IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
(COMMERCIAL COURT)
2017: No. 231

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW UNDER THE RULES OF THE SUPREME COURT 1985 ORDER 53 RULE 3

AND IN THE MATTER OF THE REGULATORY AUTHORITY ACT 2011

AND IN THE MATTER OF THE ELECTRONIC COMMUNICATIONS ACT 2011

BETWEEN:

ONE COMMUNICATIONS LTD.
(FORMERLY KEYTECH LIMITED)

First Applicant

LOGIC COMMUNICATIONS LTD.
(TRADING AS ONE COMMUNICATIONS)

Second Applicant

BERMUDA DIGITAL COMMUNICATIONS LTD.
(TRADING AS ONE COMMUNICATIONS)

Third Applicant

CABLE CO. LTD

Fourth Applicant

- v -

REGULATORY AUTHORITY

Respondent

-and-

BERMUDA TELEPHONE COMPANY LIMITED

TELECOMMUNICATIONS (BERMUDA WEST INDIES) LTD

Interested Parties

JUDGMENT

(in Court)[1]

Judicial review-failure of Regulatory Authority to complete market review of telecommunications sector within prescribed time limit-effect of non-compliance with time limit on enforceability of initial 'ex ante remedies' imposed on significant market power entities-

Date of hearing: October 24-26, 2017
Date of Judgment: November14, 2017

Mr John Wasty and Ms Claudia Eisenberg, Appleby (Bermuda) Limited, for the Applicants
Mr Alex Potts and Ms Caitlin Conyers, Kennedys Chudleigh Ltd, for the Respondent (the "RA")
Mr Jeffrey Elkinson and Mr Rhys Williams, Conyers Dill and Pearman Limited, for the Interested Parties

Introductory

1. By Notice of Application dated June 16, 2017, the Applicants sought declaratory relief in respect of an alleged failure by the Respondent to comply (within the prescribed time limits) with section 59(2) of the Regulatory Authority Act 2011 and sections 23(6)(a) and 24(5) of the Electronic Communications Act 2011.

2. The complaint is that the RA has breached a statutory obligation to complete a fresh market review so as to decide whether it is appropriate to maintain, modify or discharge "*ex ante remedies*" imposed on August 7, 2013 based on the 2013 Market Review allegedly completed on April 29, 2013. Those remedies were ordered to regulate the activities of entities with "*significant market power*" ("SMP").

3. I found that this complaint was arguable and fit for further investigation on an *inter partes* basis. Leave to seek judicial review was accordingly granted on the papers on June 22, 2017.

4. The Interested Parties were served pursuant to this Court's Order dated July 6, 2017 which also directed that the present action should be transferred to the Commercial List. They supported the submissions advanced by the Applicants at the hearing.

5. The present application turns on a comparatively narrow point of statutory interpretation arising out of a regulatory context in which the regulated Applicants and Interested Parties, unabashedly raising a 'free market' flag, in effect invite the

[1] The present Judgment was circulated without a hearing to formally hand down Judgment.

Court to 'clip the wings of' the Authority. The RA in turn contends, unabashedly flying the regulatory consumer protection flag, that by dint of the statutory scheme defining its functions and the rights of regulated parties, any slippage in complying with time limits which may have occurred cannot possibly invalidate the effectiveness of the ex ante remedies until the relevant subsidiary legislative instrument has been expressly modified or replaced. The relevant primary legislative instruments are the Regulatory Authority Act 2011 (the "RAA") and the Electronic Communications Act 2011 (the "ECA").

6. Putting to one side the subsidiary dispute about precisely when the RA was required to complete its second market review (i.e. when the 4 year time limit for completing the review expired), the central dispute was what consequences flowed from a failure to comply strictly with the statutory time limit which had clearly (by the date of the hearing) occurred. An analysis of this narrow question touches upon not just the true object and purpose of the wider statutory scheme, but also involves at least cursory consideration of what alternative remedies are available to the Applicants within this legislative scheme.

Chronology of key events

7. It is useful to set out a timeline of key events (taken from the Applicants' helpful Chronology) which are relevant to the present application:

- **February 8, 2013**: the RA publishes two consultation documents;
- **April 29, 2013**: the RA publishes Part A and Part B of its Market Review Process. Part B was entitled "*Market Review Process (Part B) Significant Market Power Consultation Summary, Final Decision, Order and General Determination*';
- **August 7, 2013**: the RA issues "*Obligations for Operators with Significant Market Power (Consultation Summary, Final Decision, Order and General Determination)*" (the "SMP Order");
- **April 29, 2017**: Applicants contend next Market Review was due to be completed;
- **May 30, 2017**: the RA publishes a Market Review Request for Quotation;
- **June 16, 2017**: the present proceedings are commenced;
- **June 23, 2017**: the present proceedings are served on the RA. The RA writes the Minister requesting a waiver of the 4 year time limit;
- **August 7, 2017**: the 4th anniversary of the SMP Order when the RA conceded the Market Review ought to have been completed;

- **October 31, 2017**: the Market Review commences.

Overview of key statutory provisions

The time limit for completing the Market Review and its parameters

8. The crucial statutory provisions are found in Part 4 of the ECA ("*PROCESS FOR IMPOSING SIGNIFICANT MARKET POWER OBLIGATIONS EX ANTE*"). The first section (20) in Part 4 provides as follows:

> "***Determination of significant market power in relevant markets***
>
> *(1)The Authority may make administrative determinations that impose ex ante remedies on a communications provider in respect of its provision of electronic communications or the provision of subscription audiovisual programming content in a relevant market or markets if, individually or together with others, the communications provider has significant market power in that market.*
>
> *(2) In order to determine whether a communications provider has significant market power, the Authority shall conduct a review of a relevant market or markets in accordance with section 23 of this Act and section 59(2) of the Regulatory Authority Act 2011.*"

9. Central to the Applicants' case on when the time for completing the Market Review expired was the contention that the "review", identifying which providers were potentially subject to the imposition of an SMP order and describing the obligations likely to be imposed, was a distinct process from the actual imposition of the SMP Order consequential upon such review process. This bifurcated view of the process was supported by the following provisions:

(a) Section 21 ("*Principles and objectives of the market review process*") provides in its opening words:

> "*In determining whether to impose, modify or withdraw significant market power obligations with respect to a particular provider or providers based on its review of the relevant market, and in deciding which types of obligations to apply, the Authority shall*…";

(b) Section 23 ("*Market review procedures*") provides in salient part as follows:

"(4) *The Authority shall conduct a public consultation to review those markets identified in accordance with section 22 that in its view are susceptible to ex ante regulation, if any, or pursuant to subsection (6), for the purposes of—*

(a) evaluating whether these relevant markets are, or continue to be, correctly defined based on an economic assessment of supply and demand;

(b) analysing whether a communications provider, individually or with others, in fact possesses, or continues to hold, significant market power in one or more of these relevant markets based on the applicable facts and circumstances; and

(c) deciding which obligations, if any, should be imposed in respect of each relevant market characterised by significant market power in order to promote or preserve effective competition, in accordance with section 24";

