[2010] UKPC 1
Privy Council Appeal No 0079 of 2009

JUDGMENT

Mossell (Jamaica) Limited (T/A Digicel)
v
Office of Utilities Regulations
Cable & Wireless Jamaica Limited
Centennial Jamaica Limited

From the Court of Appeal of Jamaica

before

Lord Phillips
Lord Rodger
Lord Brown
Lord Kerr
Lord Clarke

JUDGMENT DELIVERED BY
LORD PHILLIPS
ON

20 JANUARY 2010

Heard on 17 and 19 November 2009

Appellant
Nigel Pleming QC
Paul Beswick

(Instructed by Jones Day
Solicitors)

1st Respondent
David Batts

Ransford Braham
Suzanne Risden-Foster
George Wilson
(Jamaican Bar)

(Instructed by M A Law
(Solicitors) LLP)

2nd Respondent
Sandra Minott Phillips
Dave Garcia
Gavin Goffe
(All of Jamaican Bar)

(Instructed by Myers,
Fletcher & Gordon)

3rd Respondent
Unrepresented

LORD PHILLIPS:

Introduction

1. This appeal is about the extent of the powers, respectively, of the Minister of Industry, Commerce and Technology ("the Minister") and the First Respondent, the Office of Utilities Regulation ("the OUR"), in relation to the regulation of the telecommunications market in Jamaica. On 9 April 2002 the Minister issued a Direction ("the Direction") that purported to restrict the powers of the OUR. The OUR considered that the Minister had no power to issue this Direction. On 22 May 2002 the OUR issued a Determination Notice ("the Determination"), some aspects of which both they and the Minister considered contravened the Direction. This Determination impacted favourably on the Second Respondent, Cable & Wireless Jamaica Ltd ("C&WJ"), at the expense of the Appellant, Mossell (Jamaica) Ltd (Trading as Digicel) ("Digicel"), and the Third Respondent, Centennial Jamaica Ltd ("Centennial").

2. These events led to two applications for judicial review that were heard together. They raised the following issues:

i) Was the Direction within the Minister's powers?

ii) If it was not, was the OUR still obliged to comply with it unless and until it was set aside by a court?

iii) Did the Determination contravene the terms of the Direction?

iv) Was the Determination within the powers of the OUR and lawfully made?

3. Judgment in the judicial review proceedings was given by Dukharan J on 15 December 2003. He resolved the issues as follows:

i) The Direction was within the Minister's powers.

ii) The OUR was bound to comply with the Direction unless and until it was set aside by the court.

iii) The Determination contravened the terms of the Direction and was consequently unlawful.

iv) It was unnecessary to consider this as a separate issue.

4. The OUR appealed to the Court of Appeal (Harrison P., Cooke and McCalla JJA). The Court of Appeal allowed the appeal. It held:

i) The Direction was outside the Minister's powers and invalid.

ii) The OUR was under no obligation to comply with the Direction.

iii) The Determination did not contravene the terms of the Direction.

iv) The Determination fell within the powers of the OUR and was lawfully made.

5. Although the Minister and the Attorney General for Jamaica were party to the proceedings below, they did not appeal to the Board against the judgment of the Court of Appeal. Centennial have taken no part in the appeal to the Board. Digicel has sought to reverse the findings of the Court of Appeal on each of the four issues.

6. C&WJ sought to raise a new issue before the Board. This was that the Direction was a "regulation" as defined by section 3 of the Interpretation Act and that, by reason of section 31 of that Act, it could not take effect until published in the *Gazette*. No such publication ever took place.

7. It would not have been fair for this issue to be pursued in an appeal to which the Minister was not party and the Board ruled that it was too late for the point to be raised.

Background

8. Up to 2000 C&WJ enjoyed a monopoly in respect of the supply of telecommunications services in Jamaica. That monopoly had been granted for a 50 year period that was due to expire in 2012. Under that monopoly C&WJ provided both fixed line and mobile services. Like other monopoly providers of utility services, namely transport, sewerage, electricity and water, C&WJ was brought under the regulation of the OUR by the Office of Utilities Regulation Act 1995 "the OUR Act". Section 4(4) of the OUR Act included in the functions of the OUR

> "power to determine, in accordance with the provisions of this Act, the rates or fares which may be charged in respect of the provisions of a prescribed utility service."

9. Section 11 of the OUR Act gave the OUR power, by order published in the *Gazette,* to prescribe rates to be charged in respect of utility services, but this did not apply where any other Act specified the manner in which rates might be fixed by a licensee or specified organization.

10. In 1997 Mr Phillip Paulwell MP was appointed the Minister. His portfolio included responsibility for telecommunications. He set about liberalising telecommunications in the Island. To that end he was instrumental in the drafting of a "Telecommunications Policy" published by his Ministry in October 1998. This provided that telecommunications would be regulated by the OUR, "operating in a transparent, accountable and non-discriminatory manner". It emphasised the importance of fostering competition, to which end there would be a need for a change in the structure of telephone prices. The rate rebalancing strategy was to be developed by the OUR. The Policy dealt specifically with "interconnection" of services provided by entrants to the market with the fixed line service, in respect of which C&WJ was initially to maintain the monopoly. The terms of interconnection, including the charges, would be subject to regulation by OUR.

