BARBADOS.

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 25 of 2003

IN THE MATTER OF THE ADMINISTRATIVE JUSTICE ACT CAP.109B

AND IN THE MATTER OF THE FAIR TRADING COMMISSION ACT 2000-31

AND IN THE MATTER OF THE UTILITIES REGULATION ACT 2000-30

AND IN THE MATTER OF THE UTILITIES REGULATION (PROCEDURAL) RULES NO.104 OF 2003

AND IN THE MATTER OF THE TELECOMMUNICATIONS ACT 2001-36

AND IN THE MATTER OF THE TELECOMMUNICATIONS (CONFIDENTIALITY) REGULATIONS NO.95 OF 2003

BETWEEN:

CABLE AND WIRELESS (BARBADOS) LIMITED	***Appellant***
AND	
FAIR TRADING COMMISSION	***1st Respondent***
FLOYD H. PHILLIPS	***2nd Respondent***
AND	
BARBADOS CONSUMER RESEARCH ORGANISATION INC (BARCRO)	
BARBADOS COUNCIL FOR THE DISABLED	
MR. ALVIN CUMMINS	
CARITEL	
BARBADOS ASSOCIATION OF NON-GOVERNMENTAL ORGANISATIONS (BANGO)	
AUDREY MCKENZIE	***3rd Respondents (Intervenors)***

Before: The Hon. Sir David Simmons K.A., B.C.H., Chief Justice, Hon. Peter Williams, Justice of Appeal and Hon. Sherman R. Moore, Justice of Appeal (Acting)

2004: 12 and 13 February and 7 April

Mr. P.K. Cheltenham Q.C., Mr. Leslie Haynes Q.C., and Mr. Alrick Scott for the appellant
Mr. Roger Forde, Mrs. C. Benskin-Murray and Ms. Kim Griffith for the first and second respondents
Mr. Barry Carrington for the Barbados Council for the Disabled - Intervenor
Mr. Roosevelt King in person and as representative of BANGO – Intervenor
Mr. Hallam Hope in person and as representative for CARITEL – Intervenor
Mr. Malcolm Gibbs-Taitt in person and as representative for BARCRO – Intervenor
Mr. Alvin Cummins in person – Intervenor
Ms. Audrey McKenzie in person - Intervenor

REASONS FOR DECISION

SIMMONS CJ: On 13 February 2004 we dismissed this appeal and promised to give our reasons later. We now do so. This appeal raises issues of statutory interpretation requiring examination and analysis of 5 pieces of inter-connected legislation. These are: *(a)* the ***Fair Trading Commission Act, 2000-31*** (the FTC Act); *(b)* the ***Utilities Regulation Act 2000-30*** (the URA); *(c)* the ***Utilities Regulation (Procedural) Rules, 2003, S.I. 2003 No.104*** (S.I. 104); *(d)* the ***Telecommunications Act, 2001-36*** (the Telecoms Act); *(e)* the ***Telecommunications (Confidentiality) Regulations, 2003, S.I. 2003 No.95*** (S.I. 95). As will be observed, 3 of the 5 pieces of legislation are Acts of Parliament and 2 are subsidiary legislation made under the parent legislation.

The Parties

[2] The appellant (the company) is an amalgamation of various affiliated companies in the famous Cable and Wireless group. A certificate of

amalgamation of the affiliates was issued on 1 April 2002. The first respondent (the Commission) is a statutory body corporate established to safeguard the interests of consumers, to regulate utility services supplied by various service providers and to monitor and investigate the conduct of service providers and business enterprises and, importantly, to promote and maintain effective competition in the economy. Floyd Phillips (Mr. Phillips), the second respondent, is an attorney-at-law and a member of the Commission. The persons named as intervenors are individuals and organisations with an interest in consumerism. They have been permitted by the Commission to participate in the proceedings which have given rise to this appeal.

The Issue on the Appeal

[3] S.I. 95 and S.I. 104 both provide for certain information supplied by a service provider to be treated confidentially in certain circumstances where the jurisdiction of the Commission or the Minister responsible for Telecommunications is invoked. The single issue for our determination in this appeal is whether S.I. 95 or S.I. 104 applied to a confidentiality hearing directed by the Commission to be held on 23 October 2003. The issue has to be resolved by statutory interpretation. The legal point is a narrow one but it requires extensive consideration of various provisions of the several pieces of legislation.

Genesis of the Litigation

[4] The genesis of this litigation was an application by the company for an increase in the rates charged to the public for the supply of telephone services. During the course of the application, questions

arose as to the procedure to be adopted and the legislation to be applied to claims by the company for certain of its information to be treated confidentially and withheld from public disclosure. We return to these questions later but, for the time being, we must examine the legislation in some detail against its social and economic background.

The Social and Economic Context

[5] It is relevant to an understanding of the issue in this appeal that the legislation falling for interpretation be discussed against the background and context that spawned its enactment. Legislation cannot be interpreted in the light of its policy without knowing what that policy is. We must therefore refer to the events which led up to the legislation. A purposive interpretation of legislation demands that we consider the aims and objectives of that legislation and its place in the society. As ***Lord Griffiths*** said in ***Pepper v. Hart [1993] A.C. 593 at 617:***

> "The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted."