(c) Section 24 ("*Imposition of ex ante remedies*") provides in the opening words of subsection (1):

"*(1) If, as part of the market review process, the Authority concludes that the imposition of one or more ex ante remedies is necessary to prevent or deter anti-competitive effects that are, or are likely to be, caused by the presence of significant market power in a relevant market, the Authority may make an administrative determination imposing one or more of the following obligations on any communications provider found to have significant market power in a relevant market…*"

10. Section 23 ("*Market review procedures*") is the key provision defining the procedural aspects of a market review process. The crucial provisions for the purposes of resolving the parameters of the time limit issue are the following:

"(5) *The Authority shall issue one or more general determinations designating the communications provider, if any, which, individually or with others, has significant market power in each relevant market reviewed pursuant to subsection (4) and specifying any ex ante obligations that shall apply in accordance with section 24.*

(6) A further review of any relevant product or geographic market identified as requiring ex ante regulation pursuant to subsection (5) may be carried out by the Authority on its own initiative or, at its discretion, upon the request of an interested party, provided that—

(a) the Authority shall conclude a further review of each relevant market within a period of not more than four years from the date of its completion of the previous review of the same relevant market in any case in which it has made a finding of significant market power; and

(b) in determining when to initiate an initial or further review of a relevant product or geographic market, the Authority shall take into account requests from sectoral participants, the views of consumers and relevant market developments.

(7)A general determination made by the Authority finding that a communications provider possesses significant market power in a relevant market shall be considered interim, and shall not constitute final Authority action for purposes of the Regulatory Authority Act 2011, until the Authority makes a determination specifying the ex ante obligations, if any, that shall apply in respect of such relevant market in accordance with section 24."

11. The RA submitted that section 23(7), in providing that a general determination did not become final until an SMP order was actually made, signified that the review process itself concluded at the final order stage. At first blush, this seemed to require a strained reading of the relevant portions of the statutory scheme.

The legal character of the SMP Order

12. Under section 23 (5) of the ECA, then, the RA makes "*one or more general determinations*" as to whether there are any SMP providers in the market under consideration and, further, what "*ex ante obligations*" should be imposed on any such providers under section 24. It is explained in section 23(7) that such determinations are interim only until a determination under section 24 (characterised in section 24(1) as an "*administrative determination*") is made. The following definitions in section 2(1) of the ECA are pertinent:

- "*'administrative determination' includes a general determination, order, direction, decision, or other written determination by which the Authority establishes the legal rights and obligations of one or more sectoral participants, but does not include an advisory guideline or an adjudicative decision and order*"

- "*'ex ante remedy' means a type of regulatory obligation imposed by the Authority on one or more sectoral providers with significant market power in order to prevent anti-competitive conduct and promote effective competition*"

- "*'general determination' means a statutory instrument, made by the Authority pursuant to section 62 of the Regulatory Authority Act 2011, that is applicable to all sectoral participants, or to such sub-category of sectoral participants as falls within the scope of the general determination*".

13. At first blush the statutory scheme appears to operate as follows. The ex ante remedies are promulgated by way of a general determination under section 23(5)

of the ECA, as read with section 62 of the RAA. They are then brought into force in relation to any relevant provider by an administrative direction under section 24 (1). Section 62 of the RAA provides as follows:

"***General determinations***

62 (1) Except where this Act or sectoral legislation authorizes a Minister or the Minister of Finance to make regulations, the Authority may make general determinations to carry out the provisions and purposes of this Act, sectoral legislation or any regulations.

(2) Any general determination—

(a) shall, subject to section 66, be made following a public consultation;

(b) shall constitute a statutory instrument, pursuant to the Statutory Instruments Act 1977;

(c) shall be subsidiary to this Act, sectoral legislation and any regulations; and

(d) may be revoked or modified by the Authority through the adoption of a subsequent general determination.

(3) In any case in which the Authority makes a general determination, the Authority shall issue a decision and order adopting the general determination and shall promptly forward the general determination to the Cabinet Secretary, who shall—

(a) assign a number to the general determination, pursuant to the Statutory Instruments Act 1977; and

(b) subject to subsection (3A), cause it to be published in the Gazette.

(3A)A Schedule to a general determination made in accordance with this section is not required to be included in the publication in the Gazette under subsection (3)(b) if—

(a) the Schedule is published on the Authority's official website;

(b) the Schedule is available for inspection at the offices of the Authority; and

(c) the general determination gives notice that the Schedule—

(i) is published on the Authority's official website; and

(ii) is available for inspection at the offices of the Authority.

(4) Section 6 of the Statutory Instruments Act 1977 does not apply to any general determination made by the Authority."

14. Other statutory provisions with respect to ex ante obligations were referred to by the RA's counsel in argument, which speak to the intended duration of obligations once imposed, their regulatory object and the Act's policy purpose. First, section 24 itself provides as follows:

"(5) *Following further review by the Authority of a relevant market that is already subject to one or more ex ante remedies and that continues to be characterised by the lack of effective competition, the Authority may, following a public consultation, make an administrative determination modifying any relevant obligations or imposing such additional remedies as it deems necessary, taking into account the impact and efficacy of the existing obligations and the costs and benefits of any changes.*

(6)For the purposes of assessing the costs and benefits of imposing, modifying or withdrawing a proposed ex ante remedy and evaluating the relevant evidence, including cost data and factors relating to technical or commercial feasibility, the burden of proof for demonstrating that a remedy should not be imposed, or should be modified or withdrawn, shall rest with the communications provider that is designated as having significant market power in the relevant market."

15. These provisions clearly contemplate the possibility of changes to ex ante obligations <u>before</u> the next obligatory four year market review mandated by section 23(6)(a). However, even such 'interim' changes must be preceded by a review. The lifting of ex ante obligations at the expiry of the usual 4 year term is explicitly conditional upon there being no demonstrated need to continue them because the market has become competitive. This emerges from the terms of section 25 of the ECA:

"*25. Where, as a result of a market review conducted pursuant to section 23, the Authority determines that a relevant market is effectively competitive it shall not impose any ex ante remedies in respect of that market and shall remove any ex ante remedies previously imposed within a reasonable period of time, but the Authority may decide not to remove certain obligations, including transparency and accounting separation obligations, if they continue to be necessary to preserve effective competition in cases where a closely related relevant market is subject to ex ante regulation.*"

<u>The Minister's power to extend time</u>

16. The RAA empowers the Minister to grant an "*exceptional waiver*" pursuant to the provisions of section 5(3)-(4). In the present case, the RA has sought without

success to obtain the benefit of the following statutory powers under section 5(6) of the RAA:

"*(6) Notwithstanding subsection (4), when requested by the Authority, a Minister, for good cause shown, may waive—*

(a) any deadline imposed on the Authority by this Act or by sectoral legislation by publishing a notice in the Gazette; and

(b) any deadline established by the Authority, pursuant to section 70(2)(f), in a public consultation document."