11. In September 1999 the Government reached agreement with C&WJ as to the terms on which the latter's monopoly would come to an end, to be replaced by a competitive market. This involved three phases. In March 2000 a new Telecommunications Act ("the Act") would come into effect. Phase 1 would run for the next 18 months. During Phase 1 licences would be granted to two new providers of mobile services. C&WJ would retain their monopoly of fixed network services. In Phase 2 licences would be granted for fixed line competitors and competition would be extended in areas not relevant to this appeal. Not until the beginning of Phase 3 would competition be permitted in the provision of international facilities. Until then all international calls, whether incoming or outgoing, would have to be routed thorough C&WJ's fixed network. The pricing structure would depend critically on terms of interconnection, which would be regulated by the OUR in accordance with the Act.

The Telecommunications Act

12. Section 2 of the Act contains a list of definitions. "Functions" are defined as including "duties and powers". "Interconnection" is defined as meaning "the physical or logical connection of public voice networks of different carriers". "Logical" is not defined, but the Board was informed that this term embraces radio connection.

13. Section 4 of the Act specifies the functions of the OUR. These include:

> "(a) regulate specified services and facilities…."

> "(c) promote the interests of customers, while having due regard to the interests of carriers and service providers…"
>
> "(f) promote competition among carriers and service providers."

In exercising these functions the OUR is required to have regard to whether the specified services are provided efficiently and in a manner designed to afford economical and reliable service to customers and to whether they are likely to promote or inhibit competition.

14. Section 6 is the section relied upon by the Minister as empowering him to issue the Direction. It provides:

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

15. The sections under which the OUR contends that it validly issued its Determination appear in Part V of the Act, which is headed "*Interconnection*". Some sections in this Part apply to carriers classified as "dominant public voice carriers". Although one would think that C&WJ would, at least initially, have satisfied this description, no carrier was, in fact, classified under this description, and we will not refer to those sections. Express provision is, however, made for C&WJ, who are described as "the existing telecommunications carrier". The following provisions are relevant:

> "29. - (1) Each carrier shall, upon request in accordance with this Part, permit interconnection of its public voice network with the public voice network of any other carrier for the provision of voice services.
>
> (2) A public voice carrier shall provide interconnection in accordance with the following principles -
>
> (a) any-to-any connectivity shall be granted in such manner as to enable customers of each public voice network to complete calls to customers of another public voice network or to obtain services from such other network;

(b) end-to-end operability shall be maintained in order to facilitate the provision of services by an interconnecting carrier to the customer notwithstanding that the customer is directly connected to a different network;

(c) interconnecting carriers shall be equally responsible for establishing interconnection and so as quickly as is reasonably practicable.

(3) Copies of all interconnection agreements shall be lodged with the Office which may object to any such agreement in the prescribed manner.

(4) The Office may, either on its own initiative in assessing an interconnection agreement, or in resolving a dispute between operators, make a determination of the terms and conditions of call termination, including charges.

(5) When making a determination of an operator's call termination charges, the Office shall have regard to the principle of cost orientation, so, however, that if the operator is non-dominant then the Office may also consider reciprocity and other approaches.

(6) For the purposes of subsection (5), 'reciprocity' means basing the non-dominant carrier's call termination charges on the call termination charges of another carrier.

. . .

31. Each term and condition in relation to the provision of interconnection services provided to each carrier shall be determined -

(a) in accordance with the relevant reference interconnection offer or any part there of which is in effect in relation to the provision of those services;

(b) where paragraph (a) does not apply, by agreement between the interconnection seeker and the interconnection provider; and

(c) where neither paragraph (a) nor (b) applies, by the Office acting as arbitrator pursuant to the arbitration rules referred to in section 34(2).

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

(2) . . . the existing telecommunications carrier shall submit its initial reference interconnection offer within thirty days after the appointed day.

(3) A reference interconnection offer shall contain such particulars as may be prescribed.

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

. . .

34. - (1) Where, during negotiations for the provision of interconnection there is any dispute between the interconnection provider and the interconnection seeker (hereinafter in this section referred to as a pre-contract dispute) as to the terms and conditions of such provision, either of them may refer the dispute to the Office for resolution.

(2) The Office shall make rules applicable to the arbitration of precontract disputes.

(3) A decision of the Office 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;

(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;

(c) the principles specified in sections 29(2) and 30(1).

(4) Where neither party to the dispute is a dominant public voice carrier, the Office may decline to act as an arbitrator in relation to the dispute.

. . .

46. - (1) In this Part -

‘prescribed price caps’ means such restrictions on the price of prescribed services as are prescribed in rules made under this section;

‘prescribed services’ means services to which prescribed price caps apply;

‘price cap’ means a restriction whereby the weighted aggregate price, calculated in the prescribed manner, for prescribed services shall not be greater than a specified price.

