fine and, in economic terms, artificial: that point emerges most clearly from the discussion in Lord Hoffmann's opinion in OBG, at paras 130– 134.

222 I do not think that the conclusion, at least on the facts of in this case, that the "mere" crime of cheating the revenue can constitute unlawfulness for unlawful means conspiracy can be said to involve illegitimately creating a tort out of a crime, as mentioned in OBG , para 57. First, there is the narrow point that the crime (or at least the crime primarily relied on in the commissioners' argument) in the present case is a common law one, and therefore there is no question of disregarding the legislature's intention, which only arises where the [crime] is statutory. Secondly, there is the more general and telling point that the tort in this case involves the element of conspiracy, which is, of course, lacking in the tort considered in OBG. The importance of the ingredient of conspiracy has been examined and explained by Lord Walker and Lord Mance in their speeches, and is, as already mentioned, underlined in the field of economic torts by the anomalous tort of conspiracy to injure (or lawful means conspiracy). Thirdly, as already mentioned, the crime in the present case exists for the protection of the victim. [*Note: I have changed the word "tort" to "crime" in the square brackets in this paragraph to correct what seems to be a slip.*]

223 Further, in para 61 of his speech in OBG, Lord Hoffmann made it clear that his " discussion of unlawful means" was limited to cases involving " interference with the actions of a third party in relation to the plaintiff" , and did not necessarily apply to "a case of 'two party intimidation'", which, he said, "raises altogether different issues" . In this case, as Lord Hope and Lord Mance have explained, the tort is of a "two party" nature, in that the conspiracy could be said to have been directed against the commissioners. After all, it was directly intended (albeit for the purpose of enriching the conspirators) to deprive the commissioners of money to which they were entitled, and, if successful, it was inevitably and foreseeably going to do so, and no tort, harm or crime as against any party other than the commissioners was involved. As Lord Hoffmann implicitly recognised, it may therefore not be inappropriate to hold that the commissioners have a cause of action in such circumstances, even though they might not have had a claim if they had suffered loss (particularly if it was as an incidental result) as a result of a crime directed at a third party.

224 Thus the notion that the commissioners have a claim here is not, in my view inconsistent with the reasoning of the majority in OBG, upon which Total relies. In any event, the notion of a single consistent approach as to what constitutes unlawfulness in relation to all the economic torts can said to be inconsistent with what Clerk & Lindsell on Torts, 19th ed refer to, at para 25– 001, as the " ramshackle" nature of the economic torts and with the statement in Stevens on Torts and Rights (2007), p 297 that the economic torts " have no inherent unity" and that it is " a mistake to group these ' torts' together" . I would in any event, at least in a case such

> as this, where injury to the claimant is the direct, inevitable and foreseeable result of the conspiracy succeeding, and where the crime can be said to exist for the protection of the victim, I would find it far less offensive to hold that unlawfulness can extend to a " mere" crime in unlawful means conspiracy, when it cannot do so in causing loss by unlawful means, than to hold that a " mere" crime cannot in any circumstances constitute unlawfulness in unlawful means conspiracy, when there is a tort of conspiracy to injure by means which are neither tortious nor criminal."

48. The decision of the House of Lords makes it clear that the common law offence in that case amounted to "unlawful means" for the tort of conspiracy to injure by unlawful means and the conspirators could be liable in tort. The decision gives rise to the following questions, in particular: (1) does the ruling apply to all crimes? and (2) does the ruling apply to non-actionable breaches of non-criminal statutes? It is the second question which is vital in the present case.

49. As regards the first question, it is clear that not all criminal acts will be "unlawful means" for the purpose of the tort of conspiracy. First of all, it is necessary for the criminal acts to be the "means" by which the injury is inflicted. That point is made clear by Lord Walker at [95] – [96] and by Lord Mance at [116] and [119]. I will return to that topic later in this judgment. This means that the first question can be re-formulated: are all criminal acts "unlawful acts" for the purposes of this tort? The answer to this question is not altogether clear. I do not detect in the decision any intention to distinguish between serious and non-serious crimes nor between more or less reprehensible crimes. Lord Scott referred at [56] to the conduct being "sufficiently reprehensible" but there is no indication elsewhere in the judgments as to this being the test nor indeed how one would go about applying that test in a way which would bring certainty and predictability to the law.

50. The House of Lords does nonetheless appear to suggest the possibility that not all crimes will be unlawful acts. The point is put in different ways. At [95] – [96], Lord Walker referred to the intention of Parliament. There would only be a Parliamentary intention where one is dealing with a statutory crime (which was not the case on the facts of Total Network). Lord Walker suggested that the intention of Parliament might be relevant when asking whether the crime created by the statute amounts to "unlawful means". He then made a point about means and instrumentality. He might have been saying that the considerations set out in Cutler v Wandsworth Stadium Ltd [1949] AC 398 were relevant when considering whether the criminal act was the means of inflicting injury or whether the criminal act was collateral to the injury. Alternatively, he might have been saying that a question such as whether the statute was for the benefit of individuals or whether an individual had suffered special damage, not suffered by the public generally, could be relevant when deciding whether the criminal act amounted to an unlawful act for the purposes of this tort. He clearly stated that he did not wish to lay down any general rule. I cannot, however, read his judgment as saying that with a statutory crime, it was only an unlawful act for present purposes where it was also actionable on the basis of the principles in Cutler v Wandsworth Stadium Ltd; that would be to re-introduce the rule that the House of Lords had just rejected, to the effect that the acts had to be actionable to be unlawful acts.

51. A similar comment may be made about the speech of Lord Mance; at [119], he focused on the instrumentality question but in [116], he drew attention to the fact that in Lonrho v Shell Petroleum Co Ltd (No. 2) the sanctions order was not passed for the benefit of any particular section of the public which is, or at least may be, a different point.

52. Lord Neuberger referred to the intention of the legislature at [222] and suggested that with a statutory crime, it might be the case that Parliament intended there to be no civil claim.

53. I fear that, to me at any rate, the answer to my first question: "is every crime an unlawful act for present purposes", is unfortunately not clear. In the case of a statutory crime, it seems to me that just because the principles of Cutler v Wandsworth Stadium Ltd establish that the statutory crime is not independently actionable, that does not rule out the idea that the crime could be an unlawful act for the purposes of the tort of conspiracy to injure by unlawful means.