17. In controversy is whether or not the existence of this power signifies the importance of strict compliance with the 4 year time-limit for conducting the Market Review or contradicts the proposition that strict compliance is required. It is merely self-evident that if the 4 year time-limit under the ECA were to have been validly waived, no question of breach of the time limit would arise. The conundrum is that no such waiver has even arguably occurred. A related controversy is whether the following further time-limit (also found in the RAA) means that it is now too late for the Minister to exercise the waiver power:

"***Requests from the Authority***

10. (1)A Minister shall have the power to approve, or decline to approve, actions of, or actions requested by, the Authority where expressly provided for in this Act or in sectoral legislation.

(2)A Minister shall notify the Authority whether or not he grants approval, within—

(a) 30 days of receiving a request for approval; or

(b) such other period as the Minister may specify by written notification submitted to the Authority within 30 days of receiving a request for approval.

(3)In any case in which a Minister declines to grant approval pursuant to subsection (2), the Minister shall provide the Authority with a written explanation as to the reasons why the Minister has declined to do so.

(4) Any notification from the Minister pursuant to subsection (2) shall be published in the Gazette, and on the Authority's official website, but the Minister may cause to be redacted any portion of the notification that he reasonably concludes meets the standards specified in section 7(3)."

18. At first blush it is difficult to discern why section 10 of the RAA should apply to some requests from the RA but not requests under section 5(6).

Factual findings: the current relevance of the existing ex ante obligations

19. The Applicants' most cogent factual complaint is not that the existing ex ante obligations are no longer enforceable because the Applicants no longer enjoy significant market power. The complaint is that because of significant market changes since the 2013 Market Review, the existing obligations are no longer relevant (First Frank Amaral Affidavit, paragraphs 58-62). The heading to paragraph 63 of the same Affidavit ("*Anti-competitive effect of the ex ante remedies in the absence of a current market review*") is not on its face clearly substantiated by the following averment:

> "*63…I consider that the continued enforcement of the ex ante remedies provided for in the SMP Order (in the absence of further market reviews) will cause serious and irreparable harm to the communication providers on whom ex ante remedies have been imposed, and their customers and shareholders, for the development of natural competition in the electronic communications sector in Bermuda and for the Bermuda public in general…*"

20. It is easier to accept at face value the concrete assertion that there are "*unnecessary costs of compliance*" (paragraph 63.4) than the rather nebulous assertion that the continued impact of the obligations actually serves to impede competition. The RA's own provisional view, set out in the 2017 Consultation Document, is that "*the current regulatory framework needs to be modified in order to meet the new market realities*" (Third Matthew Copeland Affidavit, paragraph 8). The Applicants' assertion that there are unnecessary costs of compliance is not disputed, and is actually indirectly acknowledged: "*the RAB fully recognizes the fact that the Applicants have identified certain commercial concerns*" (First Copeland, paragraph 10). However, it is not expressly conceded that a likely outcome of the 2017 Market Review is the removal of all ex ante obligations. The Interested Parties' evidence (First Robin Seale Affidavit) also makes a more convincing case of commercial prejudice to the providers through the maintenance of outdated obligations, than it supports a finding that removing all existing obligations would make for a more competitive market from a consumer perspective. Such prejudice takes the form of not simply unnecessary costs being incurred, but also more generalised commercial harm attributable to uncertainties about the ability to obtain a return on investment because, *inter alia*, new products cannot sensibly be made available to the public without being able to quantify the costs of unknown pending new regulatory rules.

21. On superficial analysis, and from the SMP providers' perspective, it may well seem absurd that the RA has on the one hand openly conceded that market conditions have changed while at the same time having been coy (in terms of the formal evidential position at least) about conceding that any specific obligations need not be complied with. The response that modifications could only be brought into effect after a further review was however consistent with the express terms of the statutory scheme. The question of how strictly this aspect of the statutory scheme must be adhered to is a question which is closely connected to the central issue in controversy: what consequences flow from non-compliance with the

statutory time limits for carrying out a periodic market review? There is an obvious tension between the proposition that the time limits for carrying out the market reviews need not be adhered to strictly and the contention that existing ex ante obligations must be fully complied with, regardless of their relevance, until a new market review is carried out. This tension is exacerbated by the following statement at page 68 of the First Consultation and Markets Notice issued by the RA on October 17, 2017, upon which the Applicants relied in their Supplementary Submissions:

> "-*…the Authority considers that the regulatory framework of 2013 needs to be significantly revised.*
>
> - *The Authority is therefore proposing to remove the majority of the existing SMP remedies. While the Authority conducts the Review, the Authority expects ICOL holders to comply with a minimum set of existing obligations, such as maintaining existing access arrangements and continuing to inform the Authority of pricing and business plans regarding next generation investments*…."

22. This is a significant concession as to the current relevance of the existing ex ante obligation. In the absence of oral evidence and cross-examination, the most that this Court can factually find on the relevance of the current obligations is as follows:

    (a) it is common ground that the "*majority of the existing*" ex ante obligations are no longer fit for purpose and should be replaced;

    (b) it is unclear which particular obligations are wholly unnecessary and which are still potentially useful in terms of promoting market competitiveness;

    (c) it is clear that the providers affected by the outdated ex ante obligations are, to some extent at least, incurring unnecessary costs which as a matter of general principle they should, if possible, be relieved from incurring, pending the completion of the 2017 Market Review;

    (d) the First Consultation and Markets Notice issued by the RA expressly proposes that, pending the completion of the 2017 Market Review, providers should not be required to comply with more than "*a minimum set of existing obligations*".

Factual findings: the reasons for any delay

23. The reasons for any delay are not really material to the present application. The RA advances two main reasons as to why the Market Review was not completed before what it contends was the deadline of August 7, 2017. First, other regulatory commitments including (as of October 2016) a broadening of its mandate to include the electricity sector. Second, limited financial and human resources. These considerations do not, in my judgment, support a submission that the time limit was substantially complied with. Substantial compliance could only be established by proof that the relevant statutory obligation (completing the Market Review) was fulfilled in a sufficiently timely fashion to render any non-compliance trivial. The Interested Parties through the Affidavit of Kyle Masters disputed the pleas of poverty made by the RA, asserting that its audited accounts reveal a surplus in 2016 and the capacity to acquire the necessary human resources to conduct the review. These are disputes I see no need to resolve.

24. Mr Wasty suggested that an additional explanation for the delay may well have been a more fundamental misunderstanding by the RA of what had to be done by when. Appendix D to Market Review Process Part A incorrectly states:

> "*7. Additionally, ∱ 23(6)(A) of the ECA that a subsequent review of the relevant market must be commenced by the Regulatory Authority '…within a period of not more than four years from the date of completion of the previous review…*'" [emphasis added]

25. The same document (paragraph 334, footnote 220) correctly describes the relevant obligation as being to complete the review within four years of the completion of the last one. I am accordingly unable to find that the RA mistakenly believed that it merely had to commence (rather than complete) the 2017 Market Review within the relevant four year period. I find no reason to doubt, however, that the reasons for the delay are unintentional and explicable at least in part due to logistical challenges beyond the RA's full control.

Findings: on what date did the 4 year time limit expire?