[6] By virtue of licences granted to it by the Government of Barbados in 1991, the company has held a monopoly of all local and international telephone and telecommunications services in Barbados. Those local and international licences were due to expire on 30 September 2011. We might add that, prior to the enactment of the URA and the FTC Act, there were two different forms of price setting for

telecommunications in Barbados. The Public Utilities Board set the rates for domestic telephone services whereas the Minister responsible for Telecommunications set the rates for international services by order.

[7] On 28 February 1999 the Government and the company commenced discussions in respect of *(a)* the then proposed amalgamation of several companies in the group; *(b)* a proposed early termination of the local and international licences prior to 30 September 2011; and *(c)* the liberalisation of the telecommunications market in Barbados.

[8] A Memorandum of Understanding (M.O.U.) was signed by the Government and the company on 16 October 2001. To the extent that the M.O.U. is specifically referred to in the First Schedule to the Telecoms Act, we are empowered to refer to it and apply it, so far as may be necessary, in interpreting the legislation. Broadly, the M.O.U. provided that the company would surrender its licences on certain terms and in consideration of Government's completing a schedule of activities prior to 1 December 2001, enacting a new Telecommunications Act and developing and implementing Regulations under the FTC Act, the URA and the new Telecommunications Act.

[9] The Government wished to achieve full liberalisation of the telecommunications market on 1 August 2003 or on such later date as might have been agreed between the parties. At the same time the Government recognised that this objective required revision of certain existing legislation and the enactment of new legislation. This was in harmony with commitments made by all of the member countries of

the World Trade Organisation (WTO), including Barbados, to move towards the liberalisation of telecommunications services.

[10] It was also envisaged in the M.O.U. that the FTC Act, the URA and a new Telecommunications Act would, together, provide a new regulatory framework for telecommunications services in Barbados under which the telecommunications market would progressively move towards full and fair competition in 3 phases. The monopoly of the company would therefore cease and the market would be opened to competition from other similar service providers. Reform of the public utilities sector was considered to be imperative because of the very important role played by utility services in the social, economic and cultural development of Barbados.

The Legislative Framework

[11] The legislative programme to underpin the Government's policy objectives commenced in the year 2000. It began with the enactment of the URA followed by the FTC Act. The Telecoms Act was enacted in 2001. Prior to the enactment of this suite of legislation, utility services such as electricity, telephone and telecommunications services were regulated by the ***Public Utilities Act, Cap. 282*** passed in 1956 and modeled on U.S. legislation. This Act was repealed by the URA. Its repeal removed from the statute books an anachronism. The regulator, the Public Utilities Board, was a 'toothless tiger'. It had little or no authority to set and enforce service standards; it had little or no investigative power; its procedures were unstructured and its hearings tended to be very protracted. The inevitable consequence of such weaknesses was that the interests of consumers were not adequately safeguarded. New legislation was required, hence the

enactment of the 3 Acts and the new and enhanced role given to the Commission as regulator. Pricing structures and rates to be charged to the public were to be within the purview of the FTC.

[12] In the three Acts there is considerable cross-referencing. In each Act reference is made to the application of the other two statutes and the schedules to the URA and the FTC Act make them apply to "the supply of local telecommunications services and to "the supply of international telecommunications services". Under section 4.(1) of the FTC Act the functions of the Commission are "to enforce the Utilities Regulation Act, 2000 and any laws relating to consumer protection and fair competition which the Commission has jurisdiction to administer." In addition, it must "carry out its functions in such a manner as to –

(a) promote efficiency and competitiveness amongst; and

(b) improve the standards of service and quality of goods and services supplied by

service providers and business enterprises over which it has jurisdiction." – section 4.(2). In the definition sections of the URA and the FTC Act, there is a commonality of some terms.

[13] As another example of cross-referencing, section 6 of the Telecoms Act may be cited. It provides:

"6.(1) The Commission shall –

(a) enforce the policies established by the Minister pursuant to this Act;

(b) exercise its regulatory functions in respect of telecommunications in accordance with this

Act, the *Fair Trading Commission Act* and the *Utilities Regulation Act*;

(c) be responsible for the regulation of competition between all carriers and service providers in accordance with this Act to ensure that the interests of consumers are protected; and

(d) establish and administer mechanisms for the regulation of prices in accordance with this Act, the *Fair Trading Commission Act* and the *Utilities Regulation Act*."

[14] Similarly, in respect of the setting of rates to be charged by a service provider, section 39 of the Telecoms Act is to this effect:

> "39.(1) The Commission shall establish a mechanism for the setting of rates to be charged by a service provider in accordance with the provisions of this Act, the *Fair Trading Commission Act* and the *Utilities Regulation Act*."

[15] Read together, the three Acts are Acts *in pari materia*, covering much of the same subject matter in some parts, but with specific applicability in other parts. They may not properly be characterised as a code, but they certainly comprise a comprehensive system for the conduct, operation and regulation of utility services.

1. The Utilities Regulation Legislation

[16] The URA has as its purpose the regulation of the supply of 6 services viz., electricity, water, sewerage, domestic and international telecommunications services and natural gas. – see the Schedule. By section 3 of the URA, the Commission was given 6 functions in relation to service providers of those utilities. The functions are to:

(a) establish principles for arriving at the rates to be charged;

(b) set the maximum rates to be charged;

(c) monitor the rates charged to ensure compliance;

(d) determine the standards of service applicable;

(e) monitor the standards of service supplied to ensure compliance; and

(f) carry out periodic reviews of the rates and principles for setting rates and standards of service.

