

REPUBLIC OF TRINIDAD AND TOBAGO

**IN THE HIGH COURT OF JUSTICE
PORT-OF-SPAIN**

Claim No. CV2020-01617

DIGICEL (TRINIDAD AND TOBAGO) LIMITED

Claimant

AND

**TELECOMMUNICATIONS SERVICE OF TRINIDAD
AND TOBAGO LIMITED**

Defendant

JUDGEMENT

**Before the Honourable Madame Justice Nadia Kangaloo
Dated 14th September, 2020**

Appearances:

Mr. Jason Mootoo and Mr. Adrian Byrne instructed by Mr. Clay Hackett for the Claimant

Mr. Martin Daly S.C. leading Mr. Christopher Sieuchand instructed by Ms. Sashi Indarsingh and
Mr. Justin Junkere for the Defendant

Mrs. Debra Peake S.C. leading Mr. Ravi Heffes-Doon on a watching brief for the
Telecommunications Authority of Trinidad and Tobago.

BACKGROUND

1. In 2001 in recognition of the necessity to establish a comprehensive and modern legal framework for an open telecommunications sector, the Telecommunications Act, Chapter 47:31 (“the Act”) was passed, to permit new providers of telecommunications services to enter the market and compete fairly.
2. The Claimant, Digicel (Trinidad and Tobago) Limited (“Digicel”) is a limited liability company incorporated on 2nd October, 2003, under the Companies Act, Chapter 81:01 of the Laws of Trinidad and Tobago, with its registered address situate at 3rd Floor, ANSA Centre, 11C Maraval Road, Port-of-Spain.
3. The Defendant, Telecommunications Services of Trinidad and Tobago Limited (“TSTT”) is a limited liability company incorporated under the Companies Act, Chapter 81:01 of the Laws of Trinidad and Tobago, with its registered address situate at No. 1 Edward Street, Port-of-Spain.
4. The Telecommunications Authority of Trinidad and Tobago (“the Authority”) is an independent statutory body established in June 2004, pursuant to section 4 of the Telecommunication Act, Chapter 43:31 (“the Act”) and thereby mandated to transform the telecommunications sector into a competitive environment, to monitor and regulate the sector so transformed and to prevent anti-competitive practices.
5. Pursuant to section 21(1) of the Act, no person shall operate a public telecommunications network without a concession granted by the Minister before it can operate its network. Both Digicel and TSTT have individual Concession agreements with the Authority, by which their commercial activities are regulated.
6. Digicel and TSTT are among 8 operators who have been granted concessions. The other operators are Columbus Communications Trinidad Limited, Lisa Communications Limited, Open Telecomm Limited and Massy Communications Limited (formerly Three Sixty Communications). None of these other operators are parties to this High Court Action. Counsel for Digicel has submitted and it is accepted that each operator’s Concession Agreement is in similar vein to any other operator’s.

7. In or around 2014, the Authority required all operators, including Digicel and TSTT, to facilitate the porting of numbers between the networks.
8. To this end, the Authority engaged all concessionaires, including Digicel and TSTT, (collectively “the Operators”), with a view to appointing a supplier to provide a centralised solution for the provision of portability services.
9. The Operators eventually engaged Porting XS B.V., a company based in Netherlands, for the provision of the aforesaid portability services (“The Supplier”). The Operators then jointly executed an Agreement with the Supplier entitled “Contract for Provision of a Centralised Solution for fixed and mobile service provider number portability for the Republic of Trinidad and Tobago” (“the Supplier Contract”).
10. The Supplier Contracts annexed a draft document entitled “Number Portability in the Republic of Trinidad and Tobago – Customer Procedures” (“the Customer Procedures”).

THE CLAIM

11. As additional context, the Court finds it useful to briefly refer to Digicel’s substantive claim which comprises 2 causes of action, statutory and breach of contract.
12. By Claim Form and Statement of Case filed herein 29th June, 2020, Digicel alleges that, during the period May to June 2020, there has been an unprecedented increase in the rejection by TSTT of requests from consumers wishing to port their numbers to Digicel’s network.
13. Digicel says that this unprecedented increase in rejections, is attributable to the increased and wrongful application by TSTT, of two specific rejection codes, “Bad Debt” and “Other”, during the porting process. Additionally, Digicel claims that TSTT has sought to wrongfully induce consumers to stay with its network, by offering them incentives in the form of enhanced terms to their existing packages, after consumers initiated the porting process, and by making the porting process more administratively difficult for both Digicel and consumers.
14. Consequently, Digicel alleges that they have suffered loss and damage and have also had its goodwill and reputation adversely affected by TSTT’s conduct.

15. Digicel also claims that in or around 22nd May, 2020, TSTT made a unilateral decision to suspend porting, which it claims constitutes a breach of TSTT's contractual obligations under the Supplier Contract, and more specifically the Customer Procedures annexed to same.
16. Digicel claims further that apart from TSTT's contractual breaches, its conduct also contravenes *Section 4 (1) and Section (6) of the Protection Against Unfair Competition Act, Chapter 82:36* ("PAUCA").
17. Accordingly, Digicel seeks the following relief in respect of its substantive claim:
- i. Damages for breach of a contract in writing dated 16th February, 2016, made between Digicel, TSTT, Columbus Communications Trinidad Limited, Lisa Communications Limited, Open Telecomm Limited and Massy Communications Limited (formerly Three Sixty Communications) and The Supplier;
 - ii. Damages for breach of a contract made amongst the Operators made partly in writing and partly by course of conduct during the period 16th February, 2016, to the date hereof, alternatively by way course of conduct over the said period. Insofar as it is in writing, it is contained in a document entitled "Number Portability in the Republic of Trinidad and Tobago – Customer Procedures". Insofar as it is by the course of conduct, the Operators have relied upon and have acted in accordance with the rules and procedures set out in that document;
 - iii. Damages for breach of statutory duty owed by TSTT to Digicel pursuant to section 25 (2)(j) of the Act;
 - iv. Damages for breach of Sections 4 and 6 of PAUCA;
 - v. An interim injunction restraining TSTT, by itself, its servants or agents or otherwise howsoever from:
 - a. Rejecting customer requests to port to Digicel other than for one or more of the 9 reasons set out at Sub-Clause 1.10.2 of the Customer Procedures; and

- b. Issuing direct communications encouraging or seeking to encourage customers who have initiated a request to port to Digicel to withdraw that request.
- vi. An interim injunction requiring TSTT, within five (5) days of the date of the Order, to provide reasons for refusing all requests to port to Digicel during the period May and June 2020 (“Rectification Period”), which were rejected using only the code “Other”.
- vii. An interim injunction requiring TSTT, in respect of each port wrongly rejected during the Rectification Period, where the customer is established as still wishing to port its number to Digicel, to take all necessary steps to consent to such ports as soon as practicable and in all events subject to adherence to the requirements of the Customer Procedures;
- viii. A final injunction in terms of sub-paragraphs 5, 7 and 8 above.
- ix. A final injunction requiring TSTT, in respect of all porting requests wrongly rejected during the Rectification Period, to provide The Supplier with all electronic and other communication as is required by the Customer Procedure to indicate that TSTT consents to those requests;
- x. Interest on damages at such rate and for such period as this Honourable Court think fit pursuant to Section 25 of the Supreme Court of Judicature Act, Chapter 4:01
- xi. Costs; and
- xii. Such further and/or other relief as this Honourable Court deems fit.