26. Having heard Mr Wasty's opening submissions, the Applicant's case that the first Market Review under the ECA was completed on April 29, 2013 appeared to me to be a straightforward one. However Mr Potts succeeded in turning an improbable point into a plausible one. The review process begun under section 23 can indeed be viewed as concluding with the imposition of ex ante obligations under section 24. In reply, Mr Wasty doubted that a time limit should be viewed as being fixed by a date as fluid as when ex ante remedies happen to be imposed. Having reflected on the relevant statutory provisions, I am bound to accept Mr Wasty's construction.

27. It is entirely consistent with a straightforward reading of the statutory provisions to regard the "market review" as a process governed by section 23 of the ECA consisting of the following key elements identified in section 23(1): (a) defining products, (b) defining the geographical scope of markets, (c) assessing market power in the markets under consideration, and (d) establishing effective ex ante obligations and remedies. The RA is required to conduct a public consultation and, under section 23(5) issue one or more general determinations identifying (1) providers with significant power, and (2) identifying ex ante obligations to be imposed under section 24. That the review process is complete when these general determinations are made under section 24(5) is ultimately clear because the very next subsection (6) addresses the topic of a "further review". It is consistent with the natural and ordinary meaning of the word "review" in the context of section 23 and the ECA as a whole to construe it as meaning a 'study' conducted with a view to formulating the legislative basis for potential regulatory enforcement. This meaning, on a contextual reading of subsection (7), is confirmed by the averment that the ex ante obligations identified in the review do not take effect until they are implemented under section 24 ("*Imposition of ex ante remedies*"):

> "*(7) A general determination made by the Authority finding that a communications provider possesses significant market power in a relevant market shall be considered interim, and shall not constitute final Authority action for purposes of the Regulatory Authority Act 2011, until the Authority makes a determination specifying the ex ante obligations, if any, that shall apply in respect of such relevant market in accordance with section 24.*"

28. I accept the ultimately compelling submission made by Mr Wasty that, in time-limit terms, it makes no sense to link the completion date of the review alluded to in section 23(6)(a)) with the date when the remedies prescribed by the review are implemented under section 24. Such a construction, apart from being inconsistent with the primary meaning of the relevant provisions, would lead to absurd results if the distinction between the character of the determinations made under section 23 and 24 is properly understood. Before dealing with the significance of the enactment that the imposition of ex ante measures under section 24 does constitute "*final Authority action*" for the purposes of the RAA while the general determination made under section 23(5) does not, a few preliminary points must be made.

29. The date when the general determination is made is a solid date which can be controlled by the RA itself. The determination of market power is expressly required to be based on a "*forward-looking assessment*" (section 23(1)(c)). It is a notorious fact that foresight is not '20/20'. The four year limit for a further review is a long-stop date in a commercial and regulatory context in which the market is known to evolve quickly and it is important that regulatory measures be as current as possible. It also is self-evident that the statutory tool of regulating, *inter alia*, prices which a provider may set is an intrusive one which interferes with the regulated entity's ability to conduct business as it sees fit. Mr Wasty illustrated

this point by reference to the following observations of the English Competition Appeal Tribunal in *Telefonica-v-Ofcom* [2012] CAT 28 at [25]:

> "*The imposition of price controls is generally recognised as being the most intrusive form of regulation available …and this is reflected in…stringent conditions which have to be established before such controls may be imposed.*"

30. All of these factors point to the completion date of the review being not simply earlier rather than later, but instead based on the review itself rather than its subsequent implementation. The subsection in which the time limit appears bears reading again:

> "(6)*A further review of any relevant product or geographic market identified as requiring ex ante regulation pursuant to subsection (5) may be carried out by the Authority on its own initiative or, at its discretion, upon the request of an interested party, provided that*—
>
> *(a) the Authority shall conclude a further review of each relevant market within a period of not more than four years from the date of its completion of the previous review of the same relevant market in any case in which it has made a finding of significant market power; and*
>
> *(b) in determining when to initiate an initial or further review of a relevant product or geographic market, the Authority shall take into account requests from sectoral participants, the views of consumers and relevant market developments.*" [emphasis added]

31. The date when the administrative determination is made under section 24 of the ECA implementing the ex ante remedies identified in the general determination made under section 23(5) is a potentially fluid one. Section 23(7) makes it clear that a section 24 determination does constitute "*final Authority action*" for the purposes of the RAA. There is no right of appeal against a general determination which is not "final Authority action", but a right of appeal does exist against a section 24(1) administrative determination by virtue of section 23(7). Section 93 of the RAA provides:

> "*(1) Any person aggrieved by a final Authority action may appeal on that account to the Supreme Court.*
>
> *…*
> *(5) On any such appeal the Court may make such order, including an order for costs, as it thinks fit, provided that the Court may not issue an order requiring the Authority to pay compensatory or punitive damages for actions taken in the performance of its official duties….*

…

(8) An appeal under subsection (1) shall not result in a stay of the administrative determination of the Authority appealed from, unless the party seeking the stay can demonstrate to the court that it—

(a) is likely to prevail on the merits; and

(b) *will suffer irreparable harm if the stay is not granted.*"

32. It is ultimately clear that because of the possibility of a stay being granted pending appeal (albeit not as a matter of course) and the possibility of an appeal resulting in the setting aside of a section 24 determination, the date when the determination actually takes effect is not only uncertain but is almost completely detached from the completion of the actual review. When an SMP determination accompanied by ex ante obligations is in legal terms actually made is a moving target. There appears to be no time mandated within which such a determination must be made, but it will always be after the section 23(5) general determination. This is simply a further consideration supporting the view that that the market review process should be viewed as being completed for section 23(6)(a) time limit purposes when the section 23(5) general determination is made.

33. In the present case I find that the latest date for the completion of the Market Review was April 29, 2017, the fourth anniversary of the initial review which was completed by the making of the section 23(5) general determination on April 29, 2013.

Findings: the legal character of the SMP Order

34. The Applicants did not contest the RA's assertion that the SMP Order, applying the ex ante remedies in the general determination published on April 29, 2013, took effect as a statutory instrument. It might be that there may in some instances be a period of liminality, for instance when a section 24 determination has been stayed pending appeal, between the making of the determination and the determination taking effect as regards the appealing provider.

35. In the present case, by common accord, the Applicants and Interested Parties are bound by the ex ante obligations identified in the section 23(5) general determination and applied to them by the section 24(1) administrative determination[2]. The substantive obligations constitute subsidiary legislation, as Mr Potts asserted. I am bound to find that the statutory instrument through which the SMP Order was made remains in force until it is modified or revoked under either section 24(5) or 25 of the ECA. That is the theoretical position. In practical terms, there is of course a distinction between a statutory provision being in force

[2] The Interested Parties became subject to the ex ante obligations as a result of a merger in 2016.

and the allied but distinct question of whether it is enforceable in particular factual circumstances.

Has the RA failed to comply with the time-limit in section 23(6)(a) of the ECA?