(2) The Office shall make rules providing for the imposition, monitoring and enforcements of price caps.”

Material events

16. The Board will limit its summary of material events to those which concerned Digicel. No doubt many of these were mirrored by events that concerned Centennial.

17. On 14 March 2000 Digicel obtained by competitive auction a Domestic Mobile Carrier and other licences from the Government of Jamaica at a cost of US$47.5 million. This entitled Digicel to provide a mobile (cellular) service within Jamaica for a minimum period of 15 years.

18. In order to take advantage of its licence Digicel had to conclude an interconnection agreement ("ICA") with C&WJ and this had to be lodged with the OUR for assessment pursuant to section 29(3) of the Act. Had C&WJ obtained approval from the OUR of a reference interconnection offer ("RIO") pursuant to section 32 of the Act this would have constituted a standing offer which Digicel could have accepted, confident in the knowledge that it would have the approval of the OUR. The process of obtaining such approval proved, however, a lengthy one. C&WJ submitted a draft RIO for approval on 30 March 2000, but lengthy consultation and negotiations then ensued. Digicel was permitted to comment on the proposed terms of the RIO. A central feature of the discussion was the charge for interconnection. Digicel's correspondence with OUR makes it plain that Digicel considered that the terms of its ICA with C&WJ would be governed by the terms of the RIO.

19. In the course of negotiations the OUR issued Determinations that gave piecemeal approval to parts of the RIO. In February 2001 the OUR issued Determination 3 which set out terms that the OUR indicated should be incorporated in a revised RIO (RIO 3) to be submitted by C&WJ. This consisted both of explanatory text and mandatory directions. The Board will put the mandatory directions in bold:

> "2.2 Given the statutory timeframe, the Office believes there is a strong case for setting initial charges for a relatively short period. The quality and robustness of the cost information on which some of the charges are based will improve over time as costing systems are refined and made more reliable. Since costs change over time, charges will need to be subject to periodic review (as C&WJ recognised in its paper to the OUR of May 3). Furthermore, the system of accounts from which C&WJ has derived its proposed charges is quite new and typically, the development and refinement of accounting systems (or other costing models) is a process and not a one-off exercise.

Determination 2.1: The revised RIO should provide for automatic modification under the following conditions:-

- **when fixed-fixed interconnection (Phase II) and international network interconnection (Phase III) is allowed.**

- **where there are significant changes to licence conditions, company constitution, legislation, and where there are decisions of the court which necessitate such modifications.**

- **where the parties affected by the RIO agree on the need for change and request that the Office conducts such a review.**

- **at the initiative of the OUR.**

. . .

2.6 The Act only provides for the Office to arbitrate pre-contract interconnection disputes. Section 31 of the Legal Framework in the RIO allows for post-contract disputes to be resolved through private, binding arbitration. The Office recognises that it would not always be the most appropriate organisation to resolve disputes, such as routine or detailed commercial issues. However, a potential difficulty with C&WJ's proposals is that once initial interconnection agreements are arrived at and unless a termination clause is triggered, here would be no further role for the Office in settling interconnection disputes.

2.7 In the RIO, C&WJ proposes that it may amend the agreement at any time:

'Subject to the provisions of the Telecommunications Act, CWJ reserves the right to amend the terms of this Agreement at any time.' [Extract from 23.1 of Legal Framework]

2.8 The interconnection agreement proposed in the RIO relates to the services to be provided by the mobile entrants to C&WJ as well as vice versa (e.g. reciprocal arrangements are proposed for mobile call termination). However, nowhere in the proposed agreement is there provision for modifications to be made to the terms of the agreement by the mobile entrants. The Office considers the proposed asymmetry in the ability to modify the agreement to be unreasonable.

> 2.9 The Office, is of the view that the initial interconnect agreements should not last too long, because much will be learned from experience about the most effect and efficient interconnection arrangements and the quality and robustness of the cost information on which they are based will improve over time as costing systems are refined and made more reliable.
>
> **Determination 2.2: All interconnect agreements should include an expressed provision for modifications to take account of changes made to the RIO.**"

These provisions were consistent with a suggestion made by Digicel in a presentation in the course of negotiations. A revised RIO 3 was submitted by C&WJ on 8 March and was, for the most part, though not entirely, approved by the OUR on 8 April 2001.