THE APPLICATION FOR INTERIM RELIEF AND THE APPLICATION AGAINST JURISDICTION

- 18. Two Notices of Application have initially engaged this Court’s attention, filed by Digicel and TSTT respectively.
- 19. The Court hereunder summarizes both the evidence and the submissions presented by both parties in support of their Applications.

Digicel's Application

20. By Notice of Application filed herein 29th June, 2020, Digicel applied to the Court for the following Orders:

- i. An Order pursuant to Parts 11.10(3) and 26.1(1) (d) of the Civil Proceedings Rules, 1998 (as amended) (“the CPR”) that this application be urgently heard and that the time for service of this Notice of Application be abridged;
- ii. An Order pursuant to Part 17.1(1)(a) of the CPR restraining TSTT, by itself, its servants or agents or otherwise howsoever from:
 - a. Rejecting customer requests to port their mobile telephone numbers from TSTT to Digicel other than for one or more of the nine (9) limited reasons set out at Sub Clause 1.10.2 of the “Number Portability in the Republic of Trinidad and Tobago – Customer Procedures” annexed as Appendix I to the “Contract for provision of a centralized solution for fixed and mobile service providers number portability for the Republic of Trinidad and Tobago” made amongst Columbus Communications Trinidad Limited, Digicel, Lisa Communications Limited, Open Telecom Limited, TSTT, Massy Communications Ltd. And Porting XS B.V. dated 16th February, 2016; and
 - b. Issuing direct communications encouraging or seeking to encourage customer who have initiated a request to port to Digicel to withdraw that request pending final judgement in this action or until further Order.
- iii. An Order pursuant to Part 17.1(1)(a) of the CPR requiring TSTT, within five (5) days of the date of the Order, to provide reasons for refusing all requests to port to Digicel T&T during the period May and June 2020 (“Rectification Period”), which were rejected using only the rejection code “Other”;
- iv. An interim Order pursuant to Part 17.1(1)(a) of the CPR requiring TSTT, pending final judgement in this action or until further Order, where it rejects a request to port to

- Digicel T&T using the code “Other”, to identify which of the nine (9) reasons set out at Sub Clause 1.10.2 of the Customer Procedures is applicable to that rejection;
- v. An interim Order pursuant to Part 17.1(1) (a) of the CPR requiring TSTT, in respect of each port wrongly rejected during the Rectification Period, where the customer is established as still wishing to port its number to Digicel T&T, to take all necessary steps to consent to such ports as soon as practicable and in all events subject to adherence to the requirements of the Customer Procedures; and
 - vi. An Order that the costs of this application be provided for.

21. The Notice of Application is supported by the evidence of Digicel’s Consumer Director, Mr. Abraham Smith. TSTT filed an Affidavit of Jerome Boynes, its Manager – Service Recovery, on 13th July, 2020 in opposition to Digicel’s Notice of Application.

TSTT’s Application

22. By a Notice of Application filed herein 24th June, 2020, TSTT applied to the Court for the following Orders:
- i. An Order pursuant to Part 26.1(1)(w) of the CPR that TSTT be permitted to rely on the Affidavit of Jerome Boynes sworn to and filed in these proceedings on 13th July, 2020, as evidence in support of the Application;
 - ii. An Order pursuant to Part 11.10(3) and/or Part 26.1(1)(d) of the CPR directing that sufficient notice of this Application has been given and/or such abridgement of time as may be necessary and as may seem to the Court just in order to facilitate the hearing of this Application together with the Claimant’s Application filed on 30th June, 2020;
 - iii. An Order pursuant to Part 9.7(1)(a) of the CPR and/or Section 7 of the Arbitration Act, Chapter 5:01 and/or the inherent jurisdiction of this Honourable Court declaring that this Court has no jurisdiction to determine the matters arising in Claim filed by the Claimant;

- iv. An Order pursuant to Part 9.7(1)(b) of the CPR and/or Section 7 of the Arbitration Act, Chapter 5:01 and/or the inherent jurisdiction of this Honourable Court declaring that this Court will not exercise any jurisdiction which it may have in relation to the Claimant's Claim;
- v. An Order pursuant to Part 9.7(6) and/or Part 26.1(1)(f) and/or Section 7 of the Arbitration Act, Chapter 5:01 and/or the inherent jurisdiction of this Court directing that these proceedings be stayed permanently and/or until such time as this Court may otherwise determine;
- vi. An Order pursuant to Part 9.7(6)(a) of the CPR striking out the Statement of Case filed by Digicel;
- vii. An Order pursuant to Part 26.2(1) (b) of the CPR that Digicel's Statement of Case be struck out in its entirety or to the extent that it purports to claim interim relief on the ground that it, or so much of it is an abuse of the process of this Honourable Court;
- viii. An Order pursuant to Part 26.2(1)(c) of the CPR that Digicel's Statement of Case, or so much of it that relates to:
 - a. An alleged breach by TSTT of that Contract entered into between domestic mobile operators and Porting XS dated 16th February, 2016;
 - b. An alleged breach by TSTT of a statutory duty arising under section 25(2)(j) of the Act;be struck out on the basis that it, or so much of it, discloses no grounds for bringing a claim; and
- ix. An Order pursuant to Parts 66 and 67 of the CPR that Digicel do pay to TSTT the costs of this Application.

23. TSTT supports its Application by the evidence of Mr. Jerome Boynes.

THE EVIDENCE IN SUPPORT OF AND IN OPPOSITION TO THE NOTICES OF APPLICATION

Affidavit of Mr. Abraham Smith

24. Mr. Smith's evidence seeks to illustrate that during the month of May 2020, out of 4581 porting requests, TSTT rejected 2272 requests, being 50% of same. Mr. Smith deposed that upon a closer examination of the reasons proffered by TSTT for the said rejections, the codes "Other" and "Bad Debt" were increasingly and unjustifiably relied upon by TSTT and were not applied in accordance with the Customer Procedures.
25. In respect of TSTT's utilisation of the code "Other", 828 requests were rejected during the said period, with TSTT generally not providing any further explanation, save for 12 instances, where TSTT indicated on the Supplier platform that those requests were rejected because the customer changed his/her mind.
26. In respect of TSTT's utilisation of the code "Bad Debt", 899 requests were rejected during the said period. Mr. Smith also deposed that Digicel's porting agents contacted TSTT, via its Number Portability Hotline and Help Desk, seeking a further explanation of "Bad Debt" rejections in relation to certain numbers, only to be told by TSTT's agents that there were no outstanding balances on those accounts.
27. Mr. Smith further deposed that on or around 22nd May, 2020, that TSTT issued internal instructions to its personnel to cease the porting of numbers to Digicel's network. This assertion is supported by an internal email communication on the said day, from TSTT's Mr. Jerome Boynes to TSTT's Mr. Brian Collins, which Digicel says it acquired from a third party.
28. Mr. Smith also further deposed that on 26th May, 2020, Digicel's agents namely, Mr. Qadiyr Searles and Ms. Ocean Davidson, made calls to TSTT's Help Desk and were informed by TSTT's agents that they have been given "orders to stop doing porting" and that TSTT had "closed off ports for now at BMobile" and further advised Digicel's agents to contact the Authority for approvals going forward.

