IN THE SUPREME COURT OF BELIZE, A.D. 2002

ACTION NO. 47

IN THE MATTER **of an application by Belize Telecommunications Limited for Leave to apply for Judicial Review**

AND

IN THE MATTER **of Statutory Instrument No. 11 of 2002 made by the Minister of Budget Management Investment and Public Utilities in effect on 26th day of January 2002**

AND

IN THE MATTER **of section 23 of the Telecommunications Act, Chapter 229 of the Laws of Belize, R.E. 2000**

The Queen
and
The Minister of Budget Management Investment and Public Utilities **Respondent**

Ex parte Belize Telecommunications Limited **Applicant**

AND

ACTION NO. 261

IN THE MATTER **of a Licence granted to Belize Telecommunications Limited under section 20 of the Telecommunications Act, (now) Chapter 229 of the Substantive Laws of Belize, Revised Edition 2000**

BETWEEN
(THE ATTORNEY GENERAL **Plaintiff**
(AND
(BELIZE TELECOMMUNICATIONS LTD. **Defendant**

—

BEFORE the Honourable Abdulai Conteh, Chief Justice.

Ms. Lois Young Barrow S.C. for the Applicant/Defendant.
Mr. Denys Barrow S.C., with Mr. Elson Kaseke, Solicitor General, for the Respondent/Plaintiff.

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JUDGMENT

The Applicant, Belize Telecommunications Limited, is the sole provider of telecommunications services both nationally and internationally for Belize under a licence granted by the Government of Belize in 1987 for a period of fifteen years. The respondent is the Minister responsible for

telecommunications under the Telecommunications Act – Chapter 229 of the Laws of Belize, Revised Edition 2000. It was pursuant to this Act that the applicant's licence was granted. I shall hereafter refer to the parties as the applicant and respondent respectively unless otherwise indicated.

2. On 12th February this year, this Court granted leave to the applicant to seek judicial review in the form of a Declaration that by making an order embodied in Statutory Instrument No. 11 of 2002, the respondent, the Minister of Budget Management, Investment and Public Utilities, acted ultra vires his powers under the Telecommunications Act and therefore unlawfully; and **certiorari** to quash the decision of the respondent to make the Order; and **certiorari** to quash the said Statutory Instrument No. 11 of 2002. At the same time as granting leave to the applicant, the respondent was required by the Court to suspend the Statutory Instrument and to refrain from making any further order interfering with the charges and collection of revised tariffs by the applicant until the hearing and determination of the applicant's request for judicial review.

3. Before the substantive hearing of the applicant's request for judicial review which finally commenced on 22nd July 2002, the Attorney General as Plaintiff had, on 22nd of May, taken out an Originating Summons against the respondent as Defendant, in Action No. 261 of 2002, seeking a determination from this Court that *"on the true construction of the said Licence and in light of the telecommunication rates increases as from 1st December 2001, whether the Defendant is entitled under Condition 10 of the Licence to alter the tariffs applicable for supplying the telecommunication services to users without adequate previous notice to the Minister of Public Utilities and to impose new tariffs without the agreement of the Minister."* The Originating Summons also sought further other relief including costs for the application.

4. As the Originating Summons raised issues on **Condition 10** of the applicant's licence and the applicant's judicial review sought to impugn the respondent's action for alleged breaches of this condition, the two actions raised substantially the same issues, it was accordingly agreed to consolidate the two actions together for the purposes of these proceedings.

5. The Order of the respondent embodied in Statutory Instrument No. 11 of 2002 which the applicant seeks to impugn was made pursuant to section

23 of the Telecommunications Act. It is material and helpful, I think, to reproduce this statutory instrument in full. And it states as follows:

"STAUTORY INSTRUMENT

No. 11 of 2002

—

ORDER UNDER SECTION 23

(Gazetted 25th January, 2002.)

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***WHEREAS**, section 23 of the Telecommunications Act, Chapter 229 of the Substantive Laws of Belize, Revised Edition 2000, provides, inter alia, that where the Minister is satisfied that a telecommunications operator is contravening or has contravened, and is likely again to contravene, any of the conditions of his licence, the Minister may by order make such provision as is requisite for the purpose of securing compliance with that condition;*

***AND WHEREAS**, I am satisfied that the Belize Telecommunications Limited ("BTL"), a telecommunications operator under the said Act, is contravening the conditions of its licence in the following respects:*

(a) By replacing coin operated call boxes (Pay Phones) with prepaid operating card call boxes in the districts without consultation with the Director of Telecommunications, contrary to Condition 5.5 of the Licence.

(b) By implementing a new tariffs structure for national telecommunication services as of December 1, 2001, without properly complying with Condition 10 of its Licence;

***AND WHEREAS**, having particular regard to the extent to which the members of the public are likely to sustain loss or damage in consequence of the said contraventions, I am satisfied that an Order in terms of the said section 23 ought to be made;*

***NOW, THEREFORE, I RALPH H. FONSECA**, Minister responsible for telecommunications, **DO HEREBY ORDER** that the BTL shall –*

*(a) **STOP** the implementation of the new tariffs and revert to the position as it was immediately before December 1, 2001;*

(b) ***PROGRAM*** *prepaid call boxes already installed in the districts to accept prepaid cards at 15 cents per call until further notice;*

(c) ***NOT*** *issue or serve any Bills to consumers for the month of December, 2001 or thereafter, based on the new tariffs implemented with effect from December 1, 2001.*

Subject to the provisions of the said section 23, this Order shall take effect from 26th January 2002.

DATED *this 28th day of December, 2001.*

(RALPH H. FONSECA)
Minister responsible for Telecommunications

To:

The Belize Telecommunications Limited
Esquivel Telecom Center,
St. Thomas Street,
Belize City"

6. It is to be noticed that the respondent in exercising the powers granted him under section 23 of the Telecommunications Act avers in the Statutory Instrument that the applicant was in breach or contravention of its licence in two respects namely, as stated in paragraphs a) and b) of the second **Whereas** clause of the Statutory Instrument. That is to say:

(a) *By replacing coin operated call boxes (Pay Phones) with prepaid operating card call boxes in the districts without consultation with the Director of Telecommunications, contrary to Condition 5.5 of the Licence.*

(b) *By implementing a new tariffs structure for national telecommunication services as of December 1, 2001, without properly complying with Condition 10 of its Licence."*

7. It is also helpful to set out ***in extenso*** the provisions of section 23 of the Telecommunications Act. This provides as follows:

"23.-(1) Where the Minister is satisfied that a person who is authorised by a licence granted under section 20 above to run a telecommunication system (in this Act referred to as a "'telecommunications operator") is contravening or has contravened, and is likely again to contravene, any of the conditions of his licence, the Minister may by Order make such provision as is requisite for the purpose of securing compliance with that condition.

(2) In determining the extent of the Order to be made, the Minister shall consider in particular the extent to which every person is likely to sustain loss or damage in consequence of anything which, in contravention of the relevant condition, is likely to be done, or omitted to be done.

(3) The Order made under subsection (1) above -

(a) shall require the telecommunications operator (according to the circumstances of the case) to do, or not to do, such things as are specified in the Order;

(b) shall take effect at such time, being not earlier than –

(i) twenty-eight days after notice of such an Order (stating the relevant conditions of the licence and the acts or omissions, which in the opinion of the Minister, constitute or would constitute the contravention of any of the provisions of the Act or the conditions of licence) has been served upon the licensee; or

(ii) such longer period as may be specified by or under that Order:

Provided that no such Order shall take effect, if before the expiry of the period specified in subsection (3) (b) above, the licensee has remedied the alleged contravention to the reasonable satisfaction of the Minister:

Provided further that no such Order shall take effect unless the Minister has given reasonable consideration to any representations or objections made to him by or on behalf of the licensee or any other affect person within the first twenty days of the period specified in subsection 3 (b) above; and

(c) may be revoked at any time by the Minister.