54. If the point needed to be decided in the present case, I would incline to the view that all crimes are unlawful acts for the tort of conspiracy to injure by unlawful means. In the present case, the point only potentially arises in relation to Cayman where the relevant regulations provide that a breach of the regulations is a criminal offence. However, on my findings of fact in relation to Cayman, there was not a breach of the regulations and therefore no criminal offence was committed. In those circumstances, I will not further discuss the question of whether all crimes, or only some crimes, are unlawful acts in the present context.

55. I now turn to my second question which is a vital question in this case: does the ruling in Total Network apply to non-actionable breaches of non-criminal statutes?

56. In my judgment, the decision in Total Network itself does not answer this question. The reasoning in Total Network shows that the question is not answered by any statement in any earlier authority. I asked counsel for the Claimants if there had ever been a reported case of a successful claim based on the tort of conspiracy to injure by unlawful means where the unlawful means were breaches which were not independently actionable of a non-criminal statute. No such case has been found.

57. There is certainly support in the authorities for the Claimants' submission that the tort of conspiracy is a single tort with two branches; one branch involves unlawful acts and the other involves lawful acts with a predominant intention to injure. There is force in the Claimants' argument that it is entirely natural to put breaches of statute into the category of unlawful acts and that is less easy to put them into the category of lawful acts. However, I find this approach to the issue to be more elegant than helpful. If that elegant approach were right, then the decision of the House of Lords in Total Network ought to have been very straightforward; nobody could say that a crime is a lawful act. Although Lord Walker did refer to the attitude of the man in the street at [90], the overall thrust of the House of Lords was whether authority allowed the House to declare that that torts and crimes were unlawful acts, or whether the class of unlawful acts consisted of torts alone. As it was clear that the class included torts, the House consciously was asking itself whether it was proper to take the incremental step of declaring that the class comprised crimes as well as torts.

58. In this area, it is clear to me that any further developments of the law should be by way of incremental steps, if at all. The need for caution has been stressed in both OBG Ltd v Allan and Total Network. I refer to OBG at [57] per Lord Hoffmann, at [148] per Lord Nicholls and at [270] per Lord Walker. I also refer to Total Network at [56] where Lord Scott refers to a step by step development of the law.

59. My difficulty with the Claimants' submissions on this part of the case is that they do not involve an incremental step but they involve a considerable sidewards extension of the tort of conspiracy into an area where it has not previously gone. Although I am considering the law of various Caribbean jurisdictions and although I do not profess to know much about the degree of statutory regulation in those jurisdictions, the submissions have been made to me on the basis that I am to apply the common law which applies throughout the common law world. In the common law world, modern life is the subject of a vast amount of regulation by primary and secondary legislation. If I give effect to the Claimants' submissions it must follow that a breach of such legislation will be an unlawful act for the purposes of the tort of conspiracy to injure by unlawful means.

60. I think that the Claimants' counsel came to see the considerable breadth of the extension they were seeking. They therefore suggested that there were controls already in place or that I should fashion new controls to keep the greatly extended tort within some sort of bounds. First, they pointed out correctly that the requirement of instrumentality limits the range of unlawful means. So it does, but not enough to allay my concern about the extension of what constitutes unlawful acts. Then they suggested that I should not adopt the test of intention which found favour with the House of Lords in OBG but should instead adopt the test of intention which was rejected by the House of Lords in that case but which had been favoured by the Court of Appeal in Douglas v Hello! Ltd [2006] QB 125. I see nothing by way of principle to commend that approach and it is clear it was only put forward in an attempt to mitigate the extension of the meaning of "unlawful acts" urged by the Claimants.

61. There is one other feature of the tort of conspiracy which tends to widen the scope of the tort and which deserves to be mentioned. Conspiracy requires a combination of two or more persons. I will discuss the detail of this later in this judgment. The Claimants correctly submit that in certain cases, the combination may consist of a parent company and a wholly owned subsidiary company, or two associated companies, or a company and a director of that company or a company and a shareholder of that company. Take this very case. I have held that in several of the jurisdictions the alleged breaches are not actionable because the legislatures did not intend that they should be actionable. The Claimants seek to escape this conclusion by saying that the relevant actor was not only the operating company which was under the statutory duty but the operating company was assisted by its parent company, or another group company, or the parent or group company acquiesced in the acts of the operating company. Thus, if the Claimants are right they have produced a result that non-actionable acts have become actionable by reason of (allegedly) quite limited participation by a parent or group company. If the Claimants are right about non-actionable breaches of statute being unlawful acts, it would not be difficult to turn non-actionable breaches of a statute into an actionable conspiracy in many cases where one has the involvement of more than one company in a group of companies. I note in passing that for the purpose of considering whether there is a concerted

practice or agreement to restrict competition, for the purposes of article 101 of TFEU (formerly article 81 of the EC Treaty), the courts adopt a very different approach. The courts group together distinct legal persons into one "undertaking" if their relationship justifies them being regarded as a single economic unit: see Faull & Nikpay, The EC Law of Competition, 2nd ed. at 3.87.

62. In these circumstances, in my judgment, I should not extend the common law in the way urged by the Claimants. I conclude that non-actionable breaches of a non-criminal statute are not "unlawful acts" for the purposes of the tort of conspiracy to injure by unlawful means.

63. I next turn to consider whether a breach of contract is an unlawful act for the purposes of the tort of conspiracy to injure by unlawful means. In the present case, in my judgment, the only contract that arises for consideration is the Memorandum of Understanding in TCI. That contract was made between Digicel TCI and CWWI. Accordingly, one of the Claimants (Digicel TCI) has a right of action to sue a Defendant (CWWI) for any breach of that contract. No other Claimant alleges that it was injured by any such breach. So this case does not involve the question whether a breach of a contract is an unlawful act, where it is not actionable by a claimant injured by the breach, but is only actionable by a third party. In these circumstances, the economic tort which naturally comes to mind is the tort of inducing, or procuring a breach of contract. Where a third party, not a party to the contract, induces a party to the contract to break the contract then the party to the contract is primarily liable for the breach and the party who induced the breach is secondarily liable for the breach. The principles which apply to determine whether there is a secondary liability for a breach of contract are different from the principles which apply to an alleged tort of conspiracy to injure by unlawful means.

64. In the present case, Digicel TCI allege that CWWI and C&W plc conspired together to commit a breach of contract and thereby committed the tort of conspiracy to injure by unlawful means. However, somewhat oddly, Digicel TCI did not argue that C&W plc was guilty of the tort of inducing a breach of contract by CWWI.