29. By letter dated 27th May, 2020 Digicel's CEO, Mr. Abdujabor Kayumov, wrote to the Authority's Acting CEO, Mrs. Reddock-Downes, concerning TSTT's cessation of porting. By further letters dated 3rd June, 2020, 9th June, 2020, and 10th June, 2020, Digicel again wrote to the Authority regarding TSTT's conduct. The Authority did not respond to any of this correspondence.
30. On 12th June, 2020, Mr. Kayumov wrote to TSTT's CEO Dr. Ronald Walcott asserting that TSTT was in breach of PAUCA, as well as its contractual obligations under the Customer Procedures. The letter further required TSTT to cease and desist from its unlawful conduct and requested an undertaking that the porting process would be reinstated and that TSTT would thereafter abide by its contractual obligations.
31. By letter dated 15th June, 2020 ("the 15th June letter") TSTT acknowledged Digicel's letter, disputing the allegations raised by Digicel, but nonetheless providing the requested undertaking. In its response to Digicel, TSTT also raised a complaint, which it made to the Authority, which was ultimately subject to a Determination by the Authority on 25th June, 2020. The said complaint concerned an agent of Digicel allegedly issuing communications to persons on a WhatsApp chat group encouraging them to switch to Digicel's network. Mr. Smith asserted that the actions of this agent were not sanctioned and/or approved by Digicel and accordingly the Authority found that TSTT's allegations could not be substantiated.
32. Mr. Smith further deposed that during the period 15th June, 2020 to 26th June, 2020, TSTT rejected 89% of porting requests, and also continued to utilise the codes "Bad Debt" and "Other", in some instances without further explanation. This resulted in Digicel's agents again contacting TSTT, and on one occasion being told by an agent of TSTT that its system was automatically blocking porting requests, and on another being told by another agent that TSTT was not getting time to address the porting requests, and due to the high volume of such requests, the system was automatically blocking same. Mr. Smith also further deposed that Digicel's requests continued to be rejected on the wrongful application of the codes "Other" and "Bad Debt".

33. Digicel has placed in evidence before the Court, transcripts of the said calls between Digicel's and TSTT's respective agents, as well as screenshots of the Supplier platform in relation to the rejection of specific numbers, none of which has been disputed by TSTT.
34. In addition to the above, Mr. Smith further deposed that TSTT's hotline (being the line set up to deal with the facilitation of porting requests) was not being answered during the period 26th May, 2020 to 4th June, 2020, and from 24th June, 2020 onward, frustrating the porting process and making it more administratively challenging for Digicel.

Affidavit of Mr. Jerome Boynes

35. Mr. Boynes' Affidavit sought firstly to dispute this Court's jurisdiction and demonstrate the suitability of the Authority to deal with the instant dispute.
36. Mr. Boynes deposed that the Authority is statutorily mandated to ensure fair competition in the domestic telecommunications sector in accordance with sections 3(a) and 3(b) of the Act and is a highly specialized agency possessing specific and extensive expertise in all regulatory affairs in the telecommunications sphere.
37. Mr. Boynes also deposed that the Customer Procedures, upon which Digicel premises its contractual claim, is in fact a draft document, incapable of creating binding relations and subject to finalisation. Nevertheless, Mr. Boynes accepted that in the interim the parties to the same have relied thereon for guidance as to the porting procedures. Mr. Boynes further sought to illustrate the 'draft' nature of the said document, by identifying what he considers are two plain errors on its face.
38. In relation to Digicel's allegation about the wrongful application of certain codes, Mr. Boynes deposed that The Supplier's 'Inports System' on its platform, consists of possible rejection codes that are outside of the rejection codes contained in the Customer Procedures. He further stated that Mr. Smith also introduces his own language into the relevant conditions in the Customer Procedures and gives erroneous explanations for the application of certain codes in his evidence.

39. In support of this allegation, Mr. Boynes relied on an email dated 8th March, 2016, from The Supplier's Patty de Haan, which attempted to explain the Supplier's analysis of the rejection codes, an email which he says was also sent to 3 of Digicel's representatives and which they failed to disclose. Mr. Boynes emphatically stated that it would be commercially unreasonable for the draft Customer Procedures to contain an exhaustive list of all possible circumstances in which a telecommunications network provider may wish to legitimately reject a port, for example, unauthorized, malicious or fraudulent porting requests.
40. Mr. Boynes also deposed that Digicel has repeatedly utilised the rejection code "Other" without further explanation, and gave an example of the same, by referring the Court to 'the Steel Workers Union Incident'. The said incident involved duly executed porting requests forms from duly authorised representatives of the Steel Workers Union, which were received by TSTT on or about 25th September, 2019. The following day the porting requests were submitted to Digicel and were rejected using the code "Other". This resulted in calls being made by TSTT's agent to Digicel which revealed that Digicel had engaged the Union's representatives and they were no longer wishing to port their numbers from Digicel to TSTT. Subsequent to this call, another of Digicel's agents informed TSTT's agent that the "services/features" had been deactivated from the numbers and the process would continue smoothly. Despite these assurances, Mr. Boynes says the requests were again rejected. Eventually TSTT was informed by a representative of DirecOne, an authorised dealer of TSTT, that Digicel had contacted the Union's representatives and negotiated a new contract, which they accepted.
41. Mr. Boynes also deposed that during the period January 2019, to 4th June, 2020, the code "Other" was used by Digicel to block 85 porting requests. Mr. Boynes also references specific instances where he alleges Digicel also wrongly applied "Other" for reasons outside of the Customer Procedures.
42. Mr. Boynes then sought to set the stage for the justification of TSTT's conduct, in relation to its suspension of porting. Mr. Boynes refers to an incident, which formed the basis of TSTT's complaint to the Authority in May 2020, where he states TSTT had been receiving numerous complaints from customers relating to unsolicited messages being sent to them on WhatsApp

by a person holding herself out to be a representative of Digicel who provided brief explanations of the porting process. It is Mr. Boynes' evidence that messages of this nature are prohibited by the conditions of Digicel and TSTT's respective Concessions with the Authority.