(4) In this section, "contravention", in relation to any condition of a licence, includes any failure to comply with that condition and "contravene" shall be construed accordingly.

(5) Nothing in this section shall supersede the authority of the Minister to cancel a licence under section 31 below."

8. In support of its application for judicial review of the respondent's decision and the Statutory Instrument, a number of affidavits together with exhibits were filed on behalf of the applicant; as well, a number of affidavits were filed together with exhibits by the respondent and on his behalf, by Mr. Clifford Slusher, the Director of Telecommunications in the respondent's ministry.

9. Let me say at the outset and for the avoidance of doubt, that I granted leave to review the respondent's order even though it was, by the provisions of section 81 of the Telecommunications Act, a Statutory Instrument and therefore on its face, a **legislative act** or a **piece of subordinate legislation**, in contradistinction from an **administrative act**, and therefore presumptively immune from attack, at least in the Courts; unlike a purely administrative order or decision which is more readily amenable to judicial review. In the instant case, the respondent's action or decision which the applicant seeks by these proceedings to impugn is, as I have stated, embodied in a Statutory Instrument, quintessentially, a piece of delegated or subordinate legislation. Today, however, there is no doubt that judicial review **is** available against subordinate or delegated legislation – **R v Secretary of State for Health, ex parte United States Tobacco International Inc. (1991) 3 WLR 529,** where the Divisional Court in England granted **certiorari** to quash regulations made by the Secretary of State for Health banning the applicant's oral snuff. Therefore, in these proceedings, though the Statutory Instrument in question is a subordinate legislation and could be regarded as a piece of administrative legislation, it is however, governed and must be informed by the same legal principles such as vires or ultra vires, reasonableness, procedural fairness and proper purpose, that govern **administrative** actions generally. The Statutory Instrument therefore does not, **ipso facto**, or **qua** a Statutory Instrument, partake of the immunity from attack in court that is generally part of the attribute of a legislative Act by Parliament. As stated in **Administrative Law** by Wade and Forsyth (8th Ed. 2000) at p. 854:

"It is axiomatic that delegated legislation no way partakes of the immunity which Acts of Parliament enjoy from challenged in the courts, for there is a fundamental difference between a sovereign and subordinate law-making power. Even where, as if often the case, a regulation is required to be approved by resolutions of both House of Parliament, it still fall on the 'subordinate' side of the line, so that the court may determine its validity. Only an Act of Queen, Lords and Commons is immune from judicial review."

10. **A propos** the last sentence, I can say however, that in a country with a written constitution which is proclaimed to be the supreme law, like Belize, even legislative Acts **stricto sensu**, may not be immune from challenge for non-conformity with the Constitution. Although in such a case, the avenue for challenge might not be by way of judicial review proceedings. But in a proper case and by the appropriate process, the Courts can and will entertain a challenge alleging that an Act of the Legislature is in contravention of the Constitution.

11. In these proceedings, in which, as I mentioned earlier, the Attorney General's own action in Supreme Court Action No. 261 of 2002 has been subsumed or consolidated with the applicant's own action in which it seeks to impugn the respondent's order as contained in Statutory Instrument No. 11 of 2002, in my view, the principal burden of the applicant's case however, turns on what is called, in the jurisprudence of judicial review, the **precedent fact**. Ms. Lois Young-Barrow S.C., the learned attorney for the applicant addressed the Court at some length on this.

12. Mr. Michael Fordham in his admirable book, **Judicial Review Handbook** (3rd ed. 2000) has succinctly described a **precedent fact** as follows:

"A precedent (or antecedent) fact is one which 'triggers' the public body's function. If the public body considers the factual trigger to exist, when in truth it does not exist, the body is proceeding to exercise a function which in truth is beyond its powers. This justifies the court in investigating for itself the key question of fact, on all available material. Accordingly, errors of precedent fact are not just reviewable, but correctable."

13. Therefore, in my view, the crucial issue for these proceedings is this: Did the precedent fact that the applicant had not complied with the conditions of its licence exist to 'trigger' the respondent to act in making the Order that he did as embodied in the Statutory Instrument? In other words, was the respondent right or justified in making and issuing Statutory Instrument No. 11 of 2002?

Although section 23 of the Telecommunications Act (already reproduced **supra**), under which the respondent issued the Statutory Instrument is framed in the "subjective" form, that is to say, "where the Minister (that is the respondent) is satisfied", and indeed, the respondent himself states in the second **Whereas** clause of the Statutory Instrument that he was "satisfied" that the applicant was contravening the conditions of its licence in two identified respects, that in my view, does not foreclose enquiry by this Court. As Lord Wilberforce stated the principle thus, in a statement which I respectfully adopt, in **Secretary of State for Education & Science v The Metropolitan Borough of Tameside (1976) 3 All. ER 665** at p. 681 where the direction of the British Secretary of State for Education under section 68 of the U.K. Education Act 1944, to the respondent local authority was in issue concerning the reorganisation of schools in the area of the respondent local government authority:

> *"The section is framed in a 'subjective' form - if the Secretary of State 'is satisfied'. This form of section is quite well known, and at first sight might seem to exclude judicial review. Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment. But I do not think that they go further than that. If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the Court must enquire whether those facts exist, and have been taken into account, whether the judgment has been made on a proper self direction as to those facts, whether the judgment has not been made on other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge: See Secretary of State for Employment v Associated Society of Locomotive Engineers and Firemen (No. 2) [1976] 2 All E.R. at 967 . . . per Lord Denning MR."*

14. It is therefore the duty of this Court to inquire into the evidence, whether the precedent fact of contraventions of its licence by the applicant exists to

support the decision of the respondent to make and issue the Statutory Instrument in question. Does the evidence in this case support or warrant the respondent's action? The evidence in these proceedings is all in form of affidavits and copious and extensive ones at that, together with exhibits. As I mentioned earlier, the respondent himself swore to a number of affidavits. I have taken care to sift through the several affidavits filed by both sides together with their attached exhibits.

15. For a proper determination of this issue, I think, it is important to set out the relevant conditions of the Applicant's licence. **Condition 5.5** of the licence provides as follows:

> *"5.5 The Licensee shall from time to time consult with the Director on the methods of payment to be used for the services provided in Public Call Boxes and on the distribution of these methods of payment in the Public Call Boxes."*

In **Condition 5.7(e)**, which is a kind of definition section, "Public Call Box" is said to "mean a Call Box to which the public has access at all times which is neither a Private Call Box nor a Temporary Call Box and at which Call Box Services are or may be provided." **Paragraph (b) of Condition 5.7** states:

> *" 'Call Box Services' means the installation, repair and maintenance of Call Boxes, the service of conveying by means of the Applicable System voice telephony messages to and from such Boxes, directory information services relating to switched voice telephony services available at such Boxes and Public Emergency Call services as available."*

16. **Condition 10** of the applicant's licence with the caption: **"TARIFF DETERMINATION"** provides as follows:

> *"10. "The tariffs applicable for supplying national telecommunications services to users shall be notified in advance to the Minister who may require changes where these are inconsistent with any development and financial plan which may from time to time be agreed between the Licensee and the Minister."*
>
> *Provided that in fixing the prices, regard shall be had to:*

(a) the cost of supplying the services

(b) the need of the Licensee to secure a reasonable rate of return on investment

(c) the interests of the users.