65. On the facts, I have found (for the reasons set out in Annex G) that CWWI did commit breaches of contract but the breaches did not result in damage to Digicel TCI. Accordingly, even if there had been a combination between CWWI and C&W plc to commit a breach of contract, there would be no actionable conspiracy in the absence of damage to Digicel TCI. Further, there is no real basis on which it can be argued that CWWI and C&W plc combined to commit a breach of contract. In these circumstances, the question whether a breach of contract constitutes unlawful means for the tort of conspiracy to injure by unlawful means does not arise.

66. A breach of contract constitutes unlawful means for the purpose of the tort considered in OBG v Allen. Whilst the scope of unlawful means for that tort is different from the scope of unlawful means for the tort of conspiracy to injure by unlawful means, the scope for the first tort is narrower than for the tort of conspiracy. That reasoning suggests that a breach of contract should be unlawful means for the tort of conspiracy also.

67. If this point had to be decided, I think that the issue which would need to be addressed is whether the law should have two torts in this area. The first tort would be the

established tort of inducing a breach of contract. The second possible tort would be the tort of conspiracy to commit a breach of contract. It is clear that the ingredients of these torts differ. In particular, the intention required for each tort is different. It might be said that it is undesirable to recognise the existence of the tort of conspiracy to commit a breach of contract alongside the tort of inducing a breach of contract, where the two torts proceed on different lines. The matter is further complicated by the fact that because inducing a breach of contract is a tort, it ought in principle to be possible to have the tort of conspiracy to induce a breach of contract; this seems to have been the way the case was put in Meretz v ACP Ltd [2008] Ch 244.

68. At the trial, I referred to the question of whether it was appropriate to recognise the tort of conspiracy to commit a breach of contract alongside the established tort of inducing a breach of contract. The point was not really explored in argument. In view of that fact, and because the point does not strictly arise on my other findings in this case, I feel it is wiser to leave this point to be explored in a case where the point is necessary for the decision.

69. The Claimants have also alleged that there were breaches of the telecommunications licences. I have already held that this contention is not well founded. In those circumstances, it is not strictly necessary to discuss the nature of a telecommunications licence, what remedies are available to the grantor of the licence for any breach of it by the licensee, whether such a breach is to be analysed as a breach of contract and whether such a breach is to be regarded as an unlawful act for the purposes of the tort of conspiracy to injure by unlawful means. However, as I have held that I am not prepared to extend the scope of unlawful means to a non-actionable, and non-criminal breach of a statute or regulation, it seems to me to follow that the scope of unlawful means would similarly not extend to a breach of a telecommunications licence.

MEANS / INSTRUMENTALITY

70. There must be a combination to use unlawful means to injure a claimant. "Unlawful means" requires there to be unlawful acts but, in addition, the doing of those acts must be the "means" by which the loss is cause to a claimant.

71. The requirement that the acts are the means of inflicting loss has been explained in recent authorities. The unlawful acts must be the instrument by which the loss is inflicted. The unlawful acts will not be the instrument in this sense if the unlawful acts are incidental to, or collateral to, the loss: see OBG Ltd v Allan [2008] 1 AC 1 at [159] – [160] per Lord Nicholls and Total Network [2008] 1 AC 1174 at [95] – [96] per Lord Walker and at [119] per Lord Mance.

COMBINATION

72. The Claimants rely on the following way in which the law is described in Kuwait Oil Tanker v Al Bader [2000] 2 All ER 271 at [111] – [112]:

> "111. A further feature of the tort of conspiracy, which is also found in criminal conspiracies, is that, as the judge pointed out (at p 124), it is not necessary to show that there is anything in the nature of an express agreement, whether formal or informal. It is sufficient if two or more

persons combine with a common intention, or, in other words, that they deliberately combine, albeit tacitly, to achieve a common end. Although civil and criminal conspiracies have important differences, we agree with the judge that the following passage from the judgment of the Court of Appeal Criminal Division delivered by O'Connor LJ in R v Siracusa (1990) 90 Cr App R 340 at 349 is of assistance in this context:

> 'Secondly, the origins of all conspiracies are concealed and it is usually quite impossible to establish when or where the initial agreement was made, or when or where other conspirators were recruited. The very existence of the agreement can only be inferred from overt acts. Participation in a conspiracy is infinitely variable: it can be active or passive. If the majority shareholder and director of a company consents to the company being used for drug smuggling carried out in the company's name by a fellow director and minority shareholder, he is guilty of conspiracy. Consent, that is agreement or adherence to the agreement, can be inferred if it is proved that he knew what was going on and the intention to participate in the furtherance of the criminal purpose is also established by his failure to stop the unlawful activity.'

Thus it is not necessary for the conspirators all to join the conspiracy at the same time, but we agree with the judge that the parties to it must be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting in concert at the time of the acts complained of. In a criminal case juries are often asked to decide whether the alleged conspirators were 'in it together'. That may be a helpful question to ask, but we agree with Mr Brodie that it should not be used as a method of avoiding detailed consideration of the acts which are said to have been done in pursuance of the conspiracy.

112. In most cases it will be necessary to scrutinise the acts relied upon in order to see what inferences can be drawn as to the existence or otherwise of the alleged conspiracy or combination. It will be the rare case in which there will be evidence of the agreement itself. Curiously this is such a case, although it appears to us that in crucial respects it is also necessary to draw inferences as to the extent of the agreement from what happened after it. Thus the essential nature of the agreement can be seen in part from the evidence of Mr Al Bader and Captain Stafford, although, especially in the case of Captain Stafford, the extent of the agreement will depend upon inferences to be drawn both from the surrounding circumstances and subsequent events."

73. The Defendants do not quarrel to any significant extent with that statement of the law. However, they stress that the decision in R v Siracusa concerned a criminal conspiracy and, as was pointed out in Kuwait Oil Tanker itself at [110], there are major differences between civil and criminal conspiracies. The Defendants also say that there was no issue as to tacit agreement in the Kuwait Oil Tanker case, nor was it

a case of a person knowing that unlawful acts were being committed and failing to intervene to stop them. The Defendants refer to how the matter is put in Clerk & Lindsell on Torts, 19th ed. at 25-120 where it is suggested that persons who participated in meetings which formed part of the combination but who played no active role will not be parties to a conspiracy.