36. I find that the RA has failed to comply with the obligation to complete the requisite market review within four years of April 29, 2013, namely by April 29, 2017. I accept Mr Elkinson's submission on behalf of the Interested Parties that the Minister himself was required to adjudicate the extension request within 30 days pursuant to section 10 of the RAA. I reject Mr Potts' submission that it is still possible for the Minister, over six months' after the relevant time-limit expired, to extend the time-limit or waive the non-compliance, without the Minister himself being in breach of another time-limit imposed by the statutory scheme. I can find no valid basis for construing section 10 as applying to some requests made by the RA but not to others.

37. The power is conferred upon the Minister under section 10(1) "*to approve, or decline to approve, actions of, or actions requested by, the Authority where expressly provided for in this Act or in sectoral legislation*" [emphasis added]. Section 5(6) of the RAA provides:

> *"when requested by the Authority, a Minister, for good cause shown, may waive—*
>
> *(a) any deadline imposed on the Authority by this Act or by sectoral legislation by publishing a notice in the Gazette…"*[emphasis added]

38. Section 10(2) not only requires the Minister to decide whether to refuse or accede to any request from the RA within 30 days. It requires him within that same 30 days in default to indicate a longer period within which he will make a decision. The Minister has plainly failed to comply with section 30(2).

39. I find that the Minister has lost the right to grant an extension of time at this juncture in the factual circumstances of the present case. Supervening impossibility might justify a letter indicating that the Minister proposed to make a decision within an extended time period being sent shortly after the initial 30 day period expired. The onset of the General Election soon after the RA requested a waiver could have been a ground for the Minister notifying the RA within 30 days of the waiver request of June 23, 2017 that he would decide within a specified time after the General Election. It cannot justify a failure to both (a) not decide within 30 days, and (b) not to commit within the same 30 days to deciding within an extended time period. The Minister was served but has elected not to participate in the present proceedings.

40. But the present proceedings are primarily concerned with the underlying time-limit with which the RAA has failed to comply. It is clear beyond argument that the RA has failed to comply with the pertinent time-limit to a more than trivial extent and that the Minister has not even purported to cure that deficiency, more than three months after the statutory time within which he was required to decide (or extend the time for deciding) expired. To the extent that the pre-*Soneji* test formulated by Lord Woolf in *R-v-Home Secretary, ex parte Jeyeanthan* [2000] 1 W.L.R. 354 at 362 is still of assistance, which I believe it is, I would resolve each of the first two of three following questions posited in that case by Lord Woolf in the negative for the purposes of the present case:

> "*1. Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance? (The substantial compliance question.)*
>
> *2. Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? (The discretionary question.) I treat the grant of an extension of time for compliance as a waiver.*
>
> *3. If it is not capable of being waived or is not waived then what is the consequence of the non-compliance? (The consequences question.)*"

41. In my judgment it is clear that the RA has failed to demonstrate substantial compliance with the statutory obligation (under section 23(6)(a) of the ECA) to complete the second market review within four years of April 29, 2013. Although this question required more analysis, it is ultimately also clear that although the non-compliance could have been waived by the Minister (not this Court), waiver is no longer possible. It remains to consider Lord Woolf's third question, what are the consequences of the non-compliance which has occurred.

Findings: consequences of failure to comply with section 23(6)(a) of the ECA time-limit

Legal test

42. It was essentially common ground that the House of Lords decision in *R-v-Soneji* [2006] 1 AC 240 set out the guiding principles on the consequences of failure to comply with a statutory time-limit which this Court should follow. The core principle was that the Court has to determine what Parliament intended to be the consequence of failing to comply with a time-limit. Lord Steyn at 350 identified the crucial question as being:

"*15… taking into account those consequences, whether Parliament intended the outcome to be total invalidity. In framing the question in this way it is necessary to have regard to the fact that Parliament ex hypothesi did not consider the point of the ultimate outcome. Inevitably one must be considering objectively what intention should be imputed to Parliament."*

43. In the context of a proceeds of crime case, it was held by the House of Lords in *Soneji* (and by this Court and the Court of Appeal in *DPP-v-Roberts* [2006] Bda LR 19; *Roberts-v- DPP* [2008] Bda LR 37) that the Crown's failure to comply with a time limit did not deprive the Crown of the ability to pursue and obtain a confiscation order. The relevant test for resolving the question of what consequences flowed from non-compliance with a statutory time-limit was formulated in a nutshell as follows: what consequences would Parliament have intended to flow from the non-compliance complained of? The following passages from the judgment of Lord Steyn are most pertinent:

"*15. In London & Clydeside Estates Ltd v Aberdeen District Council [1980] 1 WLR 182, 189E-190C Lord Hailsham put forward a different legal analysis:*

'When Parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail. But what the courts have to decide in a particular case is the legal consequence of non-compliance on the rights of the subject viewed in the light of a concrete state of facts and a continuing chain of events. It may be that what the courts are faced with is not so much a stark choice of alternatives but a spectrum of possibilities in which one compartment or description fades gradually into another. At one end of this spectrum there may be cases in which a fundamental obligation may have been so outrageously and flagrantly ignored or defied that the subject may safely ignore what has been done and treat it as having no legal consequences upon himself. In such a case if the defaulting authority seeks to rely on its action it may be that the subject is entitled to use the defect in procedure simply as a shield or defence without having taken any positive action of his own. At the other end of the spectrum the defect in procedure may be so nugatory or trivial that the authority can safely proceed without remedial action, confident that, if the subject is so misguided as to rely on the fault, the courts will decline to listen to his complaint. But in a very great number of cases, it may be in a majority of them, it may be necessary for a subject, in order to safeguard himself, to go to the court for declaration of his rights, the grant of which may well be discretionary, and by the like token it may be wise for an authority (as it certainly would have been here) to do everything in its power to remedy the fault in its procedure so as not to deprive the subject of his due or themselves of their power to act. In such cases, though language like 'mandatory,' 'directory,' 'void,' 'voidable,' 'nullity,' and so forth may be

helpful in argument, it may be misleading in effect if relied on to show that the courts, in deciding the consequences of a defect in the exercise of power, are necessarily bound to fit the facts of a particular case and a developing chain of events into rigid legal categories or to stretch or cramp them on a bed of Procrustes invented by lawyers for the purposes of convenient exposition. As I have said, the case does not really arise here, since we are in the presence of total non-compliance with a requirement which I have held to be mandatory. Nevertheless I do not wish to be understood in the field of administrative law and in the domain where the courts apply a supervisory jurisdiction over the acts of subordinate authority purporting to exercise statutory powers, to encourage the use of rigid legal classifications. The jurisdiction is inherently discretionary and the court is frequently in the presence of differences of degree which merge almost imperceptibly into differences of kind.'

This was an important and influential dictum. It led to the adoption of a more flexible approach of focusing intensely on the consequences of non-compliance, and posing the question, taking into account those consequences, whether Parliament intended the outcome to be total invalidity. In framing the question in this way it is necessary to have regard to the fact that Parliament ex hypothesi did not consider the point of the ultimate outcome. Inevitably one must be considering objectively what intention should be imputed to Parliament." [Emphasis added]

44. Although there was controversy as to how this test fell to be applied, it was essentially common ground that this Court was bound to apply Lord Steyn's test and to determine what consequences Parliament must have intended to follow from the non-compliance which the Applicants have succeeded in establishing has occurred.