The rates to be charged by the Licensee for supplying international telecommunication services will be determined by market conditions."

ON CONDITION 5.5

17. Before examining the evidence on the alleged contraventions of **conditions 5.5 and 10** of the applicant's licence, I must say a word or two about the office of the Director of Telecommunications which is the focus of the alleged contravention of **condition 5.5** of its licence by the application (paragraph (a) of the second **Whereas** clause of the Statutory Instrument in question).

18. By the scheme and provisions of the Telecommunications Act, it is clear that the Director of Telecommunications is a vital cog in the regulation, provision, licensing and control of telecommunication services in Belize. The office itself is expressly established by section 6 of the Act; and by section 11, the Director is given authority to make by-laws relating to a wide range of things, including for example, fees to be charged for the provision of telecommunications services and all matters generally connected with the operation of telecommunications services (see section 11(1) d) and e)). Failure to comply with by-laws made by the Director is made an offence punishable on conviction to a fine.

19. Also, under the licence granted to the applicant, the Director of Telecommunications features prominently. He can in fact be fairly described as the point man for the operational details of the applicant's licence.

20. There is no evidence before me however, that the Director of Telecommunications made any by-laws as he is empowered to do regarding the operations of the applicant's licence. But the licence itself did import express duties and obligations on the applicant regarding some operational aspects of its business of providing telecommunications

services. Thus, for example, the provision in **Condition 5.5** of its licence, which is part of the controversy between the parties in the present proceedings.

21. This condition of the applicant's licence clearly imposes an obligation, nay a duty, on it **to consult** with the Director of Telecommunications on the **methods of payments** to be used for the telephony services provided in Public call boxes, and on the **distribution** of these methods of payment in such public call boxes.

22. On the evidence from the several affidavits and exhibits filed by both sides, I find and hold that there really was no meaningful consultation in the accepted sense of the word, and within the provision, spirit and intent of **Condition 5.5**, by the applicant of the Director of Telecommunications, before the applicant changed the method of payment in the Public call boxes which include the community telephones, from coin/card to prepaid card only.

23. I must say however, there is some divergence in the affidavits from both sides about consultation before the change in the method of payment in public call boxes from coin/card to prepaid cards only. I am, however, satisfied, after a careful analysis of the affidavit evidence, that there really was no meaningful, relevant or material consultation by the applicant of the Director of Telecommunications on such a material issue expressly provided for in **Condition 5.5** of the applicant's licence.

24. The learned Solicitor General for the respondent referred me to page 258 of **Judicial Remedies in Public Law** (1992 edition) by Clive Lewis, where the following statement appears:

> *"As the onus is on the applicant to make out his case for judicial review, this means that in cases of conflict, the courts will proceed on the basis of the respondent's affidavit."*

The learned author cited in the footnote as authority for this proposition the case of **R v Reigate Justices ex parte Curl (1991) L.O.D. 66**. The learned Solicitor General therefore invited me to prefer the evidence on behalf of the respondent on this issue of consultation or lack of it, as constituting a breach by the applicant of its licence. Sufficient to say that I decline to accede to this invitation, for I think that a conclusion on the

evidence, where there is manifest divergence, must be arrived at, after some analysis, weighing or sifting of the whole and not by some **a priori** formula.

25. My conclusion was reached after a careful sifting through of all the affidavits, together with their exhibits from both sides, which lead me to find that there was no relevant consultation of the Director of Telecommunications in terms of **Condition 5.5**, before the change from coins to prepaid cards only.

26. The following excerpts from some of the affidavits filed on behalf of the parties respectively led me to the conclusion I have arrived at on this issue:

A. ON BEHALF OF THE APPLICANT

1) From the first affidavit dated 1st February 2002 of Mr. Ediberto Tesucum, the Chief Executive Officer of the applicant -

"5. Chronology of Events in relation to Condition 5.5

In May 2001 BTL began to move from coin/card operated Public Call Boxes to purely card operated Public Call Boxes. In doing so BTL did not violate condition 5.5 of its Licence. BTL has always from time to time consulted with the Director of Telecommunications on matters concerning BTL's service to customers. I have discussed with the Director the need to change from coin/card operated Public Call Boxes because the boxes were constantly vandalised to force out the coins, or operate the machine with irregular coins. Mrs. Karen Bevans, the Manager for Marketing and Sales at BTL has also, I have been informed by her, and verily believe, discussed this matter with the Director.

6. I have received a letter from Dr. Victor Gonzalez the Chief Executive Officer in the Ministry of Public Utilities, Energy, Communications and Immigration dated 29th August 2001. The letter alleged that BTL replaced coins in Public Call Boxes with prepaid cards without consulting either the Director of Telecommunications or the Ministry of Public Utilities contrary to condition 5.5 of BTL's Licence. The letter also alleged that BTL replaced the "distribution of methods of payment in the Public Call Boxes, particularly for Community Phones" without consultation. A copy of this letter is now produced and shown to me and marked ***E.T. (2)*** *for identification.*

7. Before I was able to respond Dr. Gonzalez wrote another letter dated 6th September 2001 referring to the 29th August letter. He said that his Ministry "deplores" BTL's action in discussing and agreeing with the Ministry of Rural Development for the introduction of payphones using prepaid calling cards in place of Community phones. I should say that Community phones are different from Public Call Boxes. A copy of this letter is now produced and shown to me and marked ***E.T. (3)*** *for identification.*

8. On the 11th September 2001 I replied to Dr. Gonzalez's letter of 29th August 2001 informing him that the matter of the methods of payment of public telephones had been discussed with the Director of Telecommunication and that as far as BTL was concerned there was no issue about it. I told him that the purpose of the change was to prevent vandalism and provide a better service to the public. A copy of this letter is now produced and shown to me and marked ***E.T. (4)*** *for identification.*

9. Notwithstanding the change to card operated Public Call Boxes in May to June, it was not until the 14th November 2001 that the Director of Telecommunications wrote to BTL to say that "BTL is also in violation of condition 5.5 of its Licence with respect of the replacement of payphones with pre-paid pay phones in the districts." The Director said that this "is of concern with respect to the proposed increase in the rates for local calls in the district." This was on the same day as the Director received BTL's notification of its new tariffs. In his letter, the Director confined his comments to the districts and made no mention about the introduction of prepaid payphones in Belize City. A copy of the Director's letter is now produced and shown to me and marked ***E.T. (5)*** *for identification.*

10. I should state that cards had replaced coins in Public Call Boxes in the districts from about June of 2001and the Director, who had been consulted before, had found no issue with the change. In fact, calls in all districts from Public Call Boxes have always been metered at 25¢ for 3 minutes. This is the same as calls made in Belize City from Public Call Boxes. With prepaid calling cards, the customer pays for exactly the time used, whereas with a coin, the 25¢ was non-retrievable regardless of the time used.

11. On the 24th day of January 2002 the said Karen Bevans telephoned the Director of Telecommunications and asked him whether she could meet with him along with the CEO of BTL, in order to discuss the public pay phones issues. The Director refused to meet with us."