74. In my judgment, before a court can determine whether a defendant has been a party to a combination, it is necessary to identify what the combination is said to be and what part the defendant played in that combination. I can see that if a defendant is in a position of authority over other persons and those other persons want to feel that they have the defendant's authority to proceed before they do proceed, then the defendant's omission to stop their activity might be regarded as a sufficient signal to them that they have the defendant's backing in what they are doing. Such a defendant could be held to be participating in the combination. However, I do not think that the passage quoted above is authority for saying that every person who knows unlawful acts are being committed and who does nothing to stop those acts, is a party to a combination to carry out those acts.

75. It is clear from the passage quoted above, that the court is able to make a finding that a combination existed and that a particular defendant participated in the combination by drawing inferences to that effect from all the evidence before it.

76. It is also clear that the issue in relation to an alleged combination is whether a defendant was a party to the combination. That is a different question from whether a defendant participated in all or some of the acts done pursuant to a combination. In principle, it is possible for a defendant to be a party to a combination but not himself carry out any of the acts done pursuant to that combination.

77. In a group of companies, all of the individual companies have separate legal personality. If an enterprise organises itself so as to operate its business through a group of companies, taking the benefits of limited liability and perhaps the tax advantages involved, it cannot complain if a court holds it to an analysis based on the separate legal personality of the individual companies. Thus, in principle, a parent company can combine with a subsidiary and two subsidiaries can combine with each other. Further a director can combine with the company he directs and a shareholder (whether a corporate body or a natural person) can combine with the company in which the shares are held. Whether such a combination has taken place will depend upon the detailed facts. If an unlawful act is carried out by a subsidiary, it will be a question of fact whether that act was done pursuant to a combination between the subsidiary and its parent and, as stated above, it would normally not be sufficient proof of such a combination merely to show that the parent knew or suspected that an unlawful act was being committed and did nothing to stop it. Similarly, if it is suggested that one subsidiary did an unlawful act pursuant to a combination with another subsidiary (which did not have the ability to direct or prohibit the actions of the first subsidiary) it will not be enough to show that the second subsidiary knew or suspected that an unlawful act was being committed and did nothing to stop it.

78. The above conclusions are also subject to the limitation identified by Chadwick LJ in MCA Records Inc v Charly Records Ltd [2003] 1 BCLC 93. That case concerned the circumstances in which a director of a company could be held to be a joint tortfeasor with the company. The case did not involve the tort of conspiracy as such. However,

the law on joint torts was explained so that a person was liable as a joint tortfeasor if he participated in a common design to commit the tort or otherwise procured or induced the tort. There are obvious similarities between the test as to a common design for a joint tort and as to a combination for the tort of conspiracy. Chadwick LJ said this:

> "[49] First, a director will not be treated as liable with the company as a joint tortfeasor if he does no more than carry out his constitutional role in the governance of the company - that is to say, by voting at board meetings. That, I think, is what policy requires if a proper recognition is to be given to the identity of the company as a separate legal person. Nor, as it seems to me, will it be right to hold a controlling shareholder liable as a joint tortfeasor if he does no more than exercise his power of control through the constitutional organs of the company - for example by voting at general meetings and by exercising the powers to appoint directors. Aldous LJ suggested in Standard Chartered Bank v Pakistan National Shipping Corp (No 2) [2000] 1 Lloyd's Rep 218 at 235 - in a passage to which I have referred - that there are good reasons to conclude that the carrying out of the duties of a director would never be sufficient to make a director liable. For my part, I would hesitate to use the word 'never' in this field; but I would accept that, if all that a director is doing is carrying out the duties entrusted to him as such by the company under its constitution, the circumstances in which it would be right to hold him liable as a joint tortfeasor with the company would be rare indeed. That is not to say, of course, that he might not be liable for his own separate tort, as Aldous LJ recognised at paras [16] and [17] of his judgment in the Pakistan National Shipping case.
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> [50] Second, there is no reason why a person who happens to be a director or controlling shareholder of a company should not be liable with the company as a joint tortfeasor if he is not exercising control through the constitutional organs of the company and the circumstances are such that he would be so liable if he were not a director or controlling shareholder. In other words, if, in relation to the wrongful acts which are the subject of complaint, the liability of the individual as a joint tortfeasor with the company arises from his participation or involvement in ways which go beyond the exercise of constitutional control, then there is no reason why the individual should escape liability because he could have procured those same acts through the exercise of constitutional control. As I have said, it seems to me that this is the point made by Aldous J (as he then was) in PLG Research Ltd v Ardon International Ltd [1993] FSR 197.
>
> [51] Third, the question whether the individual is liable with the company as a joint tortfeasor - at least in the field of intellectual property - is to be determined under principles identified in CBS Songs Ltd v Amstrad Consumer Electronics plc [1988] 2 All ER 484, [1988] AC 1013 and Unilever plc v Gillette (UK) Ltd [1989] RPC 583. In particular, liability as a joint tortfeasor may arise where, in the words of Lord Templeman in CBS Songs v Amstrad [1988] 2 All ER 484 at 496, [1988] AC 1013 at 1058 to which I have already referred, the individual 'intends and procures and shares a common design that the infringement takes place'.

> [52] Fourth, whether or not there is a separate tort of procuring an infringement of a statutory right, actionable at common law, an individual who does 'intend, procure and share a common design' that the infringement should take place may be liable as a joint tortfeasor. As Mustill LJ pointed out in Unilever v Gillette, procurement may lead to a common design and so give rise to liability under both heads."

INTENTION

79. The Claimants submit that I should take the test for intention from the decision of the Court of Appeal in Douglas v Hello! Ltd (No.3) [2006] QB 125. In that case the Court of Appeal was principally concerned with the tort of unlawful interference, although the court considered that the test for intention for that tort was the same as the test for intention for the tort of conspiracy to injure by unlawful means: see at [155]. The court identified five different possible tests for intention at [159] and expressed its conclusions as to the appropriate test at [223] – [224]. However, in my judgment, the most significant thing about the approach adopted by the Court of Appeal in that case is that when the case reached the House of Lords, the House did not agree with the Court of Appeal's reasoning or conclusions as to the test for intention; the case was one of the three appeals which are reported as OBG Ltd v Allan [2008] 1 AC 1.

80. In OBG, at [62], Lord Hoffmann expressed the test for intention in this way:

> "Finally, there is the question of intention. In the Lumley v Gye tort, there must be an intention to procure a breach of contract. In the unlawful means tort, there must be an intention to cause loss. The ends which must have been intended are different. South Wales Miners' Federation v Glamorgan Coal Co Ltd [1905] AC 239 shows that one may intend to procure a breach of contract without intending to cause loss. Likewise, one may intend to cause loss without intending to procure a breach of contract. But the concept of intention is in both cases the same. In both cases it is necessary to distinguish between ends, means and consequences. One intends to cause loss even though it is the means by which one achieved the end of enriching oneself. On the other hand, one is not liable for loss which is neither a desired end nor a means of attaining it but merely a foreseeable consequence of one's actions."