Application of the Soneji test

45. The proper analysis of the presumed intention of Parliament as to the consequences of non-compliance in my judgment lies between the positions adopted by the Applicants, supported by the Interested Parties, and the Respondent. The Applicants, without convincingly making out a case for this result other than in somewhat broad-brush terms, made the following conclusory submission:

"*68. In the premises, the Applicants contend that it must be unlawful to maintain regulation in the absence of fulfilment of the relevant statutory requirements that it is only maintained when demonstrably justified as necessary and proportionate in the relevant circumstances pursuant to a market review. The Applicants respectfully ask the Court to declare it so*…"

46. Mr Potts on behalf of the RA objected in part on the grounds that the true characterisation of the relief being sought by the Applicants was injunctive relief restraining the RA from enforcing the SMP Order. Such relief was inappropriate in circumstances where there was a statutory right of appeal against any final RA action under section 96 of the RAA. In direct response to the assertion that the effect of any non-compliance was that the SMP Order could no longer be lawfully enforced, the RA argued:

> "*19. On the contrary, the correct interpretation of the ECA 2011 and the RAA 2011 is that the Bermuda Parliament intended that regulations, General Determinations, and statutory instruments published and promulgated thereunder on an indefinite basis rather than a fixed-duration basis, would continue to remain valid and inforce indefinitely, until such time as they were consciously and deliberately amended, repealed, removed or withdrawn, or otherwise replaced.*
>
> *20. This analysis does not necessarily mean that an adversely affected party with a significant interest might not be in a position to challenge, whether by way of statutory appeal or otherwise, a delay on the part of a public authority in exercising certain functions. It does mean, however, that the legal consequence of such delay is most usually going to be a Court Order directing the relevant public authority to complete its functions without any further delay, assuming such an Order serves a useful and practical purpose.*"

47. The first of these two submissions is plainly right. No coherent legal basis was identified by the Applicants which was capable of justifying the conclusion that the SMP Order became wholly unenforceable, by necessary implication from the statutory scheme, by virtue of a failure to comply with the four year time-limit for conducting a further market review which is imposed by section 23(6)(a) of the ECA. The statutory scheme clearly envisages that once ex ante obligations are imposed under section 24, they remain in force until modified or withdrawn under section 24 (5) or 25. However in my judgment the second submission, that merely a declaration requiring the RA to complete the Market Review would be appropriate, requires closer scrutiny. Mr Potts supported this submission by reference to Auburn, Moffett and Sharland, '*Judicial Review: Principles and Procedure*' (paragraph 9.29):

> "*Cases where an individual seeks to require a public body to act without any further delay do not normally give rise to any difficulty. In such cases, the court will approach the matter in the same way as it approaches other applications for mandatory orders against public bodies.*"

48. The passage relied upon does not address the present scenario where the Applicants are not simply seeking to compel the RA to perform its overdue statutory obligation, but primarily to obtain a declaration that the RA is not

lawfully entitled to enforce the SMP by reason of delay. Declarations were sought, further to the primary declaration that the RA had failed to substantively comply with, *inter alia*, section s 23(6)(a) and section 24(5) of the ECA, in the following terms:

> "*2. any attempt by the Regulatory Authority to maintain, directly or indirectly, any ex ante remedies provided for in the Regulatory Authority's 'Obligations for Operators with Significant Market Power (Consultation Summary, Final Decision, Order and General Determination)', dated 7 August 2013 is ultra vires, unlawful and invalid;*
>
> *3. any attempt by the Regulatory Authority to impose, directly or indirectly, any ex ante remedies in contravention of section 59(2) of the RAA and sections 23(6)(a) and 24(5) of the ECA will be ultra vires, unlawful and invalid.*"

49. The real difficulty with the declarations sought is their breadth, not just the fact that they amount to seeking injunctive relief without meeting the requirements for obtaining injunctive relief. The second declaration adds little of substance to the first. The legal question which these heads of relief raise is the following: may Parliament be deemed to have intended that if the relevant time limits were not complied with the RA would not (as an automatic result) be entitled to enforce <u>any of</u> the ex ante remedies? This question must clearly be answered in the negative. As Mr Potts demonstrated with his painstaking analysis of the statutory scheme, it is impossible to infer such a dramatic result having regard to the clear policy leaning in the Act in favour of the RA and its 'consumer protection' role. Here, despite the passage of time and the expiration of the four year time period for completing a further market review, some at least of the existing ex ante measures still *prima facie* have utility and vitality. The dominant legislative purpose would be undermined if, in circumstances such as these, the RA could not enforce useful obligations which were still legally in force simply because of the failure to conduct a further market review within the prescribed time. If Parliament had intended all existing obligations to lapse after four years if no further review was completed, it could have said so. This was plainly not the legislative intent.

50. On the other hand, this same analysis, blended with Mr Wasty's illumination of the extent to which the statutory scheme places importance on timeliness (e.g. RAA sections 10(2) (the Minister must decide quickly), 16(a) (the RA "*must act in a timely manner*") and 66(1) (the RA is given the power to make interim and emergency determinations) leads to the following inevitable conclusion. The intention cannot be imputed to Parliament that the RA should be required (or entitled) to enforce ex ante measures which by reason of the effluxion of time have clearly lost their intended statutory competition–promoting efficacy. The entire rationale for conferring such intrusive powers on the RA, which constrain the economic freedoms of the affected providers, is not to confer raw power on the RA which can be exercised at its whim. Rather the statutory aim is to confer regulatory powers to be deployed in service of the policy objectives of the

statutory scheme. And the statutory scheme clearly demands regulatory action which is grounded in current market realities and carefully calibrated. For instance, reliance was aptly placed by Mr Wasty on the following provisions of the ECA:

> "*21. In determining whether to impose, modify or withdraw significant market power obligations with respect to a particular provider or providers based on its review of the relevant market, and in deciding which types of obligations to apply, the Authority shall seek to—*
>
> *(a) develop or maintain effective and sustainable competition for the benefit of consumers with regard to price, innovation and choice;*
>
> *(b) promote investment in the electronic communications sector;*
>
> *(c) establish ex ante remedies that are effective but proportionate, taking into account the costs of compliance and the ultimate benefits to consumers;*
>
> *(d) establish ex ante remedies that apply on a technology-neutral and service neutral basis whenever feasible; and*
>
> *(e) rely on market forces and withdraw, reduce or limit ex ante remedies in circumstances where the Authority concludes that markets are effectively competitive or likely to become so within a reasonable period of time, taking into account actual and expected market circumstances.*" [Emphasis added]

51. Section 21(c) is relevant in the present case because the RA has in its evidence made a very important, albeit un-particularised, concession that "*the current regulatory framework needs to be modified in order to meet the new market realities*" (Third Matthew Copeland Affidavit, paragraph 8). In addition, "*the RAB fully recognizes the fact that the Applicants have identified certain commercial concerns*" (First Copeland, paragraph 10) This suggests, without providing a basis for any specific evidential findings, that it is likely that one or more of the existing ex ante remedies has lost its utility, resulting in the relevant providers being compelled to incur costs which are not proportionate to any corresponding benefit to consumers. More significantly still, the RA's own position going into the 2017 Market Review (and enunciated only days before the present hearing) is that it is "*proposing to remove the majority of the existing SMP remedies*" and only expects providers in the interim "*to comply with a minimum set of existing obligations*". This again does not justify any specific evidential findings as to which existing obligations the RA expects providers to comply with. But is a very clear indication that the RA itself has formed a provisional view that there is no longer any practical need to enforce the "*majority*" of the existing obligations.