2) From the third affidavit dated 29th April 2002 of Mr. Tesucum:

"3. I know Clifford Slusher and I have had to consult with him very often in his capacity as the Director of Telecommunications. I have frequently spoken with him on matters affecting the applicant and the telecommunication services it provides.

4. I refer to paragraph 3 of Mr. Slusher's affidavit which incorrectly states the tariff in coin operated Public Call Boxes in districts. I repeat what I stated in paragraph 10 of my first affidavit which is that "calls in all districts from Public Call Boxes have always been metered at 25¢ for 3 minutes." The real cost per minute was thus 8.3¢, but the 25¢ was charged whether or not the customer used up the whole 3 minutes. Public Call Boxes can use only a 25¢ coin because the box operates by the weight of the coin. When the method of payment was changed from dual coin and card to the prepaid card, a call from a Public Call Box in the districts, cities and towns of Belize was metered at 5¢ per minute up until 1st December 2001 when it was increased to 10¢ per minute. A copy of each page in the 1997 and 1998 Telephone Directory showing that Public Call Boxes were metered at 25¢ is now produced and shown to me and collectively marked ***E.T. (1)*** *for identification.*

5. I refer to the statement made by Mr. Slusher in paragraph 5 of his affidavit. The first I knew of Mr. Slusher's concern was his letter to me dated 14th November 2001. See Exhibit E.T. (5) to my affidavit dated 1st February 2002. It was because I did not know of his concern that I responded to Dr. Victor Gonzalez on 11th September 2001 (Exhibit E.T. (4)) by stating: "Kindly note that this matter was discussed with the Director, Office of Telecommunications and, as far as we are concerned, there was no issue. Our aim is to prevent vandalism and provide a better service to the public."

6. Again, in relation to paragraph 5, I wish to state that Community Telephones together with the Ministry of Rural Development is a separate and distinct issue from changing from coins/card to prepaid cards in Public Call Boxes. A Public Call Box is defined in the licence, which definition is as stated in paragraph 4 of my first affidavit.

7. In the case of Community Telephones, these are telephones manned by a real life operator which people can access when the operator is awake and has his or her house open. Community Phones are not contemplated by the BTL licence and are a carry-over from the days when the telephone system was operated by the Statutory Authority, BTA. The Applicant and the Ministry of Rural Development had discussed the manning of Community Phones by operators; and with the concurrence of this Ministry, instead of customers paying money to operators of the Community Phones for usage, the phone lines of the various Community Phones were directed to the prepaid platform at the Switch so that usage would be paid for with prepaid cards.

8. *Therefore, I could not have informed Mr. Slusher that the Applicant had the approval of the Minister of Rural Development to change from coin to card-operated Public Call Boxes because there is no connection between the two types of phone facilities."*

3) Affidavit dated 1st February 2002 of Karen Bevans, the General Manager of Marketing and Sales of the applicant –

"2. During the first week of May 2001 I spoke with the Director of Telecommunications over the telephone about BTL's intention to change its Public Call Boxes from coin/card operated, to prepaid card operated.

3. The Director's concern, as I understand it, was that the public's access would be restricted by having to purchase the prepaid calling cards. I explained that the public's access was even more restricted when Public Call Boxes were constantly broken through vandalism.

4. I explained to the Director that many phones were put out of service when attempts were made to get the coins out of the boxes and by removing the temptation caused by having coins in the payphones the vandalism would probably stop.

5. In addition, I explained that to facilitate customers BTL was introducing a $2.00 calling card along with the existing higher denominations and greatly increasing the number of calling and distributions. Further, all Public Call Boxes carried clear instructions on how to make a collect call through BTL's operators and free local calls to emergency numbers.

6. At the end of our conversation the Director expressed his satisfaction with the change to prepaid cards for Public Call Boxes.

7. On the 24th day of January 2002 I telephoned the Director of Telecommunications and asked him whether I could meet with him along with the CEO of BTL in order to discuss the public payphone issues. The Director refused to meet with us."

B. ON BEHALF OF THE RESPONDENT

1) From first affidavit dated 17 April 2002 of Mr. Clifford Slusher, the Director of Telecommunications:

"2. In my capacity as Director of Telecommunications it came to my attention on or before August 10, 2001 that Belize Telecommunication Limited was changing the methods of payment used for service provided in public coin operated call boxes, to prepaid card operated public telephone boxes, and such replacement affected the payments by users of the call boxes.

4. On the 10th August 2001, I informed the then Minister responsible for Telecommunications that Belize Telecommunication Limited was replacing coin operated public call boxes without consulting the Director of Telecommunications as required by condition 5.5 of BTL's licence. A copy of the letter to the Minister is exhibited hereto and marked "CS 2".

5. I was never consulted by Mr. Ediberto Tesecum or Mrs. Karen Bevans, on the need for BTL to change from coin to card operated public call boxes, and I spoke to Mr. Edilberto Tesecum, expressing grave concern that BTL had changed in the Districts from coin to card operated public call boxes without consulting me as required by condition 5 of BTL's Licence, whereupon Mr. Tesecum informed me that they had obtained the approval of the Minister of Rural Development. I was the one who approached BTL after my investigation, BTL never consulted me, and as a result of the reply I obtained from Mr. Tesecum, I wrote the letter exhibited hereto and marked "CS 2".

6. On the 14th November 2001 I wrote to Mr. Ediberto Tesecum informing him that BTL should not implement or publish any increased rates for National Telecommunication Services until condition 10 of BTL's licence was complied with. In the same letter I also informed BTL that it was contravening condition 5.5 of BTL's Licence. A copy of the letter is exhibited hereto and marked "CS 3"."

2) From his second affidavit dated 23rd July 2002, Mr. Slusher, the Director of Telecommunications, states:

"3. I have read the Fourth Affidavit of Ediberto Tesecum sworn to on the 18th July, 2002 and I ask the leave of the court to refer thereto.

4. In respect to Paragraph 3 of the said Fourth Affidavit of Ediberto Tesecum, I categorically state that I was not consulted in respect of the change to coin/card public pay phones in Crooked Tree Village, Double Head Cabbage, San Juan Area, Bermudian Landing and Hattieville, referred to the said Paragraph and more fully set out in Exhibit ET (1) exhibited thereto. Significantly, this appears to me to be an internal Memorandum of the Applicant, in which the Applicant not only seeks to change the method of payment from coin to card operated public pay phones without prior consultation with the

Director of Telecommunications as required by Condition 5.5 of Applicant's Licence, but significantly, the Memorandum seeks to change rates contrary to Condition 10 of BTL's Licence in the portion where it provides that "In future, we will advise you of the appropriate rates we would like to use for any Pay Phone we are placing outside an existing exchange area. This will be done at the initial stage when the request is issued to the Pay Phone section for installation". Also, the Memorandum is captioned "Rates for Public Payphones Outside an Exchange Area".

5. I have also read Ediberto Tesecum's Third Affidavit sworn to on the 29th April, 2002. I ask the leave of the court to refer to Paragraphs 3 to 10 of the said Affidavit.

6. I deny Paragraph 3 of the said Affidavit in so far as it speaks of any alleged consultations between the Applicant and myself. I am very clear there was no consultation on the migration from coin operated public all boxes to card operated public call boxes, hence the reason I kept on informing my Ministry of the violation of Condition 5.5.