81. Lord Hoffmann explained why he disagreed with the approach of the Court of Appeal in Douglas v Hello! Ltd (No. 3) at [130] – [134] and added at [135]:

> "The analysis of intention by the Court of Appeal in my opinion illustrates the danger of giving a wide meaning to the concept of unlawful means and then attempting to restrict the ambit of the tort by giving a narrow meaning to the concept of intention. The effect is to enable virtually anyone who really has used unlawful means against a third party in order to injure the plaintiff to say that he intended only to enrich himself, or protect himself from loss. The way to keep the tort within reasonable bounds is to restrict the concept of unlawful means to what was

contemplated in Allen v Flood; not to give an artificially narrow meaning to the concept of intention."

82. Lord Nicholls dealt with the question of intention for the tort of unlawful interference at [164] – [167], as follows:

> "164 I turn next, and more shortly, to the other key ingredient of this tort: the defendant's intention to harm the claimant. A defendant may intend to harm the claimant's business either as an end in itself or as a means to an end. A defendant may intend to harm the claimant as an end in itself where, for instance, he has a grudge against the claimant. More usually a defendant intentionally inflicts harm on a claimant's business as a means to an end. He inflicts damage as the means whereby to protect or promote his own economic interests.
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> 165 Intentional harm inflicted against a claimant in either of these circumstances satisfies the mental ingredient of this tort. This is so even if the defendant does not wish to harm the claimant, in the sense that he would prefer that the claimant were not standing in his way.
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> 166 Lesser states of mind do not suffice. A high degree of blameworthiness is called for, because intention serves as the factor which justifies imposing liability on the defendant for loss caused by a wrong otherwise not actionable by the claimant against the defendant. The defendant's conduct in relation to the loss must be deliberate. In particular, a defendant's foresight that his unlawful conduct may or will probably damage the claimant cannot be equated with intention for this purpose. The defendant must intend to injure the claimant . This intent must be a cause of the defendant's conduct, in the words of Cooke J in Van Camp Chocolates Ltd v Aulsebrooks Ltd [1984] 1 NZLR 354 , 360. The majority of the Court of Appeal fell into error on this point in the interlocutory case of Miller v Bassey [1994] EMLR 44. Miss Bassey did not breach her recording contract with the intention of thereby injuring any of the plaintiffs.
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> 167 I add one explanatory gloss to the above. Take a case where a defendant seeks to advance his own business by pursuing a course of conduct which he knows will, in the very nature of things, necessarily be injurious to the claimant. In other words, a case where loss to the claimant is the obverse side of the coin from gain to the defendant. The defendant's gain and the claimant's loss are, to the defendant's knowledge, inseparably linked. The defendant cannot obtain the one without bringing about the other. If the defendant goes ahead in such a case in order to obtain the gain he seeks, his state of mind will satisfy the mental ingredient of the unlawful interference tort. This accords with the approach adopted by Lord Sumner in Sorrell v Smith [1925] AC 700, 742:
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> > " When the whole object of the defendants' action is to capture the plaintiff's business, their gain must be his loss. How stands the matter then? The difference disappears. The defendants' success is the plaintiff's extinction, and they cannot seek the one without ensuing the other." "

83. The question of intention to injure was not in issue in Total Network but I do not detect anything in that decision which supports the idea that the test for intention to injure should be different from the test in OBG. Total Network does make it clear that the two torts being considered are different torts and the concept of "unlawful means" is different for the two torts. But that is no warrant for deliberately changing the other ingredients of the two torts so that the test for intention will also be different for the two torts. In Meretz Investments NV v ACP Ltd [2008] Ch 244, the Court of Appeal applied the statements in OBG, as to the test of intention, to the tort of conspiracy to injure by unlawful means. So too did Briggs J in Bank of Tokyo-Mitsubishi UFJ Ltd v Baskan Gida Sanayive Pazarlama AS [2009] EWHC 1276 (Ch).

84. Why then should I disapply the views of the House of Lords in OBG and revert to the views of the Court of Appeal in Douglas v Hello! Ltd (No. 3)? The Claimants did not suggest any principled reason to do so. Their submission seems to have been based on the fact that they were contending for a major extension of the concept of unlawful means for the tort of conspiracy and they felt the need to limit the tort in other respects. I have already rejected their submission that unlawful means should be extended to cover non-actionable breaches of non-criminal statutes. I decline to follow the Claimants' approach to the law in this area which seems to involve the court, like a tailor carrying out alterations to an ill-fitting garment, letting it out here (e.g as to unlawful means) and taking it in there (e.g as to the test for intention) just to suit the alleged facts of this particular case. To the extent that it arises, I hold that I should apply the test for intention identified in OBG.

85. It is clear from the Kuwait Oil Tanker v Al Bader [2000] 2 All ER (Comm) 271 at [120] – [121], that the court is able to make a finding that a defendant had the necessary intention by drawing inferences to that effect from all the evidence before it.

HONEST BELIEF

86. There is a further point of law which was fully argued before me. The Defendants say that if all the other ingredients of the tort of conspiracy are established against them, there is a further matter on which they rely which (if they establish the relevant facts) has the result that the Defendants are not liable for the tort of conspiracy. The Defendants say that if the acts or omissions which are proven against them are held by the court to have been unlawful, the Defendants are nonetheless not liable in the tort of conspiracy because when they committed those acts or were guilty of those omissions, they genuinely believed that they were not unlawful. Accordingly, the following issues arise. Is it relevant for the court to inquire into what the Defendants believed in this respect at the time of the relevant acts or omissions? If so, who bears what burden of proof in this respect? Is the absence of a genuine belief on the part of the Defendants something which the Claimants must assert and prove or is the existence of the genuine belief on the part of the Defendants something for the Defendants to assert and prove by way of defence? This question of the burden of proof was raised at an early stage in the trial in connection with the related question as to whether the Claimants had to plead the absence of a genuine belief or whether the Defendants had to plead a defence of the existence of a genuine belief. The issue was not resolved at that stage and the pragmatic decision was taken by both parties that each party would set out its case in relation to this topic.