Those functions are also repeated in section 4 of the FTC Act.

[17] In establishing principles for arriving at the rates to be charged for the supply of a service, the Commission must have regard to promoting efficiency on the part of service providers and *inter alia*, ensuring that they can earn a reasonable return on capital – section 3.(2). Equally, and importantly, the Commission must take into account the interests of the consuming public. Thus, it must "protect the interests of consumers by ensuring that a service provided to the public is safe, adequate, efficient and reasonable". And it is empowered "to hear and determine complaints by consumers regarding billings and standards of service" – section 3.(3).

[18] Part III of the URA deals with rates, rate-making, the principles relating thereto and the burden of proof upon a service provider to show that a rate is reasonable and fair and in accordance with the principles laid down by the Commission.

[19] Part V which is germane to this appeal provides for complaints, procedural matters and appeal. Under section 25 the URA incorporates, by reference, sections 23 to 31.(1)(a) and sections 31.(2)

to 41 of the FTC Act and states that those sections "shall apply *mutatis mutandis* and form part of this Act" (the URA). It is convenient to mention here those sections of the FTC Act to emphasise the linkage between the two Acts. Sections 23 to 31 of the FTC Act cover matters such as complaints, investigations and procedures before the Commission.

[20] For example, sections 23 to 25 give persons a right to complain to the Commission if they are aggrieved by an act of a service provider. Sections 26 to 31 relate to the investigative powers of the Commission, summoning witnesses, compelling the production of records, search and seizure, the fixing of hearings, the giving of decisions and the publication of same. In Part V, matters such as review, appeal, stay of proceedings pending appeal, costs and the determination of questions involved in an appeal by a Judge of the High Court are provided for.

[21] The power to make subsidiary legislation is vested in the Commission. By section 39 of the URA the Commission, with the approval of the Minister, may make Regulations. On 7 August 2003 the Commission made the ***Utilities Regulations (Procedural) Rules, 2003*** (S.I. 104). These Rules are crucial to an understanding of the issue in this appeal.

S.I. 104

[22] Rule 3 of S.I. 104 is particularly apposite to this appeal. It provides:

> "These procedural rules apply to *all proceedings of the Commission under the Utilities Regulation Act, 2000 and under the Fair Trading Commission Act, 2000.*" (Our emphasis).

Rule 4 provides:

> "4.(1) The Commission may issue procedural directions, which shall govern the conduct of proceedings before the Commission and shall prevail over any provision of these Rules that is inconsistent with those directions."

Confidentiality under S.I. 104 – Rule 13

[23] It is common ground between the parties that Rule 13 dealing with confidentiality, is also of primary importance to the resolution of this appeal. We set out this Rule *in extenso*.

> "13.(1) A party may, upon the filing of a document, request that all or any part of the document be held in confidence by the Commission.
>
> (2) A request for confidentiality shall:
>
> *(a)* include a summary of the nature of the information in the document;
>
> *(b)* address:
>
> (i) the reasons for the request, including the details of the nature and extent of the specific harm that would result if the document were publicly disclosed, namely either party's information which, if made public would likely create a competitive disadvantage for the party;
>
> (ii) measures that have been taken by the party, by the party and the party's customer or by the party's customer, to prevent dissemination of the information in the ordinary course of business;

(iii) any objection to placing an abridged version of the document on the public record and the reasons for such an objection;

(c) be filed with the Commission and served on the parties.

(3) A request under paragraph (1) shall be placed on the public record.

(4) Where a party has made a request under this Rule, the document, if filed with the Commission, shall be held in confidence unless the Commission decides, with a hearing, that the document should be placed on the public record.

(5) Where the Commission holds a hearing under paragraph (1), the Commission may direct that the hearing be held in the absence of the public in accordance with rule 39.

(6) A person may object to a request for confidentiality by filing an objection and serving the objection on the parties at least 2 business days prior to the hearing.

(7) An objection shall address the reasons:

(a) why the party requires public disclosure of the document; and

(b) why public disclosure would be in the public interest.

(8) After giving the party claiming confidentiality an opportunity to reply to an objection, if any, the Commission may:

(a) order that the document

(i) be placed on the public record;

(ii) be held in confidence by the Commission; or

(iii) need not be disclosed to the Commission;

(b) order that an abridged version of the document by placed on the public record; or

(c) make any other order the Commission may deem to be in the public interest.

(9) In considering a request under this Rule, the Commission shall apply the criteria set out in paragraph (1) of rule 39 and the burden of satisfying the Commission that a document should be held in confidence is on the person claiming confidentiality.

(10) Information that has been determined by the Commission to be confidential shall be treated as follows:

(a) an original and 7 copies of the information shall be provided for use by the Commission and staff; and

(b) the copies referred to in paragraph (1) shall be stamped confidential and held within the Commission offices in secure locations.

(11) Where the staff or any party desires to place some or all of the information which has been determined to be confidential into the record during a Commission proceeding, whether by exhibit, pleadings, testimony, direct or cross-examination, oral argument, or brief, then such party or staff shall notify all parties and the Commission in advance that such confidential

> information is proposed to be introduced and request that it be placed by the Commission in a sealed record.
>
> (12) Where any of the information which has been determined to be confidential in accordance with paragraph (11) is thereafter released or made public by unauthorised disclosure by anyone other than the party who sought its protection, the protection shall remain in full force and effect, binding all parties and the Commission."