8. I refer to Paragraph 5 of the said Affidavit. I have made enquiries with the Ministry of Public Utilities, and I have seen copies of letters to Ediberto Tesecum dated 29th August, 2001 and 6th September, 2001, in which the non-consultation by the Applicant with the Director of Telecommunication was raised with Ediberto Tesecum and the fact that such non-consultation violated Condition 5.5 of the Applicant's Licence was stated. A copy of the said letters are now shown to me marked CS (1).

9. I refer to Paragraph 6 of the said Affidavit. I maintain that community telephones are public phones because members of the community have access to them, and that community telephones fall within the Telecommunications Act and the Applicant's Licence.

10. The Ministry of Rural Development does not have jurisdiction over telecommunications, which is an area governed by the Telecommunications Act.

12. I categorically state that I was not telephoned by Karen Bevans or Ediberto Tesecum at any time to discuss the pay phones issues, before or after January, 2002."

27. From all this welter of evidence, I am convinced that there was no material consultation of the Director of Telecommunications before the applicant changed the method of payment in public telephone boxes from coin/card to prepaid cards only. It is evident, from the evidence, that the applicant might have been motivated by the need to stop the vandalization of these

public call boxes by some mischievous persons in their bid to get at the coins in the boxes. This is an unfortunate irritant in most societies with coin-operated public call boxes. But, to change from coin to pre-paid card only, however well intentioned the move, the relevant condition of the applicant's licence required it to consult with the Director of Telecommunications. I find that this was not done in any meaningful manner within the context of **Condition 5.5** of the applicant's licence. This was a matter that required more than a cursory discussion or telephone conversation. A personal meeting with the Director of Telecommunications and possibly followed by a written memorandum on the issue, would in my view, have met the requirements of **Condition 5.5**. I have set out earlier the role and significance of the Director of Telecommunications both within the provisions of the Telecommunications Act and the applicant's licence. On the evidence the applicant had in fact been told repeatedly whom to consult regarding **Condition 5.5** – see letters to Chief Executive Office of respondent's ministry to applicant – **Exhibit ET 2** of Tesucum's affidavit of 1st February 2002 and paragraph 6 thereof. Also on 29th August, applicant was told again whom to consult – **Exhibit ET 3**. Somehow inexplicably, the applicant chose not to consult directly with the Director of Telecommunications, quite contrary to **Condition 5.5**. Instead, it is averred on behalf of the applicant that there was discussion with Director of Telecommunications. The Director of Telecommunications himself wrote on **14 November 2001** to applicant among other things, pointing out that there was no consultation by the applicant regarding the change to card only in the public telephone boxes.

28. Accordingly, from my analysis of the evidence, I find that there was no material consultation of the Director of Telecommunications by the applicant before the change from coin/card to prepaid cards only for public call boxes. I have a feeling that there was, on the applicant's part, some misunderstanding or lack of appreciation of the role of the Director of Telecommunications in the context of both the Telecommunications Act and the licence granted to the applicant.

29. Therefore, in so far as non-compliance with **Condition 5.5** of the licence is concerned, the applicant's challenge of Statutory Instrument No. 11 of 2002, cannot be sustained – the applicant was in clear breach of this condition.

30. However, in view of my finding and conclusion on **Condition 5.5** of the applicant's licence, I nonetheless do not think that the dispositive paragraph (b) of the Statutory Instrument to the effect that the applicant should:

> *"(b) PROGRAM prepaid call boxes already installed in the districts to accept prepaid cards at 15 cents per call until further notice;"*

can lawfully secure compliance with the licence. What the respondent could legitimately and properly do is to instruct the applicant to revert to the pre prepaid card only regime operative in public phone boxes. The respondent cannot order the applicant to *"programme prepaid call boxes already installed in the districts to accept prepaid cards at 15 cents per call until further notice."* To do so would be imposing a tariff for calls from public call boxes on the applicant. Ms. Young Barrow S.C. for the applicant has rightly in my view therefore complained. Accordingly, I will therefore, strike out the dispositive **paragraph (b)** of the Statutory Instrument. This will also overcome the conflicting evidence from the parties as to the true rate for calls from these telephone boxes before the switch to cards only; that is, whether it was 25 cents per 3 minutes as was contended for by the applicant, or 15 cents per call, as was averred on behalf of the respondent.

31. In view of my finding however, of the precedent fact of violation, contravention or non-compliance with **Condition 5.5** by the applicant of its licence, the respondent is entitled under section 23 of the Telecommunications Act to require or order the applicant to revert to the previously operating regime for payment for the use of public phone boxes, that is, the pre prepaid card only regime, until after proper consultation with the Director of Telecommunication or until further notice. This will ensure and secure compliance with the applicant's licence, as is intended by section 23 of the Telecommunications Act. An order framed along these lines would, I think, satisfy the requirements of subsection (2) of section 23 of the Telecommunications Act.

Moreover, in view of this finding on the evidence, the absence or lack of consultation of the Director of Telecommunications by the applicant before the change over to prepaid cards only for public telephones, was in effect, an unilateral change in the tariff structure for national telecommunication

services contrary to **Condition 10** of the licence as there was no prior notification to the respondent (more on this later).

32. I have come to this conclusion because I believe in construing legislation, it is the function of the Court to take account, ***inter alia***, of the purpose of the legislation, the subject-matter it deals with and the mischief, if any, it is intended to avoid. Section 23 of the Telecommunications Act is part of Part III of the Act dealing with the licensing of telecommunications systems generally. Section 20 of this part of the Act provides for the grant of licence to telecommunications operators. Subsection (5) provides for some of the conditions to which the grant of a licence may be subjected to. Section 23 provides for securing compliance with the conditions of the licence and what the Minister (the respondent) may do in the event of contravention of a condition of a licence.

ON CONDITION 10 OF THE APPLICANT'S LICENCE

33. I now turn to the controversy surrounding **Condition 10** of the applicant's licence.

I have already set this out earlier, and it is headed **"TARIFF DETERMINATION"**. This expressly provides for the determination of rates for the supply of telephone services by the applicant for both national and international calls. For the two types of calls, that is local or national and international call, this condition of the licence provides two formulas for the determination of the rates applicable to each type of call, that is whether national or international.

34. I must confess that this condition is not exactly a model for clarity or precision on such an important issue as the determination of rates for telephone calls, especially in an undertaking that was, until the licence granted to the applicant in 1987, a state-owned public utility. I expressed my concerns about the rendition of this condition and its provenance during the argument before me to the learned Solicitor General. This condition for example, uses the expressions "tariffs", "prices" and "rates" presumably interchangeably when what is intended is to refer to the cost to the consumers or users of the telecommunications services provided by the applicant.

35. It is not surprising therefore, that matters have come to the boil between the parties as to the true meaning and purport of this condition in the

applicant's licence. The kernel of the controversy between the parties over this condition is that the applicant contends that it was only liable to **inform** the respondent of changes in the tariff structure for its services to the public in advance and, that it did so in the instant case; and that in any event, as there is no agreed financial and development plan in existence, the respondent could not require or insist on changes to the rates proposed by the applicant. The respondent for his part contends that he was not given sufficient time to consider the proposed changes in the rates and that the applicant merely informed him as a matter of form when it had unilaterally and as a **fait accompli**, decided on the new rates by publishing them with a given operational date in its customer information notice and brochure even before informing him. This, the respondent contends, was contrary to **Condition 10** of the applicant's licence.