43. By letter dated 6th May, 2020, TSTT issued a "cease and desist" letter to Digicel calling upon them to acknowledge their wrongdoings and terminate the offending activity. TSTT also copied the Authority with this correspondence and called upon the Authority to protect TSTT from what they termed Digicel's "mercenary marketing activity". A follow-up letter was sent to the Authority on 12th May, 2020, to which they responded, advising that the matter was being investigated by them.
44. The investigation by the Authority culminated in the production of a Report on 15th June, 2020. Mr. Boynes states that the said Report, which came more than a month after the Authority's acknowledgement of TSTT's complaint, concluded that the unsolicited messages came from Digicel's agent but that the Authority was unable to conclude that Digicel was in any breach of its Concession as it was unable to identify the audience which received the broadcasting message. The Authority called upon to Digicel to issue a public advisory stating that the messages were not sanctioned by Digicel.
45. In relation to Digicel's allegation of an "unprecedented increase in the number of rejections" by TSTT, Mr. Boynes deposed that Digicel's own evidence illustrated that there was a spike in the number of porting requests made in the month of May, 2020. This increase, which Mr. Boynes describes as "wholly and jarringly" inconsistent with the number of requests in previous months, placed TSTT and its representatives in a genuine state of suspicion and concern that the said requests were either malicious, unauthorized or not bona fide, especially in circumstances where TSTT already had evidence of Digicel's anti-competitive conduct.
46. Mr. Boynes further states that as a result of the Authority's response on 12th May, 2020, TSTT was left in considerable doubt that there would be any meaningful resolution of its complaint and was compelled to make a commercially necessary step and take urgent action to stop the harmful effects it was being subjected to at the hands of Digicel. This resulted in TSTT's

suspending the processing of requests for which it could not verify the bona fides, and the operations of the TSTT's Help Desk.

47. Mr. Boynes further deposed that by letter dated 25th May, 2020, and received on 26th May, 2020, the Authority instructed TSTT to resume the porting procedure during the course of its investigations. Mr. Boynes stated that this letter was met with disappointment by TSTT but nonetheless recognizing the Authority's regulatory role, it complied with the directive.
48. Mr. Boynes further stated that upon TSTT's resumption of the porting process on 28th May, 2020, TSTT began experiencing technical difficulties, which were resolved by its IT Department on 29th May, 2020. Thereafter, Digicel was advised to re-submit requests that were rejected during that period. Mr. Boynes stated that the porting process was fully resumed by TSTT on 1st June, 2020 but that during the period 1st June to 15th June, 2020, it continued to experience technical difficulties, with its system automatically and erroneously rejecting porting requests.
49. Mr. Boynes says that none of the instances flagged up by Digicel in relation to its rejection of porting requests were at all malicious and denies that TSTT was/is in any way orchestrating these events. Further, he stated that the dramatic spike in porting requests from Digicel left TSTT's limited resources overwhelmed, which accounted for any technical and/or administrative difficulties. This was also compounded by the fact that as a result of the pandemic, there was a requirement for increased duties and enhanced due diligence at TSTT.
50. In relation to any reputational harm as alleged by Digicel, Mr. Boynes drew reference to certain newspaper articles wherein he says, the blame for the porting failures was placed on TSTT and paints TSTT unfavourably, whereas social media publications are mostly supportive of Digicel. Ultimately therefore, Mr. Boynes states that it is TSTT's reputation which is at stake, not Digicel's.

Affidavit in Reply of Mr. Abraham Smith

51. Digicel responded to certain matters raised in Mr. Boynes' evidence, which the Court finds useful to briefly summarize below.

52. In treating with the issue of the validity of the Customer Procedures, Digicel relied on a letter dated 17th June, 2020, sent by the Authority to TSTT, wherein the Authority cited the Customer Procedures for TSTT's attention. Reliance was also placed the 15th June letter, wherein TSTT indicated their intention to provide the undertakings requested by Digicel.
53. Further, in relation to the purported non-exhaustive list of possible rejection codes explained by The Supplier's Patty de Haan, Mr. Smith deposed in response that those lists were merely stated to be examples of the possible type of rejections, elicited from a Request for Proposal dated November 2013, which was used in the selection process for a supplier, and in any event, was later superseded by the Customer Procedures in 2015. Mr. Smith says that while the Customer Procedures provides an exhaustive list of possible rejection codes, rejections which are not provided for on the basis of fraudulent, unauthorised and/or malicious porting requests, can be mitigated by the validation process carried out by The Supplier.
54. In relation to the unsolicited messages sent by Digicel's agent on WhatsApp and subject to Determination by the Authority, Mr. Smith reiterated the conclusion of the Authority's investigation and further stated that the said agent's association with Digicel was brought to an end on 15th May, 2020, as she was acting out of the scope of her authority, and the communications sent by her did not confirm to Digicel's brand guidelines.
55. As per Mr. Boyne's suggestion that the sudden spike in the number of porting requests from Digicel was suspicious, Mr. Smith stated that same was the direct result of an aggressive marketing campaign commenced by Digicel at the end of April 2020, with specific focus on porting. The said campaign involved the creation of a field application, making it easier to obtain the information needed for porting and improvements to its website experience.
56. In relation to the issue of the automatic blocking of porting requests by the system, Mr. Smith stated that Digicel never experienced such a difficulty and also noted that there was no correspondence passing between The Supplier and TSTT in relation to same.
57. Mr. Smith also sought to show particular instances in which TSTT advised that a port was blocked in error but was still assigning the code "Other" on the Supplier platform. In any event, Mr. Smith stated that TSTT failed to inform Digicel of the technical difficulties it was allegedly

experiencing and it was instead being told by TSTT's agents that the system was blocking ports as a result of the volume of ports that were coming in at that time.

THE SUBMISSIONS

The Court invited Submissions from the parties, which were heard orally over 2 days of virtual hearings. The Court acknowledges the hard work of the legal teams on both sides in their preparation for and presentation of these Submissions which greatly assisted the Court in its determination of the Notices of Application.

The PAUCA Claim

58. At the outset of Digicel's Submissions, its Counsel indicated to the Court that Digicel wished to abandon its claim in relation to damages for breach of the statutory duty owed pursuant to section 25(2)(j) of the Act and same is noted by the Court.

59. Accordingly, Digicel's Application hinged on 2 causes of action, breach of sections 4(1) and 6(1) of PAUCA and the other for breach of TSTT's contractual obligations.

60. The sections of PAUCA are set out hereunder for ease of reference:

Section 4(1)

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

Section 6 (1)

Any act or practice, in the course of industrial or commercial activities, that damages, or is likely to damage, the goodwill or reputation of another's enterprise shall constitute an act of unfair competition, regardless of whether such act or practice causes confusion.