Next, we discuss the Telecommunications legislation.

2. The Telecommunications Legislation

[24] On 30 September 2002 the Telecoms Act came into force except for sections 18(4) and 103(5) and paragraph 4 of the First Schedule. This Act is specific to the telecommunications sector. The Long Title explains its main aims and objectives. Its purpose is to provide for the management and regulation of telecommunications in Barbados, to ensure, *inter alia*:

(a) the establishment of a framework for authorising the ownership and operation of telecommunications networks;

(b) the provision of telecommunications services on a competitive basis allowing the widest possible access to those services at an affordable rate;

(c) the prevention of unfair competitive practices by carriers and service providers in the management of telecommunications under this Act, the ***Fair Trading Commission Act*** and the ***Utilities Regulation Act***; and

(d) the overall development of telecommunications in the interest of the sustainable development of Barbados, taking into account the introduction of advanced telecommunications technologies and an increased range of services and the preservation of the public interest and national security.

[25] A difference between the Telecoms Act and the URA is in respect of the regulator. Under the Telecoms Act, the Minister is essentially the regulator. Under the URA the Commission is the regulator. The Minister has responsibility for the management and issue of licences for the provision of telecommunications services – section 4.(2)(d). However, as was pointed out at paragraph [12], there is a role for the Commission in appropriate cases.

Ministerial Powers in Relation to Licences

[26] No person can own or operate a telecommunications network in Barbados without a licence. An application for a licence must be made to the Minister in a prescribed form, contain such information as regulations prescribe, and be accompanied by the prescribed fee – section 11. The application is made to the Minister who determines whether a licence is to be granted or refused in accordance with stated statutory criteria.

[27] The Minister has vast authority and power. *Inter alia*, he may grant, modify, suspend, refuse, or revoke a licence. He specifies certification standards and may restrict the importation or use of certain types of apparatus. He may issue prohibition orders and, in addition to his licensing responsibilities, he may apply to the High

Court for an injunction as well as the imposition of a monetary penalty upon a delinquent service provider.

[28] Part VIII of the Telecoms Act deals with rates. Two sections require citation. Section 38 provides:

> "38. The rates to be charged by a service provider are those set out in accordance with the provisions of this Part, the *Utilities Regulation Act* and the *Fair Trading Commission Act*."

Section 39 is as follows:

> "39.(1) The Commission shall establish a mechanism for the setting of rates to be charged by a provider in accordance with the provisions of this Act, the Fair Trading Commission Act and the Utilities Regulation Act."

In section 39.(2) rate-setting "shall be such as to facilitate the policy of market liberalisation and competitive pricing."

[29] In section 7 of the Act, confidential information is protected. It provides:

> "7.(1) The Minister shall take all reasonable steps to ensure that *the information submitted to him, and every person concerned with the administration of this Act in respect of licensees and applicants for licences granted under this Act* is treated confidentially except in so far as disclosure is necessary for the administration of this Act." (Our emphasis).

[30] Under this Act, where a person claims that confidential information is made or to be made available by or on behalf of that person orally or in writing at a hearing *pursuant to the Act* or, is information whose disclosure would be injurious to that person's interests and the Minister is satisfied that the claim is justified and is *not* of the opinion

that disclosure is necessary in all the circumstances, the Minister must act. He must take all reasonable steps to ensure that the confidential information is not, without the consent of the person, disclosed in the proceedings or by a person who receives the information in the course of duty – section 7.(3)*(a)* and *(b)*.

S.I. 95 – Confidentiality Provisions

[31] This Statutory Instrument deals with claims for confidentiality. It was made by the Minister in exercise of the powers conferred on him by section 110.(1)(n) of the Telecoms Act and came into force on 24 July 2003.

[32] In Regulation 2 'confidential information' is defined as including "information which is, contains or reveals

(a) a trade secret;

(b) financial, commercial, scientific or technical information;

(c) a process, a product design, a service configuration, an operation, a style of work, an apparatus, or other business proprietary information; or

(d) the amount or source of any income, profits, losses, or expenditures;

and which, if disclosed, could reasonably be expected to

(A) result in material financial loss or gain to any person;

(B) prejudice the competitive position of any person; or

(C) affect contractual or other negotiations of any person."

[33] The procedure for asserting a claim to confidentiality under S.I. 95 is set out in the Regulations. Where a party, for example, an intervenor, seeks disclosure of confidential information, that party must submit to the regulator a written request for disclosure. That request must state in detail the reasons for the request, including the public interest to be served by giving disclosure. In addition, the party must provide any material in support of the reasons for public disclosure that show how disclosure would be in the public interest. A request for disclosure must be served on the party claiming confidentiality – Reg. 4.(3) and (4).

The Special Time Frame under S.I. 95

[34] Upon service of a request for disclosure the party claiming confidentiality (the claimant) has the right to submit to the regulator and the requesting party within 10 business days after service of the request, an objection to the request for disclosure. During this 10 day period the regulator is prohibited from disclosing the information – Reg. 4.(5).