20. On 18 April 2001 C&WJ and Digicel entered into a "full" ICA, which annexed a "long form" ICA and a tariff of charges. These contracts conformed to the terms of RIO 3. Clause 5.3 of the full ICA made provision for the amendment, if necessary, of terms not yet approved by the OUR. Clause 23 of the long form ICA made provision for "review and amendment". This included the following terms:

> "23.1…either Party may seek to amend this Agreement by serving on the other a review notice if: . . .
>
> c) a revised RIO submitted by C&WJ is approved in whole or in part (and for the avoidance of doubt, revised RIOs will be submitted for approval at the commencement of Phase II and at the commencement of Phase III);
>
> d) the OUR exercises its powers under Section 29 and Section 34;
>
> . . .
>
> 23.2 A review notice shall set out in reasonable detail the events giving rise to the review required by the notice and the nature of the amendments sought by the Party serving the notice.
>
> 23.3 . . . a Party must serve a review notice within 3 months of the event giving rise to the review.
>
> 23.4 On service of a review notice, the Parties shall forthwith negotiate the matters to be resolved with a view to agreeing the relevant amendments to this Agreement provided that if the

> event giving rise to the review is as specified in either Clause 23.1 (c) or Clause 23.1 (d), this Agreement shall be modified accordingly by the Parties without the need for renegotiation. If nevertheless the Parties shall disagree on the nature or extent of the modification(s) required in any such case, they shall resolve the dispute in the manner provided in Clause 23.6.
>
> 23.5 If the event giving rise to the review is approval in whole or in part of a revised RIO submitted by C&WJ, the Parties agree that the relevant amendments will include amendments to reflect the principles in the approved RIO.
>
> 23.6 If, after a period of 30 days from commencement of such review, the Parties fail to reach Agreement, the Parties shall resolve the dispute in accordance with the dispute resolution procedure adopted pursuant to Section 34 of the Act.
>
> 23.7 For the avoidance of doubt, the Parties agree that the terms and conditions for this Agreement shall remain in full force and effect during such review until the Parties complete an agreement replacing or amending this Agreement or until such time as this Agreement is terminated in accordance with its terms."

21. Digicel then launched its mobile service. Where calls were made from C&WJ's fixed network to Digicel's mobiles these were charged and paid for according to the principle of "the caller pays". C&WJ charged its customers for these calls and then accounted to Digicel in accordance with the rates that had been agreed for fixed to mobile ("FTM") connections.

22. On 23 August 2001 the OUR issued for consultation a draft RIO 4, whose terms had been proposed by C&WJ. In a letter dated 24 September 2001 Digicel expressed strong objection to some of these, in particular to a proposed reduction, alleged to be of 33%, in the rates for FTM connections.

23. The OUR issued a further consultation document on 30 October 2001, suggesting certain interim variations to the RIO 3 tariff. Digicel responded to this on 7 November 2001, making relatively mild objection to some of the variations, but not to a proposed increase in the amount paid to mobile carriers for receiving, via C&WJ's network, incoming international calls.

24. On 22 November 2001 the OUR issued a Determination Notice which accommodated to a degree the objections made by Digicel and which, *inter alia*, increased the rates to be paid in respect of incoming international calls. The Notice stated that the rates would all be

reassessed when the OUR made its determination with respect to permanent changes to the RIO. The Notice directed that:

> "All interconnection agreements should now be modified to reflect the Office's determination. These changes are effective as of November 22, 2001. "

Digicel and C&WJ treated the changes as effecting a variation of their ICA.

25. At the beginning of 2002 Digicel continued to make representations to the OUR in relation to proposals for RIO 4, objecting in particular to any reduction in FTM rates. This was a theme taken up by the Minister. The President of the Court of Appeal identified evidence from Mr Winston Hay, who was at the time the Director General of the OUR, of the following significant exchanges with the Minister. On 24 March 2002 the Minister telephoned Mr Hay to tell him that a fourth provider was interested in entering the Jamaican market who would want the FTM rates kept at their current level for the first two years of receiving a licence. Mr Hay explained that the OUR was in the process of revising these rates and would be issuing a Determination in May. At a meeting two days later the Minister reverted to this topic, saying that the investment from the new provider was very important for Jamaica, but would probably not be made if the FTM rates were lowered. Mr Hay responded by saying that the OUR could not bend the principles of transparency and consistency in order to satisfy the wishes of a potential investor. The Minister then said that he would have to rethink the role of the OUR in telecommunications and would discuss the matter further at an early date. The President commented that this was a significant statement. The Board agrees.

26. The Minister did not discuss the matter further with Mr Hay. Instead on 9 April 2002 he issued the following Direction:

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

> WHEREAS Interconnection is one of the foundations of viable competition, which in turn is the main driver of growth and innovation in telecommunication markets.
>
> WHEREAS interconnection is the single most important issue in the development of a competitive marketplace for telecommunication services.
>
> WHEREAS at the heart of competition is allowing competitors to have the freedom to charge the prices they wish and the market determining the viability of competitors.
>
> RECOGNIZING that interconnection is not only a regulatory issue but a policy issue as well.
>
> AND FURTHER RECOGNIZING that interconnection polices that facilitate competition are pre-requisites to the successful development of a wide range of competitive services.
>
> THE OUR IS HEREBY DIRECTED that as a matter of policy
>
> > (i) The OUR is not to intervene in the mobile (cellular) market by setting rates, tariffs or price caps on the interconnection or retail charges made by any mobile competitor.
> >
> > (ii) The OUR is to facilitate competition and investment for the new mobile carriers in Jamaica".