87. Before considering the authorities on this issue in relation to the tort of conspiracy to injure by unlawful means (where the law is in dispute) I will first describe the position in relation to the tort of inducing breach of contract (where the law is now clear). I will then consider the torts which are alleged by the Claimants, ending with the tort of conspiracy to injure by unlawful means.

88. In order to be found liable for the tort of inducing a breach of contract, it must be shown that the Defendant had knowledge of the relevant terms of the contract. In this context, as elsewhere, knowledge includes "shut-eye" knowledge or wilful blindness. It is not enough that the Defendant knows he is inducing a specific act which the court later holds is a breach of contract, the Defendant must know that the act will have the effect of causing a breach of contract. That requirement was established by the decision of the House of Lords in British Industrial Plastics Ltd v Ferguson [1940] 1 All ER 479. That requirement was applied by the Court of Appeal in Mainstream Properties Ltd v Young [2005] IRLR 964 where the claimant relied on the tort of inducing breach of contract. When the latter case reached the House of Lords, reported with two other cases under the name OBG Ltd v Allen [2008] 1 AC 1, the principle was restated and applied: see per Lord Hoffmann at [39] and [69] – [70] and per Lord Nicholls at [202]. Lord Hoffmann dismissed the relevance of certain authorities relied upon by counsel for the unsuccessful appellant by saying that the authorities dealt with different points "or different torts".

89. I turn then to consider the alleged torts relied upon by the Claimants in the present case, leaving the tort of conspiracy to injure by unlawful means to the end of the survey.

90. In the case of SLU, SVG, Grenada, Cayman and TCI, I have already held that any breach of the relevant Act or the relevant regulations is not actionable. However, if I had held that the breaches were actionable, then the relevant defendant, who was subject to the duty imposed by the relevant Act or regulations, would not have avoided liability by proving that it honestly believed that it was not crossing the line by behaviour which the court holds was prohibited by the Act or the regulations.

91. In the case of Barbados, it is common ground that if the relevant Claimant proves as a matter of fact that the relevant Defendant's behaviour infringed sections 25 or 28 of the relevant Act, then the relevant Claimant has a claim to damages under section 73 of the relevant Act, and the relevant Defendant does not avoid liability by proving that it honestly believed that its behaviour did not cross the prohibited line.

92. In the case of Trinidad and Tobago, different considerations apply because section 4 of PAUCA prohibits action which is "contrary to honest practices" and, as already explained, that requires an investigation into the relevant Defendant's honesty in accordance with the established meaning of that term.

93. I turn next to the question of joint tortfeasors. If the principal tortfeasor commits a tort and that tortfeasor's belief as to the lawfulness of his action is not material to his liability then the established rules as to the liability of a joint tortfeasor do not require any investigation into the state of the joint tortfeasor's belief as to the lawfulness of his action. This means that if the Defendants are right that there is a requirement of no honest belief for the tort of conspiracy, there will be a difference between the rules which apply to joint torts and the rules which apply to the tort of conspiracy. It would

then be easier for a claimant to put forward a case based on a combination to commit a tort, resulting in liability as joint tortfeasors, than asserting a conspiracy to injure by unlawful means, namely, the underlying tort.

94. Turning then to the tort of conspiracy to injure by unlawful means, as I have explained, the claimant must show that the defendant intended to use unlawful means to injure the claimant. In Mogul Steamship (1889) 23 QBD 598 at 612, Bowen LJ stated that an intention to injure meant more than an intention to harm it meant an intention to cause wrongful harm. But does that mean that the defendant must know the intended harm is wrongful?

95. The decision in British Industrial Plastics Ltd v Ferguson [1938] 4 All ER 504 (Court of Appeal) and [1940] 1 All ER 479 is relevant to this question. In that case, the plaintiff relied on the tort of inducing a breach of contract and the tort of conspiracy to injure by unlawful means. What precisely were the unlawful means was not made clear: was it the alleged breach of contract or was it the tort of inducing a breach of contract? It was held on the facts that the defendant did not know that his involvement would bring about a breach of contract. That meant that the defendant was not liable for the tort of inducing breach of contract. As stated above, that ruling was upheld by the House of Lords and followed in Mainstream v Young . The Court of Appeal in British Industrial Plastics v Ferguson also considered the tort of conspiracy. If the alleged unlawful act was the tort of procuring a breach of contract, then it would follow that there had been no actionable inducement of a breach of contract and no unlawful act. If the unlawful act had been the breach of contract itself, what then? Slesser LJ at 512-513 held there was no actionable conspiracy because the defendant was not "wilful". He seems to have held that the defendant's lack of awareness of any unlawful act meant he was not liable. Mackinnon LJ at 512-513 said the same considerations applied to both torts which had been alleged. Finlay LJ was the most explicit of the three judges on the point. He said that the two causes of action stood or fell together. He held at 514 that a person was not liable in a civil or a criminal court if he had no knowledge that his act was unlawful. He repeated that with specific reference to the tort of conspiracy at 515-516. When that case reached the House of Lords, the speeches focussed on the tort of inducing breach of contract and there is no separate consideration of the tort of conspiracy.

96. The present question of honest belief with specific reference to the tort of conspiracy was considered by the Court of Appeal in Belmont Finance Corporation v Williams Furniture Ltd (No 2) [1980] 1 All ER 393. The Court of Appeal held that a defendant must know the relevant facts which are necessary to show that an unlawful act was involved but need not know that the legal consequence of those facts was that the act was unlawful. Buckley LJ said at 404 – 405:

> "In my judgment, the alleged conspiracy is established in respect of these three defendants, and they are not exempt from liability on account of counsel's opinion or because they may have believed in good faith that the transaction did not transgress s 54. If all the facts which make the transaction unlawful were known to the parties, as I think they were, ignorance of the law will not excuse them: see Churchill v Walton ([1967] 1 All ER 497 at 503, [1967] 2 AC 224 at 237). That case was one of criminal conspiracy, but it seems to me that precisely similar principles must apply to a conspiracy for which a civil remedy is sought. Nor, in my

opinion, can the fact that their ignorance of, or failure to appreciate, the unlawful nature of the transaction was due to the unfortunate fact that they were, as I think, erroneously advised excuse them (Cooper v Simmons, and see Shaw v Director of Public Prosecutions,where the appellant had taken professional legal advice).

If they had sincerely believed in a factual state of affairs which, if true, would have made their actions legal, this would have afforded a defence (Kamara v Director of Public Prosecutions ([1973] 2 All ER 1242 at 1252, [1974] AC 104 at 119)); but on my view of the effect of s 54 in the present case, even if £500,000 had been a fair price for the share capital of Maximum and all other benefits under the agreement, this would not have made the agreement legal. So a belief in the fairness of the price could not excuse them."