[35] Where the regulator intends to allow disclosure, the claimant must be given notice of the regulator's intention and the claimant is given a further 10 days within which to object – Reg. 4.(8). Where the regulator is satisfied that no harm would be likely to result from disclosure of the restricted material it must notify the claimant in writing of its decision and the reasons for it. But it must then allow a further 14 days for the claimant to appeal the decision to a Judge in Chambers – Reg. 4.(8). If an appeal is filed, disclosure of the material is stayed or suspended pending the decision of the Judge – Reg. 4.(9).

[36] We pause here to observe that the procedure outlined allows a claimant to 'buy time' indefinitely and, at the same time, casts an unusual burden on a party requesting information to adduce facts and materials which it is very unlikely that that party would have. Indeed, the matters sought to be disclosed would, invariably, be within the peculiar knowledge of the claimant for confidentiality.

The Rate Application – The Application for Confidentiality

[37] When a service provider, such as the company in this appeal, seeks an increase in rates charged to the public for supply of a service, an application must be made to the Commission.

On 31 July 2003, the company filed an application for an adjustment of rates with the Commission under section 16 of the URA. The affidavit of the President of the Company, Donald Austin, sworn to on 28 October 2003, deposed that the application was filed "under, *inter alia*, section 16 of the ***Utilities Regulation Act, 2000-30***".

[38] The Commission sought additional information from the company. On 5 September 2003 the Commission wrote to the company in respect of the company's claim that certain information be treated confidentially. In its letter the Commission asked the company to "note that Rule 13 of the Utilities Regulation Act 2003-30 Procedural Rules must be fully adhered to with respect to a claim for confidentiality." In particular, the Commission drew attention to Rule 13.(2).

[39] On 12 September 2003 the company wrote to the Commission and pointed out that, in a previous letter of 5 September 2003, it had filed "information on sales projections and revenue forecasts....in commercial confidence in accordance with section 11 of the Fair

Trading Commission Act, 2000-31 and the Telecommunications (Confidentiality) Regulations 2003." Paragraph 2 of the letter reiterated the claim for confidentiality. It stated:

> "Cable and Wireless hereby resubmits the confidentiality claim in accordance with Rule 13 of the ***Utilities Regulation Act 2000-30 Procedural Rules***, the ***Fair Trading Commission Act***, the ***Telecommunications Act*** and the ***Telecommunications (Confidentiality) Regulations, 2003***...." (see p.159 of the record).

The company was apparently unsure as to which statutory instrument applied so it founded its claim under S.I. 95 and S.I. 104. Clearly both could not apply and it was for the Commission to determine which statutory instrument would govern the confidentiality claim.

[40] On 7 October 2003, the Commission sent a letter to the company in which the Commission advised that it would convene "a confidentiality hearing on October 29, 2003 at 10.00 a.m. to hear the requests for confidentiality made by Cable and Wireless (Barbados) Limited" in respect of various documents listed in the letter. The letter ended by informing the company that the Commission would apply "the criteria set out in Rule 39 of the ***Utilities Regulation Act Procedural Rules*** and the burden of satisfying the Commission that a document shall be held in confidence is on the person claiming confidentiality."

[41] There was a procedural conference on 15 October 2003 and, according to a letter of 17 October 2003 from the company's attorney-at-law, Mr. Patterson Cheltenham Q.C., it was urged on behalf of the company that representation of certain intervenors be

consolidated "pursuant to Rule 67.(7) and (8) of the ***Utilities Regulation (Procedural) Rules, 2003***".

Guidance Note #3

[42] By letter of 21 October 2003, the Commission informed the company that it would hold a confidentiality hearing on 23 October 2003. It issued *Guidance Note #3*. The text of the Guidance Note began:

> "The ***Utilities Regulation Act (Procedural) Rules 2003, S.I. 2003 No.4*** *will govern the proceedings in this matter.*" (Our emphasis).

[43] A hearing was held on 23 October 2003 at which Mr. Phillips presided as sole Commissioner. He made an order that the proceedings relating to claims for confidentiality were to be governed by S.I. 104.

The Judicial Review Proceedings

[44] On 29 October 2003 the company filed an application for judicial review under the ***Administrative Justice Act, Cap. 109B*** in which, so far as material to this appeal, it sought two Declarations. It first challenged the decision of the Commission that Mr. Phillips should preside over the proceedings as a sole Commissioner. It sought a Declaration that to have presided as a sole Commissioner was in breach of and in excess of the jurisdiction conferred by section 5 of the FTC Act. Secondly, the company contested the decision that S.I. 104 applied to the hearing of the confidentiality claims and sought a Declaration that S.I. 104 did not apply to the confidentiality hearing.

[45] The judicial review application was heard over 5 days by Madam Justice Kentish. She gave her decision with commendable dispatch on 20 November 2003. She held that the confidentiality hearing of 23

October 2003 was null and void on the ground of illegality because such a hearing required a panel of at least 3 Commissioners. Mr. Phillips' sitting as a sole Commissioner was illegal. As prayed for in the Notice of Motion commencing the judicial review proceedings, the trial judge made a Declaration that S.I. 104 applied to the confidentiality hearing.

The Appeal

[46] Dissatisfied with that part of the decision of ***Kentish J*** in respect of which she held that S.I. 104 applied to the confidential hearing, the company has appealed to this Court on one broad ground. It is this: "That the learned trial judge erred in law in holding that the ***Utilities Regulation (Procedural) Rules, S.I. NO.104*** of 2003 shall govern the confidentiality hearing before [the Commission] to the exclusion of the ***Telecommunications (Confidentiality) Regulations S.I. 95*** of 2003."