27. The original version of this Direction stated that it was made pursuant to section 10 of the Act. The Minister subsequently amended the Direction to state that it was made pursuant to section 6.

28. On 16 April Mr Hay wrote to the Minister enclosing an advice from the OUR's 'in house' leading counsel to the effect that the Direction was *ultra vires.* On 2 May 2002 the OUR obtained an opinion from Queen's Counsel confirming that opinion. This ended with the following advice:

> "In these circumstances where the Minister asserts the legality of his exercise of the power under S.6 and the Office questions it, the courts should perhaps be asked to resolve the dispute. In the absence of a judicial ruling on the legality of the direction, it would not be advisable for the Office to act in accordance with the direction. The Office may, but need not be the one to initiate such judicial intervention. The Office may, after an appropriate response in writing to the Minister, elect to

continue to discharge its 'functions' circumspectly and in strict compliance with the Act, leaving it to the Minister or others to initiate litigation."

29. The Cabinet Secretary also took advice from Queen's Counsel. He too concluded that the terms of the Direction were *ultra vires.* The Solicitor General gave an opinion that disagreed with this conclusion.

30. On 22 May 2002 the OUR issued the Determination in relation to RIO 4. Once again this consisted both of explanatory text and mandatory directions and the Board will put the mandatory directions in bold:

"Regulatory Regime

1.3 The Office does not directly regulate the termination rates of mobile carriers other than Cable & Wireless Jamaica (C&WJ). The Office's concern in regulating the termination rates of C&WJ Mobile is to ensure that those rates are cost-orientated as per the requirement of the Telecommunications Act.

1.4 The Office also regulates the retail rates that C&WJ fixed (the wire-line portion of C&WJ) is allowed to charge its customers for fixed-to-mobile (FTM) calls. These rates are a separate basket in C&WJ's price-cap plan. The price cap is cost-orientated. The regulations that the Office imposes on C&WJ, through price-cap and interconnection regulation, also affect other mobile carriers. Additionally, the Office, through its regulation of interconnection, limits the portion of FTM charges that C&WJ fixed is allowed to retain. Retention is limited to a cost-orientated level. The remainder of FTM charges are distributed to the mobile carrier—whether C&WJ Mobile or some other mobile carrier.

1.5 The Office believes that charging retail FTM rates above the cost-orientated cap would reduce overall economic efficiency and the welfare of C&WJ's fixed customers. The Office, therefore, does not permit C&WJ to collect FTM rates above the cap from its fixed lines customers.

1.6 The Office does not regulate the rates that C&WJ Mobile or any other mobile carrier charges its own customers. In particular, any mobile carrier can impose airtime charges on its own customers for terminating calls, in addition to the amounts it receives in termination charges.

Determination 1.1

C&WJ Mobile is required to participate in this FTM calling regime and may set any non-predatory price for mobile termination up to the cost-orientated maximum rate. Other mobile carriers may also set prices up to this same maximum rate, and C&WJ fixed is required to interconnect with all mobile carriers that choose to participate. Other mobile carriers may set a higher rate than the maximum allowed for C&WJ Mobile, but C&WJ fixed cannot charge a higher retail rate to its customers than the maximum determined by the Office, and shall not be required to pay any mobile carrier more than the maximum rate that applies to C&WJ Mobile."

. . .

Mobile Termination Rates for Domestic Calls

2.11 The costs of mobile termination are the most significant component of the overall maximum FTM termination rates. As was previously noted, the Office has determined that this charge shall be the sum of C&WJ's mobile termination costs plus an imputed charge for spectrum. The imputed spectrum charge shall be the capital cost of a US$50 million investment based on a 34.5% cost of capital, or US$17.25 million per year. The per-minute costs of this element shall be determined based on traffic levels exclusive of incoming international traffic expected for the year beginning in July 2002.

. . .

Determination 2.5

The price of FTM calls shall continue to be set by participating mobile carriers, subject to a cap. The cap for domestic FTM calls shall be the sum of the C&WJ's mobile termination costs plus the imputed cost of spectrum plus the retention for the fixed network costs, which includes an allowance for bad debt.

Determination 2.6

The following maximum termination charges shall be applicable as of July 1, 2002:

J$6.838 per minute peak,

J$5.593 per minute off-peak, and

$4.349 per minute weekend

. . .

Mobile Termination for Incoming International

. . .

2.19 The international settlement rates that have recently prevailed suffice to cover both the costs of mobile termination and the RIO-3 fixed-retention costs. It seems likely that the final RIO-4 fixed-retention costs plus the costs of mobile termination will continue to be less than recently prevailing international settlement rates.

2.20 Nevertheless, it is possible that international settlement rates will decline, so that they no longer cover the costs of mobile termination plus fixed-retention costs. Such a situation could arise only through C&WJ's negotiations with their international carriers. The Office urges C&WJ not to enter into settlement agreements where settlement rates do not cover the costs of mobile termination plus fixed-retention. The Office is willing to lend its full support to C&WJ to avoid this unfortunate outcome. The Office is therefore willing to support a proposal for separate settlement rates for calls terminating on mobile networks.