52. The legal default position cannot possibly be, as the RA contends, that it may lawfully enforce existing remedies which have lost their statutory function until

such time as it completes the 2017 Market Review. Mr Potts astutely appreciated that this position, in its most absolute form, was untenable. Accordingly, he suggested that the more appropriate remedy for the Applicants was to, in effect, wait and see if the RA took enforcement action and then challenge any action which they saw fit to challenge through the appeal process. Mr Wasty rightly poured scorn on this proposition.

53. The purpose of judicial review is to promote the interests of good administration. In *R v Monopolies and Mergers Commission, ex p Argyll Group Plc* [1986] 2 All ER 257 at 266, Sir John Donaldson MR in a frequently quoted judgment stated:

> "*We are sitting as a public law court concerned to review an administrative decision, albeit one which has to be reached by the application of judicial or quasi-judicial principles. We have to approach our duties with a proper awareness of the needs of public administration….*
>
> *Good public administration requires a proper consideration of the legitimate interests of individual citizens, however rich and powerful they may be and whether they are natural or juridical persons. But in judging the relevance of an interest, however legitimate, regard has to be had to the purpose of the administrative process concerned….*"

54. In my judgment it is inconsistent with the interests of good public administration for a regulatory authority which has failed to comply with its statutory obligation to ensure that commercial entities required to comply with intrusive regulatory measures are only doing so for some corresponding public benefit to, in effect, adopt the following position. '*We appreciate that these measures are commercially hurtful and we consider that the majority of them are out of date and no longer serve any practical policy purpose. Despite having failed to comply with the statutory time limits designed to ensure that this does not occur, we will not take the initiative to decide, on an urgent basis, that some emergency relief is required. We will not tell you definitively which obligations we suspect should be withdrawn. If you, the providers, believe that we are not entitled to enforce certain obligations which are still technically in effect. Ignore the relevant obligations and take your chances with being found to have broken the law if we choose to take enforcement action. PS: the public is advised that we do not propose to enforce all of the obligations pending the completion of the review*'. This position is, very broadly, analogous to the following hypothetical scenario:

- *the Minister for Works and Engineering under section 7(2A) of the Road Traffic Act 1947 imposes a special speed limit for the month of August due to road works by publishing a statutory order on a particular stretch of road. By August 27 the work is clearly finished but the Order has not*

been formally revoked. A law abiding driver seeks advice as to whether or not the special speed limit is still in force, and the Ministry suggest that it is up to the driver to decide whether or not he wishes to abide by the special speed limit or risk getting booked for speeding: in my judgment, the Minister's statutory duty would be to promptly revoke the order imposing the special speed limit which is no longer required and inform the citizen that this is being done.

55. The RA's suggested approach is in my judgment inconsistent with the rule of law. Enforceable legislative rules must have a minimum level of certainty to them. First Deemster David Doyle in a September 18, 2017 talk to Manx trainee advocates on 'The Rule of Law' defined the rule of law in the following way:

> "1. *Different people define 'the rule of law' in different ways. It appears common ground that the rule of law requires adherence to certain minimum standards of fairness, both substantive and procedural, in the enforcement of rights and responsibilities.*
>
> *2. It is suggested that the rule of law as a minimum must deliver just laws which:*
>
> - *are clear, certain, predictable and accessible to all…*"

56. In my judgment the RA's contention that it can make no adjustment to the ex ante obligations until the full quadrennial Market Review is completed is based on an overly mechanistic view of its regulatory functions which grossly underestimates the flexibility of its statutory powers and fails to appreciate the intended dexterity of its statutory role. It is a view which effectively writes the interim/emergency general determination powers under section 66 of the RAA out of the legislative picture. It also calls for an interpretation of the RAA and the ECA which could potentially be used as a clarion call for inaction and delay. The RA would effectively be rewarded for failing to comply with statutory time limits designed to ensure the efficacy of regulatory measures while the regulated entities would bear all risks and costs. It is, most significantly, also inconsistent with the express representation made shortly before the substantive hearing of the present application in the First Consultation and Markets Notice issued by the RA on October 17, 2017 that pending the completion of the 2017 Market Review, the RA will only require providers affected to "*comply with a minimum set of existing obligations, such as maintaining existing access arrangements and continuing to inform the Authority of pricing and business plans regarding next generation investments*". As this statement speaks to the interim position the RA proposes to adopt pending the completion of the 2017 Market Review, it cannot be dismissed as reflecting a merely interim or provisional position.

57. The effect of this representation can be analysed in two ways. It may be characterised as giving rise to a substantive legitimate expectation that the RA will

only require the Applicants and Interested Parties to comply with a minimum set of existing obligations, such as those indicated in the document. The Applicants did not seek to amend their case to rely on any such legitimate expectation, doubtless because they sought broader relief and were unwilling to dilute their arguments by addressing the possibility of narrower declaratory relief. Alternatively, this representation may be viewed as simply fortifying the conclusion that this Court would otherwise have reached on the fundamental unfairness of a regulatory authority both (a) acknowledging that most of a set of obligations will not be enforced and (b) declining to clarify precisely what obligations regulated entities are expected to comply with during the course of a recently commenced market review process. The rule of law requires public bodies entrusted with creating legally enforceable rules to ensure that persons affected by the rules can ascertain with relative ease and certainty what the content of the operative rules actually is.

58. The present factual matrix is, it must be acknowledged, an unusual one. The RA admits that the existing ex ante obligations are both (a) mostly no longer fit for their intended purpose, and (b) creating undue commercial pressure on the regulated providers. The regulator has on top of this been found in breach of an obligation to complete the second market review, at the latest, by April 29, 2017. Absent this constellation of factors, the default position might well ordinarily be that the most appropriate remedy for disgruntled providers would be appealing any enforcement action taken against them if they elected not to honour obligations they believed were no longer lawfully enforceable.