[47] Leave was granted to supplement the original ground of appeal to allege an error of law by the trial judge in holding that, on a proper construction, S.I. 95 does not apply to any proceeding commenced before the Commission under the URA or the FTC Act. It is further pleaded that the trial judge erred in holding that S.I. 95 was not sector specific.

[48] Further, the amended Notice of Appeal alleged that the trial judge did not give any or sufficient weight when considering S.I. 95 to the considerations that the telecommunications sector is being liberalised, that for the first time the company was being exposed to competition and the detrimental effect that disclosure of confidential information is likely to have on the company.

[49] The company did not allege in its grounds of appeal that, so long as Mr. Phillips had acted illegally in sitting as a sole Commissioner, it was axiomatic that any decision which he made as to the application of S.I. 104 to the confidentiality hearing was necessarily and consequentially void. As we understand the submissions of Mr. Cheltenham, the company and the Commission nevertheless seek this Court's decision on the applicability or otherwise of S.I. 104 as a matter of urgent public importance to guide future proceedings of the Commission. We therefore do not treat the issue on this appeal as academic although the appeal might have been disposed of on the simple point that Mr. Phillips' action in sitting as a sole Commissioner was a nullity and his ruling as to the applicability of S.I. 104 was also necessarily a nullity and of no legal effect.

The Arguments

[50] Mr. Cheltenham Q.C., for the company, repeatedly emphasised the interlocking nature of the legislation, the duality of the regulatory responsibilities of the Commission and the Minister under the Telecoms Act and his construction that the Telecoms Act and S.I. 95 were sector specific. It was his contention that, once a claim for confidentiality is made by a telecommunications service provider, even if proceedings begin under the URA, the question arises as to which statutory instrument (S.I. 95 or S.I. 104) applies. He contends that whenever a telecommunications service provider is before the Commission, S.I. 95 applies. S.I. 95, he argues, is specific subsidiary legislation and, to the extent that the company is a regulated entity, in that context S.I. 95 applies.

[51] Mr. Forde, on the other hand, while accepting the interlocking nature of the legislation, submits that the relevant context to be considered is that *the issue arose out of and in connection with a rate hearing.* Even though the Telecoms Act does mention the matter of rate-setting in sections 38 and 39, Counsel submits that it is an application under section 16 of URA that drives the rate-setting exercise and not section 39 of the Telecoms Act.

[52] Both Counsel were very helpful to the Court in examining the pertinent sections of the various Acts and statutory instruments in detail. We are indebted to them and indeed, to Mr. Alvin Cummins, a layman whose presentation as an intervenor was careful, clear, concise and relevant.

Interpreting the Legislation

[53] The overriding principle of statutory interpretation is that the Court must ascertain the intention of Parliament. In seeking to find that intention, the relevant legislation must be considered in its entirety and courts pay careful attention to the purpose of legislation and the context in which it is made to apply. The sheer size and complexity of the legislation in this appeal make limited repetition a virtue rather than a fault. Thus, we stress that our function is to give the language of the legislation a meaning and interpretation that reflect the objectives of the drafters. We must find and express the purpose of the legislation in our interpretation of it. It is usually unhelpful to interpret legislation without consideration of its nature, purpose and context.

[54] In ***Attorney-General v. Prince Ernest Augustus of Hanover [1957] 1 All E.R. 49, Viscount Simonds*** (usually a strict constructionist) said:

> "...[W]ords, and particularly general words, cannot be read in isolation; their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use context in its widest sense which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes *in pari materia*, and the mischief which I can, by those and other legitimate means, discern that the statute was intended to remedy." – p.53.

[55] More recently, ***Lord Steyn*** emphasised the shift from a literal construction to a more purposive approach. In ***Inland Revenue Commissioners v. McGuckian [1997] 3 All ER 817*** his Lordship said:

> "During the last 30 years there has been a shift away from literalist to purposive methods of construction. Where there is no obvious meaning of a statutory provision the modern emphasis is on a contextual approach designed to identify the purpose of a statute and to give effect to it." – p.824

[56] ***Lord Nicholls*** reiterated the current approach in ***MacNiven (HM Inspector of Taxes) v. Westmoreland Investments Ltd [2001]1 All ER 865*** when he said at p.869:

> "When searching for the meaning with which Parliament has used the statutory language in question, courts have regard to the underlying purpose that the statutory language is seeking to achieve."

Resolving the Issue

[57] It is clear upon a careful scrutiny of the various pieces of legislation, that the legislative intent was to provide a comprehensive system for the operation and regulation of 6 types of utility service in Barbados.

Competition was to become the order of the day; new pricing structures and rate-setting mechanisms were to be introduced; the telecommunications market was to be progressively liberalised; efficiency was to be encouraged and the overarching aim was to improve standards of utility services, all in the interests of the consuming public.

[58] In the new environment ushered in by the legislation, the Commission was accorded a pivotal role as regulator to pursue the objectives more particularly set out in section 4 of the FTC Act – see paragraph [12] (*supra*). Under that Act, and directly relevant to this appeal, the Commission was given the power to establish principles for determining rates to be charged by service providers, set the maximum rates to be charged and monitor the rates to ensure compliance. Under section 16 of the URA the Commission was specifically authorised to review rates on its own initiative or upon an application by a service provider or consumer.