. . .

Determination 2.8

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

31. This Determination related to the terms of RIO 4, and thus the rates at which C&WJ were permitted to contract with mobile carriers. Thus the Determination necessarily impacted on the terms that would be agreed by C&WJ in respect of any future contracts that they concluded. The parties proceeded on the basis, however, that the Determination also impacted on the existing ICA between C&WJ and Digicel. In an application to the OUR for reconsideration of the Determination, Digicel contended that the effect of Determination 2.6 was to reduce the rates that it would receive in relation to calls to Digicel's mobiles from C&WJ's fixed network by between 27.2% and 44.3%, depending on the time of the call, and that the effect of Determination 2.8 was to reduce the revenue that Digicel would receive

from international calls routed via C&WJ's fixed network to Digicel's mobiles by 13%. In relation to international calls, the gross sum retained by C&WJ would not be affected, so Digicel's loss would be C&WJ's gain.

32. Digicel commenced judicial review proceedings on 3 July 2002 in which the relief sought included the quashing of Determination 2.6 and 2.8. On 30 October 2002 the OUR commenced judicial review proceedings seeking a declaration that the Direction was unlawful, void and of no legal effect. These two sets of proceedings have given rise to the issues outlined at the beginning of this judgment. The Board now turns to consider those issues.

Was the Direction within the Minister's powers?

33. Section 6 of the Act empowered the Minister to give directions of "a general nature as to the policy to be followed by the [OUR] in the performance of its functions under this Act". It is accepted by the OUR that the second paragraph of the Direction fell within the power conferred by this section. In the courts below the OUR challenged the first paragraph on the grounds that (i) the Direction was not "of a general nature as to policy" and (ii) it was not one that could be followed in "the performance of its functions" by the OUR. The OUR submitted (i) that the Direction was not general but very specific and (ii) that the Direction ordered the OUR not to perform some of its statutory functions.

34. In both courts the OUR sought to buttress these simple submissions by an argument that section 6 did no more than authorise the Minister to give "guidance" to the OUR as to how the OUR should carry out its statutory functions, drawing an analogy with the statutory power granted to the Minister to give guidance to the Civil Aviation Authority, that was the subject of consideration by the Court of Appeal in *Laker Airways Ltd v Department of Trade* [1977] QB 643.

35. The Solicitor General, who appeared for the Minister in the courts below, argued that the Direction related to policy and was general in character. The issue of policy was whether, so far as the entrants to the market were concerned, price regulation or free competition would better serve the public interest. The Direction was general in that it was not directed against a particular competitor, or section of the competition, and did not seek to set a particular rate or rates. It imposed a general prohibition on intervention in the market.

36. In his judgment, with which the other members of the Court of Appeal agreed, the President accepted the OUR's submissions, including the analogy drawn with the power to give guidance in *Laker Airways.* The President rejected the Minister's arguments. He held that the Minister had disregarded those parts of the Act that made provision for price

regulation and had set out to promote competition alone to the exclusion of the other objects of the Act. This was outside the power conferred by section 6.

37. There was some debate before the Board as to whether the power given by section 6 of the Act is to be equated with the power to give guidance in *Laker Airways.* The Board did not find this debate helpful. The scope of the power conferred by the Minister by section 6 can readily be deduced by the terms of the section itself. The section provides for Directions to be followed by the OUR in the performance of its statutory functions. Functions include duties. Thus a Direction must be one that it is possible for the OUR to follow in carrying out its duties under the Act. A Direction that prohibits the OUR from carrying out those duties cannot lawfully be made by the Minister.

38. What are the relevant duties imposed on the OUR by the Act in relation to telecommunications? They are those in Part V, which deals with interconnection, which is what this case is all about. Section 29 imposes a duty on every carrier, that is both C&WJ and any competitor licensed to provide telecommunications services, to permit other carriers to interconnect. Such a requirement could be rendered nugatory if it were left to each carrier to decide upon the charges that it would make for interconnection. Equally, in the absence of the regulation of charges, the market could be abused by a dominant licensee, or by anti-competitive agreements between licensees. No doubt for this reason (i) section 29(3) requires every interconnection agreement to be submitted for assessment by the OUR , which has the power to determine the terms and conditions, including charges – section 29(4); (ii) C&WJ, which was in a special position as the existing carrier, had to submit its initial RIO for approval; (iii) any other carrier is entitled (and any dominant carrier bound) to submit an RIO for approval. Approval of an RIO involves the approval of charges.

39. Performing these functions was of the essence of the OUR's role as regulator. The Minister had stated that he intended to "rethink the role of the OUR in telecommunications". He had done precisely that and sought, by the Direction, to emasculate OUR's statutory function in relation to interconnection.

40. For these reasons, the Court of Appeal was correct to hold that the Minister's Direction was *ultra vires.* It occasions no surprise that the Minister has not appealed against that finding.