59. On the facts of the present case, however, the Applicants must in my judgment be entitled to a declaration which at a minimum acknowledges that the RA is not entitled to enforce any elements of the ex ante obligations which by reason of the effluxion of time no longer serve their intended purpose of mitigating the adverse market effects of the Applicants' dominant market position. There is no alternative appropriate statutory remedy they should be left to seek. The practical result would be to neutralize the normal statutory presumption that the remedies are not only in force but also enforceable and accordingly must be complied with. Section 24 provides:

> "*(7) A communications provider on which the Authority imposes ex ante remedies shall comply promptly, fully and in good faith with any and all such obligations.*"

60. The obligations which a provider is required to comply with are, by necessary implication, obligations which have been imposed and maintained in accordance with the statutory scheme. In my judgment it is impossible to impute to Parliament the intention that if the RA fails to comply with the time limits prescribed for the review of the efficacy and concedes that some of the obligations are no longer achieving their intended competition-promoting effect, the RA should still be entitled to enforce them nonetheless. There is no principled objection to the proposition that certain aspects of a regulatory regime enacted by way of primary or subsidiary legislation may cease in particular factual circumstances to be

enforceable against a particular individual or entity despite the fact that for other purposes it remains fully in force. As Lord Steyn observed in *Soneji* after concluding that non-compliance with a time-limit did not deprive the court altogether of jurisdiction to make a confiscation order:

> "*42…It may be that, if actings or failures on the part of the prosecution or the court authorities were to lead to a delay of more than six months, this might, depending on the circumstances, amount to an abuse of process which would make it unfair and inconsistent with the spirit of the Act for the court to make a confiscation order…*"

61. By analogy, it is open to this Court to find that it would be a misuse of the RA's enforcement powers to deploy them to punish non-compliance with ex ante remedies which are no longer serving their intended statutory purpose, in part because the RA has failed to carry out a fresh market review within the time prescribed by Parliament.

62. The same question of statutory construction may be approached by a different route which leads to the same interpretative destination. Where a legislative regime requires a statutory body to apply legislative rules in practice, those rules should be both interpreted and applied in a way which is consistent with their statutory purpose. For example, in *Lekan Scott-v-Attorney-General* [2016] SC (Bda) 52 Civ, I made the following findings about how the Legal Aid Committee should apply their statutory powers to assess the income eligibility of applicants for Legal Aid:

> "*16. I find no justification for giving the word "household" for the purposes of the Act any meaning more complicated than its natural and ordinary meaning. However, the requirement to take into account the aggregate income of any household of which a Legal Aid applicant is a member requires membership to be assessed with regard to the object and purpose of the specific provision in which this phrase appears against the wider backdrop of the Act as a whole. Although Mr Sanderson did not quite present his argument in this way, privileging reliance on general principles of construction over a focussed analysis of the relevant provisions of the Act, I find that the crucial question is whether or not the Committee is bound to consider the household membership question solely based on the position when the first of a series of applications is made…*
>
> *20. What does the Third Schedule mean when it mandates an assessment of the income of the household of which the applicant "is" a member? In my judgment, this means an assessment must be carried out at the time an application is made. Having regard to the fact that this legislative scheme is intended to give effect to constitutional fair trial rights in relation to, inter alia, criminal cases, I find that the question of an*

applicant's household status cannot be subject to a rigid approach which either ignores financial realities or facilitates financial unreality…"

63. By analogy, it is open to this Court to find that the enforcement powers conferred on the RA by the RAA must be construed and deployed having regard to their statutory function under the RAA as read with the ECA. Section 93 of the RAA confers broad powers on the RA to commence enforcement procedures in respect of, inter alia, a breach of "*any administrative determination*" (section 93(1)(d)). We are in the present case concerned with potential breaches of an administrative determination made under section 24 of the ECA, which determination can only be made where "*the Authority concludes that the imposition of one or more ex ante remedies is necessary to prevent or deter anti-competitive effects that are, or are likely to be, caused by the presence of significant market power in a relevant market."* In my judgment it is self-evident that the RA's enforcement power could only lawfully be exercised if, at the time the enforcement action is instituted, the Authority believes that the specific remedy or remedies it is seeking to enforce are still "*necessary to prevent or deter anti-competitive effects*".

Relief

64. As I have already noted, the correct legal position lies in the middle of the positions contended for by the parties. The consequences of non-compliance with the market review time-limit is <u>not</u> that the SMP Order is wholly unenforceable, having regard to both (a) the fact that it is still generally in force as a matter of law, and (b) the fact that it has not been established that the impugned obligations are wholly redundant in practical and regulatory efficacy terms. The consequence of this finding is <u>not</u>, in turn, that the RA is entitled to enforce all of the relevant obligations, including those which may be wholly redundant in practical and regulatory efficacy terms. I find that the Applicants are entitled to declarations substantially in the following terms:

"*1. The Regulatory Authority has failed to comply with the time limit imposed by section 23(6)(a) of the Electronic Communications Act 2011 which required it to complete a market review within four years of the initial market review which was completed on 29 April, 2013.*

2. any attempt by the Regulatory Authority, to initiate enforcement action for non-compliance with any ex ante remedies provided for in the Regulatory Authority's 'Obligations for Operators with Significant Market Power (Consultation Summary, Final Decision, Order and General Determination)', dated 7 August 2013 is ultra vires, unlawful and invalid, but only to the extent that such enforcement action relates to an alleged failure to comply with any of the said remedies which are no longer '*necessary to prevent or deter anti-competitive effects*' *as required by section 24 (1) of the Electronic Communications Act 2011.*"

65. The practical result of such relief should be as follows. The Applicants (and the Interested Parties) will still to some extent be required to take their chances and to decide with which obligations they believe they are required to comply. But the declarations granted should afford them more protection than if no declaration as to the legal position was made at all, as the Court has accepted Mr Wasty's submission that this would be a legally unsatisfactory result., The legal ground will have shifted significantly from the RA's preferred starting position because:

    (1) this Court will have formally declared that the RA will only be able to successfully enforce those remedies which it is able to establish still serve a useful purpose; and

    (2) this Court hereby expresses the strong provisional view that the RA is not only legally bound by the promise to only enforce "*a minimum set of existing obligations*", but as a consequence of that promise, is also legally required to identify within a reasonable time and with due specificity precisely which obligations it intends to enforce during the interregnum period.

66. With the benefit of the declarations granted, it ought to be possible in any event for the providers affected to notify the RA that they believe that certain obligations ought no longer to be enforced, requiring the RA to either counter that position or waive (either actively or passively) any non-compliance which thereafter occurs. The Applicants have accordingly achieved a significant measure of success. The uncertainty of which the Applicants complained at the outset of the present proceedings has been reduced rather than eliminated altogether.

67. On the other hand, the legal vacuum which Mr Potts cautioned against is also avoided, because the starting position is that all of the ex ante remedies are still in force and assumed to be enforceable unless the contrary is established. This theoretical position has been significantly modified in practice, not least by virtue of the RA publically stating that it does not intend to enforce most of the existing obligations pending the completion of the 2017 Market Review. Nevertheless the RA has also achieved an important measure of success in defeating the claim for a declaration that the SMP Order is wholly unenforceable. Its broad position that it is not enough for the Applicants to make generalised complaints of commercial prejudice has to a material extent been vindicated. This is essentially because the statutory scheme is designed to permit restrictions on SMP providers' economic freedom in service of enhanced competition.

Conclusion

68. I will hear the parties, if required, as to costs and the terms of the final Order.

Dated this 14th day of November, 2017

_____
IAN RC KAWALEY CJ