36. First, was the necessary notification of the proposed new tariffs the applicant wished to bring into force given in advance to "the Minister" as is required by **Condition 10** of the licence? From the evidence it is established that the applicant did send on **25th January 2001** a memorandum on the subject "BTL Tariff Proposals" to "Minister Fonseca". This memorandum itself is in evidence as **Exhibit ET 6** to the first affidavit dated 1st February 2002 of Mr. Ediberto Tesucum, the Chief Executive Officer of the applicant. He states in this connection at paragraph 13 of the said affidavit as follows:

> **"13. Chronology of Events in relation to Condition 10**
>
> *On the 25th day of January 2001 BTL's proposed tariff proposals were delivered to the Hon. Ralph H. Fonseca, then the Minister of Budget Management Investment and Trade. The documents sent contained the rationale for the rebalancing, highlights of the rebalancing, the tariff rebalancing schedule, outline of the network's upgrade and expansion plan, profile of the lower user group and proposals with respects thereto. A copy of the package sent to Minister Fonseca is now produced and shown to me and marked ET (6) for identification."* (emphasis added)

37. The respondent on the other hand, states in his affidavit of 17th April 2002, among other things, as follows:

"1. I am a Minister of Government, and as from the 15th day of October, 2001, I became the Minister responsible, among other things, for Telecommunications.

6. In regard to the letter dated 25th January 2001 from BTL addressed to myself as Minister of Budget Management, Investment and Trade, I had then no power to consider the tariff change proposal from BTL as I was then not the Minister responsible for Telecommunications and I am informed by the acting Financial Sectary (sic) and verily believe that the acting Financial Secretary wrote to BTL on the 30th January, 2001, advising BTL that it should forward its letter to the Hon. Maxwell Samuels, the then Minister responsible for Telecommunications.

7. BTL never held a meeting with me in my capacity as Minister responsible for Telecommunications such as that held on the 8th February, 2001 in Belmopan (as I subsequently found out) between three directors of BTL and the Hon. Maxwell Samuels, Dr. Victor Gonzalez, Dr. Gilbert Canton when BTL allegedly presented its new tariff proposals to the Hon. Maxwell Samuels.

8. On the 14th November, 2001, BTL sent me a notice pursuant to Condition 10 of BTL's Licence as Minister responsible for Telecommunications that BTL's revised rates would become effective on 1st December, 2001, and containing a bald assertion unsupported by any data that in setting the new charges, BTL had regard to the cost of supplying the service, BTL's need to secure a reasonable rate of return on its investment and the interests of users. A copy of the said notice is now shown to me marked "RF 5".

9. BTL has never supplied me, in my capacity as Minister responsible for Telecommunications, on or after the said letter of 14th November, 2001, any evidence on which the tariff revision was based."

38. It is clear from this that the respondent was not notified in terms of **Condition 10** of the licence of the proposed change of tariffs by the applicant. The memorandum of 25 January 2001 was addressed to

"Minister Fonseca" who, it is common ground between the parties, was not on that date the Minister responsible for telecommunications. In fact, a couple of days following the date of the memorandum, Mr. Joseph Waight acting Financial Secretary in the respondent's ministry wrote to Mr. Tesucum, the Chief Executive Officer of the applicant in terms, not exactly "return to sender" but such as to make it clear that the memorandum was addressed not to the appropriate authority. It is helpful, I think, to reproduce this letter here, It is **Exhibit ET 7** to Mr. Tesucum's affidavit of 1st February 2002:

"GOVERNMENT OF BELIZE
Ministry of Finance
Belmopan, Belize

Please Quote

Ref: *C/GEN/5/01/01(12)*

By Fax and By Mail

Fax No. 02-32096

30th January, 2001

Mr. Ediberto Tesucum
Chief Executive Officer,
BELIZE TELECOMMUNICATIONS LIMITED
P.O. Box 603
Belize City

Dear Sir

I refer to your letter of 26th January, 2001 and to an unsigned memorandum from the "BTL Management" dated 25th January, 2001 both of which were addressed to the Hon. Ralph H. Fonseca, Minister of Budget Management, Investment and Trade and both of which concerned new BTL Tariff Proposals.

I wish to advise that such proposals should more appropriately be submitted to the Hon. Maxwell Samuels, Minister of Public Utilities, Energy, Communications and Immigration under whose portfolio this subject falls. At the same time the proposals should be copied to the Chairman of the Public Utilities Commission, Gilbert Canton, Ph.D.

The Hon. Minister of Public Utilities would, after consultation with the Public Utilities Commission, submit the proposals to Cabinet for its consideration together with his Minister's recommendations on the matter. At this time, of course, Minister Fonseca will be privy to tall (sic) of the Information for decision making.

You may therefore wish to resubmit the proposals as indicated above.

Yours Sincerely,

sgd: J Waight
Joseph Waight
Ag. Financial Secretary

cc: Hon. Minister of Public Utilities, Energy, Communications and Immigration
Chairman, Public Utilities Commission"

Moreover, although Mr. Tesucum avers in the same affidavit at paragraph 15 that he had been informed and verily believed that at a meeting on 8th February 2001 in Belmopan, three directors of the applicant presented its new tariff proposals to the Hon. Maxwell Samuels the Minister responsible then for telecommunications, in the presence of witnesses, there is nothing in evidence to show what was actually presented to the Hon. Maxwell Samuels, who was then the Minister responsible for telecommunications. What is in evidence on this issue is **Exhibit ET 6** to "Minister Fonseca" who only became the Minister responsible for telecommunications on 15 October 2001.

39. Thereafter, on 14 November 2001, the applicant wrote to the respondent in his capacity as the Minister responsible for telecommunications. This letter is in stark contrast to the memorandum of 25 January 2001 sent to "Minister Fonseca" when he was not responsible for telecommunications. This letter was really in effect, a **fait accompli** and intimated to the respondent that in accordance with **Condition 10** of the applicant's licence it was enclosing advance notification of BTL's revised rates which would become effective as from December 1, 2001. The enclosed "advance notification" was actually a **Customer Notice** by the applicant informing the public of the schedule of services, the existing rates and new rates that would become effective as from 1st December 2001. The same schedule was sent to the Director of Telecommunications together with a slightly differently worded letter – see **Exhibits 9 and 10** of Mr. Tesucum's affidavit of 1st February 2002 and paragraph 5 of his fourth affidavit of 22nd July 2002.

40. However, on behalf of the respondent, the Director of Telecommunications sent **Exhibit CS 4** of Mr. Slusher's affidavit of 17th April 2002 complaining about the notification to the respondent by the applicant in the letter of 14th November 2001 **(Exhibits 9 and 10** of Tesucum's affidavit of 1st February 2002).

41. On the available evidence, I am not satisfied that such "notification" as there was of the respondent met the requirements of **Condition 10**.

42. Secondly, a relevant question also pertinent to **Condition 10** is this: Does it merely provide for advance notification to the respondent of any proposed tariff change by the applicant and nothing more? In my view a closer reading and analysis of **Condition 10** shows that more than advance notification was intended. I have noted earlier that this condition provides for two formulas in determining the tariffs for the applicant telecommunications services, depending on whether they are 1) national and 2) international. In the case of the latter, the licence provides that the rates (no doubt meaning the tariffs the applicant may charge) will be determined by market conditions. Whatever this provision may mean, in the context of the applicant's position, as the **sole** provider of telecommunications services and, therefore enjoying a veritable monopoly, however, it was really a kind of golden formula. "Market conditions" as price determinant would, I imagine, ordinarily depend on supply and demand. But where there is only one supplier, market conditions as a price determinant is a wholly different thing altogether. But such is the provision of the applicant's licence in relation to the rates to be charged for supplying international telecommunication services. I can only say that in an imperfect market without countervailing competition, it is an alluring provision a less scrupulous supplier would be sorely tempted to capitalise on.