[59] All parties are agreed that the company's application for an adjustment of rates was made under section 16 of the URA. Where Mr. Cheltenham and Mr. Forde part company is that Mr. Cheltenham argues that, notwithstanding commencement of a rate hearing under section 16 of the URA, once the company as a supplier of telecommunications services claims confidentiality for certain materials, the Telecoms Act and S.I. 95 came into play and the Commission should then use the provisions of the S.I. 95 to hear the confidentiality claim. Mr. Forde disagreed.

Factors pointing in favour of S.I. 104

(i) The Commencement of the Application

[60] Upon a construction of all of the legislation examined in this appeal, there are at least 5 factors which support our finding that S.I. 104 applied to the proceedings before the Commission. In our judgment, S.I. 104 Rule 3 *(supra)* is the starting point. It bears repetition. "These procedural rules apply to *all* proceedings of the Commission *under the Utilities Regulation Act, 2000* and under the Fair Trading Commission Act, 2000." The substantive application by the company was for a hearing under the *Utilities Regulation Act* for the purpose of adjusting its rates. It was not a hearing *pursuant* to the Telecoms Act. (see para. [30]). The claim by the company for confidentiality was a step in the rate hearing. It was a procedural matter incidental and subsidiary to the main and substantive hearing. As such, why should it not be governed by the same legislation that applied to the main and substantive hearing?

[61] Asking ourselves the simple question, which rules apply to such an application, we are of the opinion that the language of Rule 3 is plain enough. Then, under Rule 4, the Commission was empowered to issue Guidance Note #3 which stated that directions issued by the Commission "*shall govern* the conduct of proceedings before the Commission....." As we have recounted at para.[37], the affidavit of the company made it clear that the application for a rate hearing was being made under the URA and Mr. Cheltenham's letter requesting consolidation of representation of the intervenors referred to S.I. 104 – see para. [41]. These are indicia to suggest that the company itself acknowledged the applicability of S.I. 104 to the proceedings.

[62] But that is not the end of the matter. We must now construe the specific parts of S.I. 95 and S.I. 104 relating to confidentiality. S.I. 104, Rule 13 is set out in full at paragraph [23]. Subrules (4) and (5) anticipate a hearing being held in response to a request for confidentiality. A person objecting to a request for confidentiality may do so by filing a notice in terms of Rule 3.(7). Thereafter, it is the Commission's decision as to what order to make – see Rule 3.(8). We think that Rule 3.(9) is of significance for two reasons. First, by virtue of Rule 39.(1) referred to in Rule 3.(9), the Commission may hold a hearing *in camera* if it is of opinion that "trade secrets, financial, commercial, scientific, technical or personal matters may be disclosed at the hearing and the desirability of avoiding disclosure in the interests of any person affected or in the public interest outweighs the desirability of an open hearing."

[63] Secondly, the burden of satisfying the Commission that a document should be held in confidence is upon the person claiming confidentiality. This requirement is entirely fair and consistent with established principle.

(ii) The Licensing Requirements under the Telecoms Legislation

[64] This statutory instrument has been reproduced, in its material respects, at paragraphs [31] to [36] (*supra*). It has to be read in the context of its parent Act, the Telecoms Act. We are in no doubt that Part III of this Act and Part IV have to be read together. Part IV deals with licensing requirements in respect of public telecommunications including the submission of information in support of an application for a licence to the Minister.

[65] The structure of Parts III and IV seems to us to be out of logical sequence. We would have expected that those provisions dealing with applications for licences should have preceded a provision for confidentiality. However, reading the two Parts together, the words "*information submitted to him*" in Section 7.(1) must mean the information contained in the application on the prescribed form – see section 11. It is perfectly reasonable to understand that a person applying for a licence may disclose certain information that, if obtained by a competitor, might prejudice the application. Hence the necessity for treating information in an application confidentially.

[66] Moreover, since the application is made to the Minister, having regard to the structure of the public service administration where files pass from junior officers through more senior officers until they reach the Permanent Secretary and ultimately the Minister, it is easy to understand why section 7 includes in its ambit of persons to be bound by confidentiality, "every person concerned with the administration of this Act in respect of licensees and applicants for licences."

[67] We also think that the ***Telecommunications (Public Telecommunications Licensing) Regulations, 2003, S.I. 2003 No.79*** are helpful in an interpretation of the legislation and a resolution of the issue on this appeal. These Regulations which apply, for example, to applicants for a service provider's licence, were made by the Minister on 17 July 2003. *Inter alia,* they require such an applicant to use the relevant form set out in the Schedule to the Regulations. An examination of Part F of the Schedule shows that an applicant for a licence must provide financial information to the Minister. That financial information includes a statement of accounts containing an income

statement, a balance sheet, a statement of investment portfolio and a list of other financial information.

[68] An applicant will clearly not wish the details of its financial position disclosed to a competitor. It made eminent sense that applications containing such information be protected by confidentiality regulations. Viewed against such a background, the *raison d'etre* of S.I. 95 becomes immediately intelligible.