61. In relation to section 4(1), Digicel relied on the well-known case of Royal Brunei Airlines v Tan¹ wherein it was held that the test for dishonest acts or omissions requires an objective standard, not a subjective one. As succinctly stated by the Learned Judge, “*honest people do not intentionally deceive others to their detriment*”².
62. Digicel supported this allegation by relying on certain items of evidence. Firstly, the correspondence sent by TSTT to the Authority on 22nd May, 2020, informing the Authority of TSTT’s intention to suspend porting on the basis of “cannibalization”, a courtesy which Counsel says TSTT did not extend to Digicel. Counsel submitted that this correspondence is also to be looked at in the context of the 15th June letter wherein TSTT, *inter alia*, alleged defamation on Digicel’s part for saying TSTT had stopped porting and also stated that any employee who indicated that TSTT was not doing porting, was acting without directive and therefore ultra vires. It is also to be looked at in circumstances where TSTT claimed to have been experiencing technical difficulties with its system automatically rejecting ports.
63. Equally relevant, Counsel submitted, was also the fact that TSTT was providing reasons on the Supplier platform for their rejections, contrary to what was being told to Digicel’s agents by TSTT’s agents, and the fact that TSTT shut down their hotline.
64. Senior Counsel for TSTT’s primary submission in this regard is that Digicel’s claim is wholly exaggerated. Senior Counsel drew particular reference to the 24 specific instances referred to in Mr. Smith’s evidence. Counsel submitted that upon a scrutiny of such evidence, the Court will find that Digicel is asking for the grant of interim relief on “a sample” of evidence, a sample of less than 1%.
65. TSTT also sought to convince the Court that its suspension of porting was due to genuine commercial anxiety, as it had seen a sudden and dramatic spike in the number of requests to port in the month of May 2020, which Senior Counsel submitted was a statistical anomaly. This resulted in TSTT suspending porting for 6 working days as it held an honest and genuine belief that it was being subjected to anti-competitive practices by Digicel and took defensive

¹ [1995] 3 All ER 97

² Paragraph 451 of Judgement

measures. The Court was reminded of TSTT's mutual concern in relation to the unsolicited messages, which resulted in its lodging of a complaint to the Authority.

66. TSTT relied on the decision of Ivey v Genting Casinos (UK) Ltd t/a Crockfords Club.³ which came after the case of Royal Brunei (*supra*) and which clarified that the proper test for dishonesty requires a fact finding tribunal to determine subjectively the actual state of the individual's knowledge or belief as to the facts, the reasonableness of which is a matter of evidence.

67. In relation to Section 6 of the PAUCA claim, Counsel for Digicel submitted that there was there no requirement for an element of dishonesty, all that was required was to show that TSTT engaged in commercial activities which damaged the goodwill and reputation of Digicel. Counsel for Digicel submitted that Digicel had satisfied this requirement and referred the Court to articles and publications on social media platforms, wherein persons expressed frustration with the challenges experienced in attempting to port to Digicel.

Breach of Contract

68. Counsel for Digicel relied on the Supplier Contract and the Customer Procedures from which he says the parties' respective contractual obligations are borne.

69. The first point made by Counsel is that this agreement is one which is made amongst various parties and as such, terms which are general in nature and impose obligations, extend these obligations to all parties unless the terms themselves explicitly or implicitly confine it to a limited number of parties. Thus, Counsel says, the rights and obligations contained in the Supplier Contract and the Customer Procedures exist between Digicel and TSTT individually.

70. Counsel referred the Court to the following clauses:

Clause 21 – Assignability

21.1 None of the Parties shall assign this Agreement to a third Party without all of the other Parties' prior written consent, such consent not to be unreasonably withheld,

³ [2018] 2 All ER

denied, conditioned or delayed provided that nothing herein will be deemed to prevent any of the Operators from assigning its rights and/or obligations hereunder without the other Parties' consent to any parent company or Affiliate or pursuant to any merger, acquisition, reorganisation, sale or transfer of all or substantially all of its assets;

21.2 *The Supplier may not novate or sub-contract any part of this Agreement or the Services without the prior written consent of the Operators, such consent not to be unreasonably withheld, denied, conditioned or delayed.*

71. With respect to Clause 21, Counsel contended that this clause collectively binds the parties placing them on equal footing.

Clause 23 – Compliance with Laws

23.1 *Each Party shall comply with all applicable national law and regulations including the procurement of permits and licenses throughout the term of this Agreement.*

23.2 *The Supplier shall from time to time comply with any reasonable request made by the Operator to ensure compliance with legislation subordinate legislation and regulation in any jurisdiction including without limitation to ensure compliance with the requirements of the Authority. In particular, but without limitation, the Supplier shall at the request of the Operators provide access to the Authority to premises and data as required in relation to the carrying out of any examination, investigation or audit in connection with the provision of the Services by the Supplier.*

72. Counsel submitted that the requirement for compliance with laws binds TSTT and directly translates into a requirement that both parties comply with the Act, and the *Telecommunications (Interconnection) Regulations* made pursuant thereto.

Clause 25 – Cooperation of the Parties

a) *The Parties shall furnish each other in a timely manner with all data or information useful and necessary to execute the Agreement properly and provide full cooperation thereto.*

b) *The Parties will at all times follow each other's instructions in relation to the use of the Service and/or the proper performance of the Agreement.*

73. Counsel submitted that the term “to execute the Agreement properly” in Clause 25 does not carry the ordinary meaning of execute but rather speaks to the performance of the agreement, which is one which contemplates porting.

74. In relation to the Customer Procedures the Court does not propose to set out in detail each of the clauses raised by Digicel but instead seeks to provide an explanation of the same as follows:

Clause 1.12- prohibits a porting request from being recalled once it has been initiated by a customer by affixing his/her signature;

Clause 1.54 – requires a donor Operator (being the operator from which a customer seeks to port) to provide a Notice of Rejection to Supplier and containing the reasons for the rejection, which Notice will then be provided to the recipient Operator (being the operator to which a customer seeks to port)

Clause 1.10.2- provides a list of circumstances where a donor Operator is entitled to reject a porting request.

Clause 1.5.5- prohibits the automatic rejection of ports, without consideration thereof.

75. Counsel for Digicel submitted that TSTT breached these Clauses of the Customer Procedures as set out in the evidence traversed by the Court hereinabove.

76. Counsel for TSTT denied that the above obligations are imposed *inter se* i.e. between the parties individually. He submitted that upon a proper construction of the Supplier Contract, one will find that the obligations arise as between the Supplier, on the one hand, and the Operators collectively, on the other. Counsel submitted that where the Supplier Contract seeks to impose obligations on an individual level, this is explicitly provided for. Moreover, Counsel submitted that if the obligations can in fact be enforced *inter se* then Digicel is left to contend with the dispute resolution clause contained in same, which states as follows:

Clause 26

All disputes or differences which might arise between the Supplier and Operators, touching and concerning this Agreement or its construction or affecting the rights or duties of the Parties and failing such settlement within 30 days of the dispute arising (or such further time as agreed to in writing by the Parties) shall be referred to arbitration in Trinidad and Tobago in accordance with the Arbitration Act, Chapter 5:01 of the Laws of the Republic of Trinidad and Tobago.