43. However in relation to the tariffs for national, that is, local or domestic calls the applicant can charge, different considerations come into play. First, there is the need to notify the respondent in advance and he in turn may require changes to the proposed tariffs. This he can do where the proposed tariffs are inconsistent with any development and financial plan which may be agreed between the applicant and the respondent. There is no evidence before me that there was in existence at the material time an agreed development and financial agreement between the parties. Ms. Lois Young Barrow S.C. for the applicant therefore submitted, that absent

such a plan, the applicant was free to implement the proposed tariff changes, the only obligation on the applicant was to inform the respondent in advance. If this argument was pressed home, then the formula for determining the tariff for domestic or national calls would be no different from that applicable to international calls.

44. But, secondly, there is the need to have regard in setting the tariff for national (domestic) calls, to bear in mind the three-fold consideration stated in paragraphs a), b) and c) of the **proviso** in **Condition 10**. I think that properly interpreted and understood, even in the absence of an agreed financial and development plan between the parties, the determination of the tariffs for domestic calls should (the proviso says "shall"') should be influenced and informed by the considerations stipulated in the proviso. I think therefore, that the learned Solicitor General is correct when he submitted that the effect of the proviso in **Condition 10** of the licence is that in relation to the formula for setting the tariffs for domestic calls, these should be notified in advance to the respondent, who may then require changes, having regard to any data or evidence or submissions to him relating to a) the cost of supplying the services; b) the need of the licensee (the applicant) to secure a reasonable rate of return on investment and c) the interests of the users.

45. Thirdly, therefore, discounting the fact that the respondent **qua** the minister responsible for telecommunications did not receive **Exhibit ET 6** of 25th January 2001, as I have recounted above on the evidence, then all he received by way of notification of the proposed tariffs change from the applicant, was the bare and formulaic letter of 14th November 2001 **(Exhibit ET 9)**. This was a kind **fait accompli**, informing the respondent that the new rates would come into effect on 1st December 2001. There was nothing in it on which the respondent could make an informed response as to the new tariffs. Nor did it say for that matter how the applicant itself arrived at the revised rates, other than the bare assertion that it had regard to the three considerations. It was in truth, no more and no less than an unilateral determination of rates by the applicant not in keeping with the provisions of **Condition 10**, nor within its spirit. And it was quite contrary to the practice, I find on the evidence, had developed between the parties in determining the rates for the applicant telecommunications services. This practice, I find, involved the fact that the applicant would inform the respondent (that is the Minister for the time being responsible for telecommunications), in good enough time so as to enable the latter to take the proposals to Cabinet for consideration and

approval before the applicant implemented the changes – see paragraph 8 of the Director of Telecommunications Mr. Slusher's affidavit of 17th April 2002 and **Exhibit CS 5** thereto. This practice was certainly not outside the spirit or provision of **Condition 10**. It furnishes evidence that that was how the parties themselves understood and applied **Condition 10** in determining the rates for tariffs.

46. I therefore find that on the materials before me, and have weighed carefully the arguments and submissions of Ms. Lois Young Barrow S.C., the learned attorney for the applicant, and those of the Solicitor-General, for the respondent, there was an unilateral determination of new tariffs by the applicant that was not in keeping with its licence.

47. Accordingly, this precedent fact of violation of its licence in so crucial an aspect as tariff determination, I find, entitled the respondent to exercise the powers granted him under section 23 of the Telecommunications Act to ensure compliance by the applicant with its licence. Therefore, the Statutory Instrument No. 11 of 2002 is valid and lawful in this respect.

48. The applicant has however, also sought to impugn the Statutory Instrument on other grounds as well. Ms. Lois Young Barrow S.C. for the applicant with some vigour and skill constructed a platform of several planks from which to launch this attack. Let me say right away on this score that if, from the evidence, any of these is true, it would vitiate the Statutory Instrument, for the respondent would have been acting **ultra vires** in making it. These may be stated briefly. In the very able presentation of Ms. Young Barrow S.C., the cutting edge of this attack is that in making the Statutory Instrument, the respondent acted unfairly, because he did not, before making the Order contained in the Statutory Instrument, tell the applicant what the alleged breaches of its licence were and that he did not give the applicant an opportunity to remedy these alleged breaches.

49. It is now settled law that if a decision-maker who is authorised by law to take an action that would adversely affect some other person fails to inform that other person the reason for making the decision and giving him the opportunity to dissuade the decision maker by being allowed to put forth reasons or to put his own side of the case, as it were, the resultant decision would be flawed and vitiated for ignoring what has been called the elementary doctrines of fair procedure. As the learned authors, Wade

and Forsyth in their seminal work **Administrative Law**, already mentioned above, state at page 437:

> *"Just as a power to act 'as he thinks fit' does not allow a public authority to act unreasonably in bad faith, so it does not allow disregard of the elementary doctrines of fair procedure. As Lord Selborne once said:*
>
> > *"There would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice." (In Spackman v Plumstead District Board of Works (1885) 10 App. Cas. 229 at 240)*
>
> *"Quoting these words, the Privy Council has said that 'it has long been settled law' that a decision which offends against the principles of natural justice is outside the jurisdiction of the decision making authority (in Attorney General v Ryan [1980] A.C. 718).*
>
> *Likewise Lord Russell has said:*
>
> > *"It is to be implied, unless the contrary appears, that Parliament does not authorise by the Act the exercise of powers in breach of the principles of natural justice, and that Parliament does by the Act require, in the particular procedures, compliance with those principles."*
>
> *Thus violation of natural justice makes the decision void, as in any other case of ultra vires."*

50. I am therefore satisfied and, indeed fortified, to state that even though section 23 of the Telecommunications Act (under which the respondent made the Statutory Instrument) states clearly that *"Where the Minister is satisfied"* that a licensed telecommunications operator (such as the applicant) is contravening, or has contravened, and is likely again to contravene, any of the conditions of its licence, then the Minister (the respondent), may make and order to secure compliance with the conditions of the licence, if on the evidence, in making the Order there was a disregard of the elementary doctrines of fair procedure, as alleged by the applicant, then the resulting Statutory Instrument would be infected with procedural impropriety and consequently bad in law. As has

succinctly been stated by Fordham in his **Judicial Review Handbook**, already mentioned, **supra**, at page 186: *"Natural justice is an umbrella term for the legal standards of basic fairness.*

51. I believe however, that a closer examination of section 23 itself would show that it has a kind of in-built safeguard to assure compliance with the principles of fair procedure consonant with respect for natural justice – see in particular subsection (3).

52. What is the evidence in this case of the circumstances attendant on the final making of the Statutory Instrument and its coming into effect? On 29th August 2001, the applicant received a letter from the Chief Executive Officer in the respondent's Ministry complaining about lack of consultation with the Director of Telecommunications on the change over to prepaid card only for calls from public call boxes (see paragraph 6 of Tesucum's affidavit of 1st February 2002 and **Exhibit ET 2** thereto). This was followed by yet another letter from the same Chief Executive Officer on 6th September 2001 to the applicant mentioning the letter of 29th August 2001 and repeating the allegation of breach of **Condition 5.5.** of the applicant's licence; and deploring the applicant's discussion of introducing prepaid calling cards with the Ministry of Rural Development whose 'approval' the applicant obtained, as a clumsy attempt to circumvent the authority of the respondent's Ministry. Again, explanation and or comment from the applicant was sought, as did the letter of 29th August 2001 (see paragraph 7 of Tesucum's affidavit **supra** and **Exhibit ET 3**. There was no response from the applicant until 14th November 2001, when it wrote both the respondent and the Director of Telecommunications that

The applicant replied on 11th September 2001 to the Chief Executive Officer of the respondent's Ministry referring only to the letter of 29th August 2001, stating that there was discussion with the Director of Telecommunications, and as far as the applicant was concerned there was no issue – see **Exhibit ET 4** of Tesucum's affidavit **supra** and at paragraph 8 thereof.