97. In Belmont , Waller LJ said at 414 – 415:

"The next question is whether or not the defendants were guilty of conspiracy. A conspiracy is an agreement between two or more persons to effect an unlawful purpose which results in damage to somebody (see Crofter Hand Woven Harris Tweed Co Ltd v Veitch ([1942] 1 All ER 142 at 147, [1942] AC 435 at 440) per Viscount Simon LC). A person is a party to a conspiracy if he knows the essential facts to constitute that conspiracy even though he does not know that they constitute an offence (see Churchill v Walton). Since there was a breach of s 54 and the defendants through their directors made all the arrangements and knew all the facts constituting the breach, it would follow that they conspired together to contravene s 54, the object of their conspiracy being Belmont, and if Belmont suffered damage they are liable."

98. Those passages from Belmont clearly distinguish between a belief in a factual state of affairs, where (if the belief had been correct) there would have been no unlawful act and a belief that the known facts are not unlawful as a matter of law. The case of Churchill v Walton (reported as Reg. v Churchill (No. 2) [1967] 2 AC 224) was a decision of the House of Lords in a criminal case.

99. Reg. v Churchill (No. 2) was applied to the civil tort of conspiracy by Goff LJ in Pritchard v Briggs [1980] Ch 338 at 414 – 415; the other two members of the court did not deal with this point, which did not arise on their analysis of the case.

100. OBG Ltd v Allen did not consider the tort of conspiracy to injure by unlawful means but it did consider the tort of inducing breach of contract and the further tort of causing loss by unlawful means. The House of Lords stressed that the intention required for the tort of inducing breach of contract differed from the intention required for the tort of causing loss by unlawful means: see at [8], [39], [62], and [69] - [70] per Lord Hoffmann. With the tort of inducing a breach of contract, what must be shown is an intention to procure a breach of contract. Such an intention was described as being both necessary and sufficient. It is not necessary for the defendant to be proven to have the intention of causing damage to the claimant. The tort can be committed even where there was no such intention or even where the defendant considers that his conduct will result in the claimant being better off. With the tort of

causing loss by unlawful means, what must be shown is an intent to cause damage to the claimant.

101. In OBG at [164], Lord Nicholls considered the necessary intention to cause damage to the claimant in the tort of causing loss by unlawful means. He stated that that tort required there to be intentional harm. He added: "[a] high degree of blameworthiness is called for, because intention serves as the factor which justifies imposing liability on the defendant for loss caused by a wrong otherwise not actionable by the claimant against the defendant."

102. What one sees in OBG is that the defendant's honest belief that his actions did not bring about a breach of contract was relevant when assessing whether the defendant intended to bring about a breach of contract (for the tort of inducing breach of contract) but there is no reference to the defendant's honest belief being relevant when one considers whether the defendant intended to cause damage to the claimant (for the tort of causing harm by unlawful means).

103. There is nothing in the Total Network case which bears on this present issue.

104. The Defendants' submission is that even in a case where the court holds that the Defendant's behaviour is unlawful, the tort of conspiracy to injure by unlawful means is not made out where the Defendants honestly believed that their behaviour was not unlawful. The Defendants submit that this is because in such a case the Defendants lack the necessary intention to injure the Claimants. They submit that this proposition is established by the decision of the Court of Appeal in Meretz Investments NV v ACP Ltd [2008] Ch 244. It is necessary to examine that decision in a little detail.

105. In Meretz in the Court of Appeal, the claimants relied upon two torts, namely, the tort of inducing breach of contract and the tort of conspiracy to injure by unlawful means. The claimants' case failed on both of these torts.

106. Although not directly in point, it is worth noticing the reasoning in Meretz in relation to the tort of inducing breach of contract. The circumstances of the various competing rights and obligations in that case were highly unusual. Arden LJ held that, in relation to the alleged breach of contract by ACP, what had happened was that ACP's obligation to grant a lease had by agreement been converted into a liability to pay damages for not granting that lease: see at [123] and [143]. Further, Arden LJ held that the other defendants in that case had not procured or induced a breach of contract although their actions had prevented ACP performing its obligation to grant the lease; there was a critical difference between inducing a breach of contract and preventing performance of a contact: see at [129] – [140]. Arden LJ would also, if it had been necessary to do so, have held that the defendants could plead justification as a defence to the tort of inducing breach of contract: see at [142]. As to the defendants' state of mind, Arden LJ said at [124] and [127] that because the defendants believed that they were entitled to act as they did, the tort of inducing breach of contract was not made out. If that statement means that the defendants believed that they were not doing anything unlawful then the proposition is not controversial after OBG Ltd v Allan, in relation to the tort of inducting breach of contract.

107. Arden LJ then considered the alleged tort of conspiracy. She dealt with this comparatively briefly. She appears to have approached the case on the basis that the

alleged unlawful means were the alleged breach of contract rather than the tort of inducing a breach of contract: see at [145]. The trial judge had held in terms that a breach of contact amounted to unlawful means for the tort of conspiracy: see at [39]. At [147], Arden LJ held that there were no unlawful means; she held that the defendants had acted lawfully in exercising a power of sale which was available. At [146], Arden LJ stated that the test for intention to cause loss which was described in OBG in relation to the tort of causing loss by unlawful means should also apply to the tort of conspiracy to injure by unlawful means. She held that there had to be an intention to cause loss. She held that, on the facts, there was no intention to cause harm. There appear to be two reasons for that conclusion. The first was that a belief that the right to the lease would be overridden was inconsistent with an intention to cause harm to Britel. The second (introduced by "nor") was that the Claimant's rights were to damages and there was no intention to prevent performance of the obligation to pay damages. Arden LJ did not, at any rate not in terms, hold that an honest belief that the means were lawful meant that there was no intention to cause harm.

108. In Meretz, the appellants cited Belmont Finance Corpn Ltd v Williams (No. 2) [1980] 1 All ER 393: see [2008] Ch at [118]. Arden LJ stated that she had rejected the relevance of the approach in that case in Mainstream Ltd v Young [2005] IRLR 964 at [84]. However, in the Mainstream case she was dealing with the tort of inducing breach of contract. It is quite right that in the Mainstream case, Arden LJ proceeded on the basis that after the decision of the Court of Appeal in Douglas v Hello ! Ltd (No. 3) [2006] QB 125, one could proceed on the basis of an "holistic" approach to the economic torts but that approach was falsified by the decision of the House of Lords in OBG.