Injunctive Relief

77. At the outset of the hearing of Digicel's Application, the Court questioned the supervision that would be required were it to grant the interim Order sought pursuant to Part 17.1(1) (a) of the CPR requiring TSTT, in respect of each port wrongly rejected during the Rectification Period, where the customer is established as still wishing to port its number to Digicel T&T, to take all necessary steps to consent to such ports as soon as practicable and in all events subject to adherence to the requirements of the Customer Procedures. Counsel for Digicel conceded that this would be challenging to pursue in the terms sought.
78. In respect of Digicel's claim for injunctive relief, Counsel for Digicel relied on the oft-cited cases of Jetpak Services Ltd. BWIA International Airways Ltd.⁴ and East Coast Drilling and Workover Services Ltd. V Petroleum Co. of Trinidad and Tobago Ltd.⁵ which have long settled the test for the grant of injunctive relief – *where does the greatest risk of injustice lie, in granting or not granting the injunction?*
79. On this issue, Counsel for Digicel submitted that the greatest risk of injustice lay in the Court not granting the injunction and Digicel being left to a remedy of damages; damages being an unsatisfactory and insufficient remedy for Digicel. The reason for this, Digicel's Counsel submitted, lies in the very quantification of those damages. Such an assessment, Counsel argued, would be very complex and problematic and will involve, *inter alia*, an evaluation of all porting requests during the period May to June, 2020, with such figure being excess of

⁴ (1998) 55 WIR

⁵ (2000) 58 WIR

4000. Further, such an assessment would also necessitate a speculative element as customers also have an ability to port and report. Apart from this speculative element, it would also be highly unreliable because of the many variables in this case, such as customer freedom of choice, how performance would be perceived by the customer etc.

80. Counsel for Digicel contended that there was ample authority to demonstrate that damages would not be an appropriate remedy in this case. The case of Evans v Marshall⁶ was cited to the Court in which it was found that loss of goodwill and trade reputation are also examples of situations in which monetary quantification cannot be done in the assessment of damages.

81. Counsel went further to say that the grant of an injunction in the instant dispute is about public interest and customer freedom of choice. Counsel stressed the importance of public interest and referred the Court to decision of Associated British Ports v Transport and General Workers' Union et al⁷.

82. Counsel also relied on letter dated 29th May, 2020, sent by Acting CEO Mrs. Reddock-Downes to TSTT's CEO Dr. Walcott. By this letter, the Authority gave a direction to TSTT to reinstate its porting service and noted its unilateral decision to suspend porting, ascribing to TSTT's conduct, obduracy and disregard for the interest of consumers. The Authority went further to remind TSTT of their obligations in relation to number portability, citing both the Act and TSTT's Concession, specifically condition A42 thereof, placed in context hereinbelow:

Section 25(2)(j)

(2) In respect of a concessionaire's obligations pursuant to subsection (1), the Authority shall require a concessionaire to—

(j) provide, to the extent technically feasible, number portability when required to do so and in accordance with the requirements prescribed, by the Authority;

⁶ [1973] 1 WLR 349

⁷ 1 WLR

Condition A42

The concessionaire shall in accordance with any regulations relating to number portability, facilitate the portability of numbers assigned to any customer of any operator of public telecommunications networks or providers of public telecommunications services.

83. Counsel submitted that Digicel has surpassed the threshold for the grant of injunctive relief and demonstrated to the Court that it had more than just a prima facie case, but a strong one. In this regard, the Court was again reminded to note the contents of the 15th June letter, the undertaking provided by TSTT and its subsequent non-compliant conduct.
84. Counsel submitted that this offers the Court insight into how TSTT may behave in the absence of an injunction. Counsel further submitted that parties who wilfully break contractual obligations should find themselves in a particular setting, as per the case of Jetpack (*supra*).
85. As per the mandatory aspect of the injunction sought, Counsel submitted this should pose no difficulty to the Court in the special circumstances of the instant case and relied on the case of Digicel v TSTT⁸ wherein mandatory relief was granted by the Honourable Mr. Justice Beraux (as he then was).
86. Counsel for TSTT again emphasized the lack of and/or insufficiency of evidence presented by Digicel. Counsel for TSTT stated that Mr. Boynes by his affidavit has sought to explain TSTT's use of the "Other" code and has proffered valid and commercial reasons for same. Thus, Counsel submitted, it would be a stretch for the Court to deem TSTT's application of this code as dishonest, on the face of the "flimsy" evidence presented by Digicel.
87. Furthermore, Counsel for TSTT submitted that any clarification and/or finalization of the terms of the Supplier Contract by the Court would translate into an adjustment of the arrangements of all parties to the agreement as it would be difficult for the Court to attempt to excise the application of the code from the such arrangements. Counsel submitted that the Court is being asked to make a one-sided assessment without word from the other parties to the agreement i.e. the other Operators.

⁸ Claim No. CV 2006- 003421

88. TSTT therefore sought instead to persuade the Court on the merits of its own Notice of Application, mounting its challenge to this Court's jurisdiction.

Jurisdiction

89. In relation to the PAUCA claim, Counsel for Digicel submitted that the Court has a discretion to exercise its jurisdiction, in the determination of any issue under PAUCA, and it should do so. In support of this submission Counsel relied on the decision of in the case of Digicel v TSTT (*supra*) wherein the Honourable Mr. Justice Breaux (as he then was) determined that the Court did have jurisdiction in relation to the PAUCA claim therein, and that claims of this nature are not subject to the alternative dispute resolution process by arbitration.

90. Counsel for Digicel also relied on the case of Digicel (St. Lucia) Ltd. & Ors. V Cable & Wireless PLC & Ors⁹ in which he submitted that no point was taken by the Court as to jurisdiction at all, despite section 82 of PAUCA being highlighted in Justice Morgan's deliberations.

91. Counsel further submitted that section 4(2) of PAUCA provides for remedies obtainable under the civil law, which must contemplate or court order or judgment, in the absence of which there would be no realization of such remedies.

92. Furthermore, Counsel for Digicel also submitted that an Act using general words cannot derogate from the provisions of a special Act using special words and referred the Court to the decision of Seward v Cruz¹⁰. Counsel submitted that on the facts of the instant case, the general Act is the Telecommunications Act, and the special Act is PAUCA, which deals with and/or creates the special subject matter i.e. acts of unfair competition.

93. In relation to Digicel's breach of contract claim, Counsel submitted that Section 82 of the Act speaks to the requirement for process.

⁹ H.C. No. 07C01917 @ para 60

¹⁰ (1884) 10 AC 59

Section 82 (1)

The Authority shall establish a dispute resolution process to be utilised in the event of a complaint or dispute arising between parties in respect of any matter to which section 18(1) (m) or 25(2) (h) applies, or where a negotiated settlement, as required under section 26, cannot be achieved, or in respect of any other matter that the Authority considers appropriate for dispute resolution.