[69] Since section 7 makes specific reference to "licensees and applicants for licences", it is our construction of section 7 that the protection offered by that section is limited to applications for licences and matters affecting licensees. In our opinion, S.I. 95 is applicable to licensing situations where a claim for confidentiality is made in regard to such situations. That statutory instrument does not apply to circumstances where an application for confidentiality is made in the context of a rate hearing.

(iii) The Time Breaks – The Possibility of Delay

[70] We are further strengthened in our view that S.I. 104 applied to the confidentiality hearings in this case when consideration is given to the implications of Regulation 4 of S.I. 95. Not only is the burden of proof now placed on the person seeking disclosure but the 10 day time breaks referred to at paragraph [34] and the possibility of suspending proceedings interminably if the procedures of the High Court are invoked, impel us to the view that to invoke the S.I. 95 procedure in a rate hearing application could have the effect of unreasonably delaying those proceedings. We do not believe that the context of a rate hearing contemplates such indefinite delay. It would be to the distinct advantage of a service provider who was reluctant to disclose

financial information, to seek to stall proceedings. Unreasonably delaying a rate hearing, even for strategic or tactical reasons, would be contrary to the intent and objectives of the URA and the FTC Act and would, in effect, be turning the clock back to the days when the ***Public Utilities Act*** was in vogue.

[71] An application for a licence will necessarily take time to go through the bureaucratic process. The Minister will need to evaluate the application and weigh up the recommendations of the functionaries and experts in the Ministry before making a decision on an application for a licence. Time considerations are unlikely to be of the same importance in such an application as in a rate hearing where there is a need for speed and expedition in completion of the hearing. It was a justifiable criticism of the old ***Public Utilities Act*** that rate hearings were too long and led to burdensome bills of costs. The interests of consumers were the least of all considerations.

[72] It was the expectation of the new legislation that it would redress the problems and imbalances associated with the ***Public Utilities Act*** and be more consumer-friendly. Excessive delay in a rate hearing will almost certainly conduce to an increase in the costs of the hearing and these will inevitably be passed on to the consumer. We therefore do not believe that the intention of the legislation is to cause hearings to be delayed interminably. To do so would be unfair to the consuming public. Under the various pieces of legislation, an overarching objective is to secure better prices and cheaper rates for the public. The S.I. 104 procedure does not have the time breaks of S.I. 95 and, in our opinion, the S.I. 104 procedure would better promote the legislative purposes referred to in this judgment.

(iv) The Principle of Fairness

[73] That brings us to another point. In interpreting the legislation we must bear in mind that we should apply public law notions of fairness. We must interpret the legislation to do fairness both to the company and to the consuming public, both of whose interests are recognised in the purposes of the legislation viewed objectively and as a whole.

(v) *Paragraph 4 of the First Schedule to the Telecoms Act*

[74] There is one final aspect of the legislation to be considered. Although sections 38 and 39 of the Telecoms Act speak of "rates" and provide a mechanism for rate-setting and, although "regulator" is defined in Regulation 2 of S.I. 95 as "the Commission or the Minister, as the context requires", we do not think that these provisions can avail the company in its contention that S.I. 95 is the appropriate legislation to be applied in this case. Before sections 38 and 39 can be invoked, paragraph 4 of the First Schedule to the Telecoms Act must be construed.

[75] This paragraph is as follows:

> "4.(1) Subject to section 113, the Commission shall ensure that a rate-setting mechanism to be used by the Commission is established for rates to be charged by licensees and shall facilitate the policy of market liberalisation and competitive pricing in accordance with Schedule 6 of the Memorandum of Understanding between the Government of Barbados and Cable and Wireless BARTEL Limited and Cable and Wireless BET Limited signed on the 16th day of October, 2001.

> (2) The Minister shall at the commencement of Phase III of the Transition Timetable referred to in paragraph 5, require that the Commission commence use of an incentive based rate setting mechanism to establish rates to be charged by licensees.
>
> (3) The revenue sharing arrangement of the former Act will be systematically altered to manage the reduction of the subsidy during the transition to achieve the objective of gradually removing or eliminating the revenue sharing arrangement between the international rates and the domestic rates."

[76] The effect of paragraph 4 is that the Commission, as a regulator under the Telecoms Act, is to establish a rate-setting mechanism, facilitate market liberalisation and competitive pricing in accordance with Schedule 6 of the M.O.U. But, this paragraph is *not* yet in force. It follows then, that the Commission has no authority in respect of rate-setting under the Telecoms Act at the present time. It would be incongruous, if not illogical, that a claim for confidentiality could be made in a rate hearing which the Commission cannot undertake because the law is not in force. It has to be remembered that *the context of the application before the Commission was a rate hearing.* Put another way, in so far as the provision in the parent Act in respect of rate setting is not in operation, subsidiary legislation owing its force and effect to that provision can likewise have no effect – *ex nihilo nihilis sit.*

Conclusion

[77] For the reasons expressed at paras. [61] to [75], it is our opinion that, upon a true construction of all of the legislation referred to in this judgment and, paying due regard to the context in which the

legislation is expected to function, the rate hearing and the application for confidentiality are to be governed by the ***Utilities Regulations (Procedural) Rules, 2003, S.I. 2003 No. 104.***

Costs

[78] When we reserved our reasons for dismissing this appeal, we indicated that we would hear argument on the question of costs today. We shall deal with this question separately.

Chief Justice

Justice of Appeal

Justice of Appeal (Acting)