Three days later on 14th November 2001, the applicant wrote to both the respondent and the Director of Telecommunications informing them of its revised tariffs and stating that the new rates would become effective on December 1, 2001. (See Exhibits 9 and 8 respectively of Tesucum's affidavit of 1st February 2002). On the same day, that is 14th November

2001, the Director of Telecommunications in the respondent's Ministry, wrote to Mr. Tesucum, the Chief Executive Officer of the applicant, informing the applicant that it should not implement or publish any increased rates for its domestic services until **Condition 10** of the applicant's licence had been complied with. In this letter, the Director of Telecommunications also informed the applicant that it was contravening **Condition 5.5** of its licence (see **Exhibit CS 3** of Mr. Slusher's affidavit of 17th April 2002). It would appear that the applicant forwarded a copy of **Exhibit ET 9** (its letter of 14th November 2001 to the respondent himself) to the Director of Telecommunications, the latter again wrote the applicant on 15th November 2001 stating that there was no evidence that **Condition 10** was being observed by the applicant. The Director of Telecommunications in this letter directed the applicant not to further any activities for the implementation of the proposed rates on 1st December 2001, until the respondent had given approved directive (see **Exhibit ET 11** of Tesucum's affidavit **supra**, which is the same as **Exhibit 4** of Slusher's affidavit **supra**).

This was were the exchanges between the parties rested until 28th December 2001 when the applicant was served with the respondent's Order containing the Statutory Instrument. This draft order contained the particulars of the breaches of its licence being alleged against the applicant. It is, however, important to observe here, that although the Statutory Instrument is dated 28th December 2001, it states expressly on its face that it *"shall take effect on 26th January 2002"* so it did not therefore stop the applicant immediately – this would be as from 26th January 2002, if at all.

The applicant in the meantime wrote the respondent on 16th January 2002, some 18 days after the date of the Order (which was really then only a draft) and some nine days before it was to come into effect, taking objections to and making representation on the draft order to the respondent (see paragraph 26 of Tesucum's affidavit of 1st February 2002 and **Exhibit 14** thereto). The respondent replied to the applicant on 24th January 2002 stating that he had considered its representations but he was satisfied that it was in contravention of **Conditions 5.5 and 10** of its licence and as such the draft order would go into effect on 26th January 2002. The respondent however concluded that the applicant might make further representation to him (see paragraph 6 of the respondent's affidavit of 6th February 2002 and **Exhibit RF 3** thereto). Two days later the draft

order came into effect as Statutory Instrument No. 11 of 2002. And on 28th January 2002, Ms. Lois Young Barrow S.C. wrote to the respondent stating that the applicant would comply with the Statutory Instrument (see **Exhibit RF 4**). The applicant therefore launched these proceedings to challenge the Statutory Instrument.

53. I have set out the evidence at some length. From my analysis of it, I don't think it is reasonable to say with any degree of conviction that the respondent acted unfairly and breached the principles of natural justice. It is manifestly clear that from August and November 2001, the applicant had been informed by the Chief Executive Officer of the respondent's Ministry and twice by the Director of Telecommunications, that **Conditions 5.5. and 10** of its licence were not being complied with. Moreover, even after service upon it of the draft order, the applicant did make objections and representations to the respondent. It is plainly therefore unarguable, that the applicant was informed of the alleged contraventions and he was afforded a clear opportunity to make representations to the respondent and to dissuade him from acting as he did.

54. Accordingly, therefore, I am not convinced, on the evidence, that in deciding to make the Order and in making the Order as contained in the Statutory Instrument in question, the respondent acted unfairly or unreasonably.

Ms. Lois Young Barrow S.C. for the applicant valiantly sought to impugn the Statutory Instrument on the grounds that it was unreasonable and made in bad faith. I am afraid on the evidence before me, as I have tried to set it out here, this charge against the respondent falls quite short of the **Wednesbury** standard, that is, that the respondent's decision in the circumstances, was *"so absurd that no sensible person could even dream that it lay within the powers of the authority"* – ***Associated Provincial Pictures House Ltd v Wednesbury Corporation (1948) 1 K.B. 223,*** where at p. 229, Lord Greene MR alluded to Warrington L.J. in **Short v Poolecpn (1926) Ch. 66** giving the example of the red-haired teacher who was dismissed because she had red hair. Lord Greene MR continued: *"That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith, and in fact all these things run into one another."*

55. Accordingly, on the evidence, I am satisfied that the respondent did not act unreasonably or irrationally or in bad faith.

56. Ms. Young Barrow S.C. also argued that in making the Statutory Instrument the respondent took into account irrelevant matters and failed to take into account relevant issues such as that the applicant's new rates lowered tariffs in more cases. Although the correctness of the last assertion is, on the evidence, debatable, the short answer is that it is not however an answer to a charge of not consulting the Director of Telecommunications before changing the method of payment in public call boxes, nor for failing to meet the requirements of **Condition 10** on determining the rates for national calls.

The charge of taking irrelevant matters into consideration by the respondent in making the Statutory Instrument is outlined in paragraphs 21, 22 and 23 of Mr. Tesucum's affidavit of 1st February 2002 to which he exhibited a copy of a press release issued by the Government of Belize and dated 28th December 2001 as **Exhibit ET 12**. I am however unable to find or hold, on a close reading of this press release, that the respondent took extraneous or irrelevant issues into consideration in issuing the Statutory Instrument. I am persuaded by the evidence as averred in paragraph 3 of the respondent's affidavit of 17th April 2002, that *". . . at no time did I take into account extraneous or irrelevant factors in arriving at the decision to issue the Order."* See also paragraph 3 of his further affidavit of 23rd July 2002.

57. I am therefore unable to hold that the respondent in making the Statutory Instrument in question here, took irrelevant or extraneous matters into consideration or acted in bad faith with a view to punish the applicant, such as to render flawed or tainted the Order he made.

58. **CONCLUSION**

In the light of all the materials before me and after weighing carefully the arguments and submissions of Ms. Lois Young Barrow S.C. for the applicant and the Solicitor General, Mr. Elson Kaseke for the respondent, I am unable to grant the reliefs the applicant seeks from this Court.

Accordingly, the application is refused and, save as I have indicated earlier at paragraphs 30 and 31 of this judgment, the Order of the

respondent contained in Statutory Instrument No. 11 of 2002 is not ultra vires and is therefore lawful and valid.

58. I must, in closing, record my appreciation of the industry which both Ms. Young Barrow S.C. and the Solicitor General put into this case and the tenacity with which both learned attorneys argued for their respective clients and the assistance they afforded the Court. I also gratefully acknowledge the assistance they afforded to the Court, although the passage was not exactly smooth sailing.

I will now hear counsel on the question of costs.

A. O. CONTEH
Chief Justice

DATED: 25th November, 2002.