94. Counsel submitted that the aforesaid section requires that only disputes in respect of which dispute resolution processes have already been established by the Authority, can properly be the subject of a determination by it. On this point, Counsel submitted that the current dispute resolution processes established by the Authority only address matters in respect of sections 25(2)(h) and 26 of the Act and does not include matters captured under section 18(1)(m), under which Counsel says the current dispute falls.

Section 18(1)(m) of the Act states:

(1) Subject to the provisions of this Act, the Authority may exercise such functions and powers as are imposed on it by this Act and in particular—

(m) investigate complaints by users, operators of telecommunications networks, providers of telecommunications and broadcasting services or other persons arising out of the operation of a public telecommunications network, or the provision of a telecommunications service or broadcasting service, in respect of rates, billings and services provided generally and to facilitate relief where necessary.

95. Further, Counsel for Digicel also stated that in order for TSTT to contend that Digicel must follow the established dispute resolution procedures, it must show that the present dispute is one which concerns interconnection, as per section 2 of the Act. Counsel also cited Regulation 9 of the Telecommunications (Interconnection) Regulations (hereinafter referred to as “the Interconnection Regulations”) for the Court’s attention:

Section 2

“Interconnection” means the linking of public telecommunications networks and public telecommunications services, to allow the users of one provider to access the services provided by such other provider.

Regulation 9

A concessionaire shall configure its network to facilitate number portability between similar networks as and when directed by the Authority.

96. In respect of the above, Counsel for Digicel drew a distinction between a concessionaire’s obligation to “configure its network to facilitate number portability” and the rejection of a request to port from one network to the other. Counsel argued that configuration relates to the design element and/or design component of a concessionaire’s network, which is an aspect of interconnection, whereas the refusal of a network to accept a request to port is a different and separate thing entirely.
97. In summary Counsel for Digicel submitted that the subject matter for which the Court has jurisdiction is inextricably wound up in the allegations of porting, because the actions of dishonesty are also tied to the actions which support the breach of contract claim making the facts almost identical. Thus, Counsel contended that if the claim were to be broken up and not kept before this Court, it would not only be inconvenient, but could also lead to increased costs and the wrong finding of fact.
98. Furthermore, Counsel expressed concern that a tribunal would not be able to grant injunctive relief as the same is a creature of statute. Counsel submitted that the only circumstances in which an injunction can be granted is in aid of arbitration, where the parties have a contractual agreement to refer a matter to arbitration, which on the facts of this dispute, does not exist.
99. Counsel for TSTT submitted in response that the jurisdiction of the Court is ousted as the Act is a specialist statutory framework within which disputes as to interconnection are treated with, an aspect of which is number portability. Accordingly, Counsel stated that the Act by necessary implication, has the effect of ousting the Court’s jurisdiction, but if this is not so, then the Court

should find that there are compelling reasons upon which it may determine that it should decline to exercise any jurisdiction it may have, or stay the proceedings pending a determination by the Authority.

100. In respect of the PAUCA Claim, Counsel for TSTT disputed that obligations are created *inter se* as suggested by Counsel for Digicel but submits that if the Court should disagree with this position, then the Court ought to acknowledge the dispute resolution clause contained in the Supplier Contract, which stands to be treated as an arbitration agreement for the purposes of the Arbitration Act.

101. Counsel referred the Court to the decision in Western United Credit Union Co-operative Society Ltd. V Corrine Ammon¹¹ where it was held that,

"The court's approach to the construction of ouster clauses is prescribed by well-settled principles which were set out in the judgment of Luckhoo J.A., in Guyana Sugar Corporation v Seeram Teemal as follows-

"(1) the jurisdiction of the court was not ousted by statute except by express words or by necessary implication.

(2) a statute imposing restrictions upon a citizen's right of action in court should be strictly construed and should not be extended beyond what the words used actually covered; and

(3) where a right or liability not existing at common law was created by statute, which gave a special remedy for enforcing it or appointed a specific tribunal for its enforcement, a party seeking to enforce his right 36 must resort to that remedy or to that tribunal and not to others."

102. Counsel for TSTT also accepted that Digicel has pleaded almost identical facts in relation to both the causes of action. This was signalled by Counsel as he stated that both parties are *ad idem* on the law that pertains to special and general Acts i.e. that general legislation does not derogate from special legislation. Counsel however contended that the special Act in this situation, is the Telecommunications Act and PAUCA is the general Act.

¹¹ Civ. App. 103 of 2006

103. Counsel further submitted that there can be no reasonable dispute that the Authority is empowered and has the jurisdiction to deal with all of the matters raised by Digicel, as the Authority is intended to treat with all matters arising in the telecommunications sector concerning anti-competitive practices.

104. There were various provisions in the Act cited by Counsel in support of his submission, the relevant of which are as follows:

Preamble

Whereas, the Government believes that in order to promote the country as the regional centre for the new information economy, it is necessary to establish a comprehensive and modern legal framework for an open telecommunications sector by permitting new providers of telecommunications services to enter the market and compete fairly:

And whereas it is appropriate that an Authority be established with transparent regulatory processes to guide the sector's transformation from virtual monopoly, in which Telecommunications Services of Trinidad and Tobago is the principal provider of telecommunications services, to a competitive environment, to monitor and regulate the sector so transformed and, in particular, to prevent anti-competitive practices.

Section 3 (a)

The objects of the Act are to establish conditions for—

(a) an open market for telecommunications services, including conditions for fair competition, at the national and international levels.

Section 22 (1) (b)

(1) Every concession for a public telecommunications network, a public telecommunications service or a broadcasting service shall—

(b) prohibit anti-competitive pricing and other related practices;

Section 29 (2) (c)

(2) The Authority may establish price regulation regimes, which may include setting, reviewing and approving prices, in any case where—

c) the Authority detects anti-competitive pricing or acts of unfair competition.

Section 80

(1) The Board, employees of the Authority and every person concerned with the administration of this Act shall treat documents, information or other matters related to the administration of this Act as secret and confidential except that disclosures—

(a) made by the Authority, or any other person, pursuant to the provision of this Act or any Regulations made hereunder; or

(b) which the Authority considers necessary in the discharge of its functions, shall not be deemed inconsistent with any duty imposed under this section.

105. Counsel argued that a holistic reading of the above makes provision for competition in a rather specific manner, as opposed to the general provisions made by way of PAUCA.

106. Further, Counsel stated that there are specific concessions which deal with parties restraining themselves from acts of unfair competition, as well as direct and specific contractual obligations in the individual Operator's Concessions which puts the enforcement of same in the hands of the Authority.

107. Counsel referred the Court specifically to condition A21 of the Concessions which provides that:

“The concessionaire shall not engage in conduct which has the purpose or effect of preventing or substantially restricting or distorting competition, in any telecommunications or broadcasting markets or interfering with the operation of networks, or the provision of services by any of its competitors.”

108. In relation to section 6 of the PAUCA claim, Counsel submitted that the remedy available for a breach of same, is the same remedy available as per section 4(2) of PAUCA. Counsel further

submitted that PAUCA makes no provision for any special tribunal for the resolution of the dispute nor is there special relief.