Was the OUR obliged to comply with the Direction even though it was ultra vires?

41. This issue raises subsidiary issues that were not explored, either before the courts below or before this court. What remedy, if any, would C&WJ have had if the OUR had failed to take action because of the Direction? What remedy, if any, would Digicel have had

if the Direction had been *intra vires?* The Board has not found it wholly satisfactory to address the primary issue without having heard argument on the subsidiary issues, but has concluded that the governing principles are clear.

42. It was Digicel's submission that the OUR was bound to comply with the Direction unless and until it was declared invalid and quashed by a court of competent jurisdiction. Principally the argument relied upon well-known dicta in two House of Lords decisions. First, from Lord Radcliffe's speech in *Smith v East Elloe Rural District Council* [1956] AC 736, 769-770:

> "An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."

Importantly, it was held impossible in that case for the appellants to take the necessary proceedings to get the (compulsory purchase) order quashed: the relevant legislation required any challenge to be brought within six weeks and the appellants were out of time. Second, from Lord Diplock's speech in *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 where, having quoted the above passage from *Smith v East Elloe* and noted that the appellants were intending to challenge the validity of the relevant order, he said this (pp 366-367):

> "It is not disputed that they have locus standi to do so, but this does not absolve them from their obligation to obey the order while the presumption in favour of its validity prevails – as it must so long as there has been no final judgment in the action to the contrary."

Here too it is important to recognise the context in which this was said. The Crown was applying for an interim injunction to enforce the order and the sole issue arising was whether it should be required to give the usual cross undertaking in damages. It was held not:

> "The duty of the Crown to see that the law declared by the statutory instrument is obeyed is not suspended by the commencement of proceedings in which the validity of the instrument is challenged. Prima facie the Crown is entitled as of right to an interim injunction to enforce obedience to it. To

> displace this right or to fetter it by the imposition of conditions it is for the defendant to show a strong prima facie case that the statutory instrument is ultra vires."

43. Both these cases and much of the rest of the extensive jurisprudence on the vexed question of the effect of executive orders and administrative decisions before a final judgment is reached on their validity were considered by the House of Lords in *Boddington v British Transport Police* [1999] 2 AC 143. It is sufficient for present purposes to cite just the following two short passages from the speech of Lord Irvine of Lairg LC:

> "Subordinate legislation, or an administrative act, is sometimes said to be presumed lawful until it has been pronounced to be unlawful. This does not, however, entail that such legislation or act is valid until quashed prospectively. That would be a conclusion inconsistent with the authorities to which I have referred. In my judgment, the true effect of the presumption is that the legislation or act which is impugned is presumed to be good until pronounced to be unlawful, but is then recognised as never having had any legal effect at all." (p 155 B-C)
>
> "In my judgment Lord Diplock's speech in the *Hoffmann-La Roche* case [1995] AC 295, when read as a whole, makes it clear that subordinate legislation which is quashed is deprived of any legal effect at all, and that is so whether the invalidity arises from defects appearing on its face or in the procedure adopted in its promulgation." (p 157G).

The Board would reject entirely Digicel's submission that the principle established in *Boddington* is relevant only in the context of criminal prosecutions and not, as here, Ministerial Directions. The Board would reject too the suggested analogy between Ministerial Directions and the orders of superior courts which, it is well established (see for example, *Isaacs v Robertson* [1985] AC 97) must always be obeyed, whatever their defects, until set aside.

44. What it all comes to is this. Subordinate legislation, executive orders and the like are presumed to be lawful. If and when, however, they are successfully challenged and found *ultra vires*, generally speaking it is as if they had never had any legal effect at all: their nullification is ordinarily retrospective rather than merely prospective. There may be occasions when declarations of invalidity are made prospectively only or are made for the benefit of some but not others. Similarly, there may be occasions when executive orders or acts are found to have legal consequences for some at least (sometimes called "third actors") during the period before their invalidity is recognised by the court – see, for example, *Percy v Hall* [1997] QB 924. All these issues were left open by the House in *Boddington*. It is,

however, no more necessary that they be resolved here than there. It cannot be doubted that the OUR was perfectly entitled to act on the legal advice it received and to disregard the Minister's Direction. This much too is plain from *Boddington* (see Lord Irvine's speech at pp 157H-158D) and, indeed, in the context of ministerial "guidance", from Lord Denning's judgment in *Laker Airways*:

> "[I]f the Secretary of State goes beyond the bounds of 'guidance', he exceeds his powers: and the Authority is under no obligation to obey him." (p 700A).

45. In the event, the OUR having disregarded the Direction and now been vindicated in its decision by the Board's judgment on the first issue, this second issue is altogether more easily resolved than might have been the case had there arisen the sort of subsidiary issues we identified earlier at para 41. Digicel must fail on issue two also.

Did the Determination contravene the terms of the Direction?

46. In the light of the answers that the Board has given to the first two issues, this issue is academic. The Board proposes to deal with it nonetheless, for it has an interrelationship with the fourth and final issue. The Board approaches this issue on the basis that the Determination had the effect of varying the terms of the ICA between C&WJ and Digitel and would have the same effect on any ICA concluded by a new competitor.