109. The second judgment in Meretz was given by Toulson LJ. He first dealt with the alleged tort of conspiracy to injure by unlawful means. He held at [167] – [170] that the means used were not unlawful. He then considered the question to intention to injure and said this at [174]:

> "Although my conclusion on the issue of unlawful means makes it unnecessary to decide the point, I would support Arden LJ's view, at para 127, that it is a defence to an action for conspiracy to injure by unlawful means if the defendant not only acted to protect his own interests but did so in the belief that he had a lawful right to act as he did. Just as the tort of conspiracy to induce breach of contract is not committed if the defendant believes that the outcome sought by him will not involve a breach of contract (the Mainstream case [2005] IRLR 964), so a defendant should not be liable for conspiracy to injure by unlawful means if he believes that he has a lawful right to do what he is doing. This is consistent with Lord Hoffmann's comment in the OBG case [2008] 1 AC 1 , para 56, when considering the tort of causing injury by unlawful means, that the common law in this area is designed only to enforce basic standards of civilised behaviour. Moreover, Lord Nicholls was not addressing such a situation in the passage set out at para 125 above. (I would note two supplementary points. First, for avoidance of doubt, I do not consider that this conclusion is inconsistent with the decision of the House of Lords in R v Churchill (No 2) [1967] 2 AC 224 , which concerned a very different issue, namely, the mens rea element of the crime of conspiracy in the context of an

agreement which led to the commission of a strict liability offence. Secondly, we are not in this case concerned with the alternative form of conspiracy to injure, where the intent to injure is the defendant's dominant intention and questions of the lawfulness of the means do not arise.) I would also concur with Arden LJ's conclusions about intent on the evidence before the judge."

110. As to the passage at [174]: (1) Toulson LJ held that it was unnecessary to decide the point; (2) the cross reference to [127] in the judgment of Arden LJ is to a passage dealing with inducing breach of contract and not the tort of conspiracy; (3) Toulson LJ referred to a conspiracy to induce breach of contract, i.e. a conspiracy to commit a tort; if the underlying tort was not committed because the defendants believed there was no breach of contract then there was no actionable conspiracy either; (4) Toulson LJ then stated that there should not be a liability in conspiracy if there was a belief that the action was pursuant to a legal right.

111. Toulson LJ then dealt with the tort of inducing breach of contract although he described the case as one of conspiracy to induce a breach of contract. That seems to have been because the appellants in that case put their case on the two economic torts in similar ways: see at [175]. Toulson LJ held that the defendants had not induced the alleged breach of contract. He next held that the defendants could plead justification. Thirdly, he went on to hold at [180] that the defendants were not liable for inducing breach of contract when they believed they were entitled to act as they did.

112. The third member of the court in Meretz (Pill LJ) gave a short judgment but I do not see that he committed himself specifically to what Toulson LJ had said at [174].

113. Finally, for the sake of completeness, I refer to the decision of Briggs J in Bank of Tokyo-Mitsubishi v Baskan [2009] EWHC 1276 (Ch) where, at [836] – [837], he quoted Toulson LJ in Meretz at [174] and stated that there was now a requirement that the defendant must have known that the relevant conduct was unlawful, and that the unlawful conduct would cause harm to the claimants. Briggs J stated that this requirement gave rise to additional complexity.

114. It is clear from the above analysis of the judgments of Arden and Toulson LJJ in Meretz, that they approached the case on the basis that a defendant was not liable for the tort of inducing breach of contract nor the tort of conspiracy to injure by unlawful means where the defendant did not know that he was acting unlawfully. It is of course readily understandable that they would adopt that approach in a case which was argued both by reference to the tort of inducing breach of contract and to the tort of conspiracy to injure by unlawful means, where the underlying facts were identical for both alleged torts and even more so where it was not clear whether the unlawful means for the tort of conspiracy was a breach of contract or a tort of inducing a breach of contract. The same comment applies to the decision of the Court of Appeal in British Industrial Plastics Ltd v Ferguson [1938] 4 All ER 504.

115. The Court of Appeal in Meretz was aware of, and referred to, the Belmont case and Reg v Churchill (No. 2).

116. It is quite possible that an appellate court might be prepared to hold that the decision in the Court of Appeal in British Industrial Plastics Ltd v Ferguson was not

completely clear on the present point, that nothing has been said which would entitle the Court of Appeal not to follow Belmont, and that the decision in OBG does not apply to the tort of conspiracy to injure by unlawful means.

117. It is probably the case that the statements in the Court of Appeal in Meretz on this present point were obiter. But for the decision of the Court of Appeal in British Industrial Plastics Ltd v Ferguson, I might have been prepared to hold that I was bound by the ratio of Belmont and I should follow that ratio notwithstanding the obiter dicta in Meretz. However, in view of what was said by the Court of Appeal in British Industrial Plastics Ltd v Ferguson together with the dicta in the Court of Appeal in Meretz, my conclusion is that a judge at first instance ought to follow what is clearly stated by Toulson LJ in Meretz at [174].

118. Accordingly, I will proceed on the basis that, in relation to the acts which the Claimants say were unlawful acts, if the Defendants genuinely believed that those acts were lawful, then the Defendants are not liable in the tort of conspiracy to injure by unlawful means.

119. The next question is: on whom does the legal burden of proof rest in this regard? Do the Claimants have to prove that the Defendants did not honestly believe they were acting lawfully or do the Defendants have to prove that they honestly believed they were acting lawfully? Putting the question that way suggests that the legal burden should be on the Defendants as they are asserting a positive matter and they should therefore be expected to prove it, instead of requiring the Claimants to prove a negative. I note that Toulson LJ in Meretz at [174] referred to a defendant having "a defence" of honest belief; that suggests that the Defendants would be expected to raise and then to prove the defence. However, the cases on this subject, in particular, British Industrial Plastics Ltd v Ferguson and OBG discuss this point as part of the intention which the Claimants must show that the Defendants had when they acted as they did. That would suggest that the legal burden is on the Claimants to show all relevant aspects of the Defendants' state of mind. As it does not arise on the facts, I will leave that matter unresolved. Even if the legal burden is on the Claimants, as with any issue as to the fact of combination and the existence of the relevant intention, these matters can be the subject of inference and the circumstances of a particular case may place an evidential burden on a defendant to raise and prove the allegation that he genuinely believed he was acting lawfully.