47. The submission that the Determination did not contravene the Direction received short shrift from Dukharan J. He held at p 20:

> "The OUR capped the amount to be paid by Cable and Wireless to mobile carriers in respect of calls made from its fixed line customers which terminate with a mobile carrier. The OUR also set the amount to be retained by Cable and Wireless when an incoming international telephone call is received by Cable and Wireless for termination on the network of a mobile carrier."

This, in his judgment, contravened the Direction.

48. The President took a different view. What the Direction prohibited was "setting rates, tariffs or price caps on the interconnection or retail charges *made by any mobile competitor"* (the Board's emphasis). The point accepted by the President was this. Determination 2.6 put a cap on the termination charges for calls from C&WJ's fixed network to Digicel's mobile network. This protected the callers, who were billed by C&WJ under the "caller pays" system. It was, however, open to Digicel to impose a charge on its own customers in respect of the calls that they received. Thus there was no cap on the charges that could be made by Digicel.

49. The Board considers this argument fallacious. Under the "caller pays" system, the mobile carrier who receives the FTM calls determines the charge to be made for termination (the mobile receipt of the call). The fixed network operator then recovers this from its customer. Determination 2.6 effectively capped the charge that Digicel could make. The fact that, in theory, Digicel could make a charge on its own customer, which would incidentally have violated the "caller pays" principle, is nothing to the point. So far as international calls were concerned, C&WJ would recover at rates not subject to regulation for the receipt of the incoming calls, but the amount that Digicel could charge C & WJ for onward transmission of these calls to its mobile network was capped.

50. The Board considers it clear that the Determination that produced these consequences contravened the Direction. That view was shared by both the Minister and the OUR.

Was the Determination within the powers of the OUR and lawfully made?

51. This issue is independent of the issue of the *vires* of the Minister's Direction. Digicel had advanced two independent grounds for contending that the Determination was unlawful. The first was that it was vitiated by irrationality. Mr Pleming QC told the Board that Digicel had reluctantly decided not to pursue this ground. The other ground turned on the construction of the Act. Digicel argued that the Act gave the OUR no power to impose on the parties to an existing agreement a variation of the terms of that agreement. Section 29(4) did not confer on the OUR a free standing power to impose on parties to a concluded contract, in relation to which the OUR had made no objection under section 29(3), terms and conditions in place of those that they had agreed. The power conferred by section 29(4) could be exercised only (i) where the parties were in a pre-contract dispute under section 34(1) or (ii) where the OUR had objected to an ICA under section 29(3). Neither was applicable in the present case.

52. The Board's conclusions are as follows. One way in which the Act enables the OUR to regulate charges is by imposing constraints on the terms under which those

competing in the market can contract with one another. Section 46 appears to contemplate an alternative means of price capping, but no rules were made pursuant to this section.

53. The Determination related to the approval of RIO 4 for C&WJ. This was part of an ongoing process pursuant to section 32(2) to (4) of the Act. Earlier RIOs had been approved, but on the basis that these were only to have temporary effect, to be replaced in due course by a revised RIO. Digicel were involved in the ongoing negotiations and had made no objection to the process. More significantly, at the instigation of the OUR, they had included in the ICA that they negotiated with C&WJ, provision for amendment of the ICA to give effect to changes that might be made to C&WJ's RIO.

54. The Board can see nothing inconsistent with the provisions of the Act in the process of replacing C&WJ's interim RIO with RIO 4. The Determination was lawfully made in accordance with the provisions of the Act. The effect of that determination on the ICA between C&WJ and Digicel is essentially a matter of private rather than public law. It depends upon the interpretation of clause 23 of that agreement. Clause 23.5 appears to constitute an agreement that the ICA would be amended to reflect the revised RIO.

55. C&WJ in their written case, paragraph 75, contended that the Court of Appeal found that, given Digicel's participation in the RIO approval process, Digicel was estopped from objecting to the Determination. That contention was not challenged, but it does not appear clear from page 45 of the Court of Appeal's judgment that in referring to estoppel the court was making its own finding rather than reciting a submission made by the OUR.

56. The Board has not found it easy to identify the precise reasoning of the Court of Appeal in relation to this issue. The President appears to have rejected the submission that C&WJ and Digicel could, by agreement, have conferred on the OUR the power to make a Determination that was not conferred by the Act, but held that Determination 2.6 and 2.8 were valid in relation to RIO 4.

57. As the Board understands the position, Digicel acted as if the OUR's Determination would, and subsequently did, amend the terms of its ICA with C&WJ. If any issue remains as to precisely how the Determination impacted on that contract, this is not a matter for resolution by the Board on this appeal.

58. For the reasons set out in this judgment the Board will humbly advise Her Majesty that this appeal should be dismissed.

59. Unless application is made to the Board within 28 days, the Appellant is to pay the Respondents' costs.