109. Counsel for TSTT further argued that the Act has created the Authority, being a special authority, which of itself is entitled to grant relief through another special tribunal, the composition of which is also dictated by the Act. The Authority, Counsel submitted, has a statutory mandate to ensure that it has the requisite competence, experience and understanding of the telecommunications sector specifically, and how competition issues may arise therein. Counsel continued that disputes of this nature requires more than an assessment of legal principles, but also requires an assessment of facts and circumstances.
110. Counsel refuted Digicel's assertion that number portability is not an aspect of interconnection and as such there is no established dispute resolution to deal with same. Counsel submitted that Section 25 of the Act squarely deals with same.

Section 25(1)

In addition to the requirements of sections 22 and 24, a concession for a public telecommunications network or a public telecommunications service shall include conditions obliging the concessionaire to provide for—

(a) direct interconnection with the public telecommunications network or public telecommunications service of another concessionaire;

(b) indirect interconnection with such network or service referred to in paragraph (a), through the public telecommunications networks or public telecommunications services of other concessionaires; and

(c) the transmission and routing of the services of other concessionaires, at any technically feasible point in the concessionaire's network.

Section 25 (2)

In respect of a concessionaire's obligations pursuant to subsection (1), the Authority shall require a concessionaire to—

(j) provide, to the extent technically feasible, number portability when required to do so and in accordance with the requirements prescribed, by the Authority;

111. Counsel further submitted that if the Court should find that number portability is a distinct feature and not an aspect of interconnection, such a finding is of no moment and there is nothing to preclude a dispute from being referred to the Authority thereby triggering the Authority's duty to establish dispute resolution processes in accordance with Section 82(1) of the Act. Counsel argued that the mandatory obligation contained therein is a very broad obligation and thus requires the Authority to provide for the resolution of all disputes.

112. The following Regulations were also cited by Counsel in support:

Regulation 31

Where a dispute arises between concessionaires with respect to interconnection, the matter may be referred to the Authority for consultation and guidance, on the agreement of both parties, prior to either party submitting the matter to the Authority as a dispute.

Regulation 32

Save as provided in regulation 31, every dispute regarding interconnection shall be submitted to the Authority for resolution in accordance with the dispute resolution process.

113. Counsel for TSTT also sought to dispel the suggestion by Digicel that it would not be given the interim relief sought if the dispute is referred to the Authority by referring the Court to Regulation 33, which states that:

(1) The Authority may, in relation to any dispute referred to under these Regulations, direct that the parties implement such interim arrangement for interconnection as the Authority considers appropriate having regard to the nature of the dispute.

114. Counsel places reliance on the local decision in Solomon Gabriel v 91.9 Trini Bashment Ltd.¹² which he submits is the most helpful authority on the issue of jurisdiction.

¹² CV 2006-00298

ANALYSIS/FINDINGS

115. It will not be disputed by either party in the instant case that this action can be characterized as a dispute between 2 titans of the telecommunications industry in Trinidad and Tobago. It also cannot be disputed that while these parties have argued before this Court and awaited judgment, there are other operators in our telecommunications industry who are parties to Concessions with TSTT and to the Supplier Contract and the Customer Procedures aforementioned. It finally cannot be disputed that the Authority has a role to play in the instant case. The Authority has attended the Court hearings and been supplied with all documents filed on the basis of a watching brief, without objection from either party. Indeed, the Authority has, prior to the commencement of this High Court Action, been entreated by the parties and has acted in respect of matters concerning number portability.
116. The Court is persuaded on the basis of the evidence and the submissions of Counsel for Digicel, that in matters concerning number portability, that TSTT may have been operating contrary to honest practices, as defined in Royal Brunei. However, whether TSTT's conduct amounted to an act of unfair competition contrary to PAUCA requires an analysis of the evidence and facts and an interpretation of the Customer Procedures in particular and their application, which is not an exercise that this Court considers that it has the luxury to embark upon such as to deliver to the parties the appropriate remedies for the resolution of this dispute.
117. As it pertains to Digicel's breach of contract claim, the Court agrees with Counsel for Digicel and finds that the Supplier Contract and Customer Procedures appended thereto, form the basis of the arrangements of the parties in relation to number portability. The Court also finds that whilst the Customer Procedures have been expressed to be a draft subject to finalisation, these procedures have been relied upon by Digicel and by TSTT as demonstrated on the evidence and also been recognized and relied upon by the Authority, without any objection to their purported "draft" status.
118. The evidence presented to this court in support of Digicel's application for interim relief descends into world of codes and reasons. The Court is being asked to interpret these codes and cross-reference them with such reasons and to make findings which this Courts says will

not only impact the parties hereto but all Operators. There are other Operators who have not had say in these proceedings.

119. The Court finds that the Supplier Contract is an agreement made amongst multiple parties and that to make any findings and/or clarifications in relation thereto, will necessarily foist obligations upon all Operators, inhibiting their contractual freedom. To delve into matters of the number of and interpretation of codes and to make determinations thereon to bind only the parties to this action, would be to usurp the function of an Authority which is mandated to monitor and regulate the telecommunications industry and prevent anti-competitive practices.

120. Accordingly, in disposing of the aforementioned Notices of Applications the Court finds that there are 2 issues for its determination.

Should the Court grant Injunctive Relief?

121. The Court agrees with the test advanced by Counsel for Digicel, as per the cases of Jetpack and East Coast Drilling – where does the greatest risk of injustice lie?

122. In determining whether to grant the interlocutory relief sought by Digicel, the Court finds that it will be required to conduct an in-depth analysis of number portability, the technical framework required for the same, how the same is to be facilitated and to conclude whether the same has ultimately supported customer choice.

123. The Court recognises that the instant dispute has its genesis in the applicability of certain “rejection codes” which touches and concerns the Supplier Contract, which the Court has already expressed its hesitation to construe, particularly as any finding of this Court will impact on other Operators. The Authority, has by its letter of 17th June, 2020, exhibited as “JB.31” to the Affidavit of Jerome Boynes referred to the Customer Procedures. The Authority goes on in that correspondence to cite what it considers to be the only 9 reasons allowed for a donor to reject a port. This Court asks itself, is it better placed than the Authority to make such a finding and based on that finding to grant injunctive relief? The Court answers this question in the negative.

124. The Authority has also by its letter dated 20th July, 2020 to both Digicel and TSTT confirmed that the Authority is willing to facilitate meetings between the parties with a view to resolving present disputes with the object of ensuring that both parties comply with their obligations under the Concessions, the Act and Regulations made thereunder and any agreements entered into in relation thereto. In so ensuring compliance by both parties, the Authority, as regulator, is also setting the stage for like compliance by all Operators in our telecommunications industry.
125. This Court also agrees with Counsel for Digicel that damages will not be an appropriate remedy in the circumstances of this dispute, as the process of assessment and/or estimation thereof may prove complex and unsatisfactory. An award of damages also does not account for any continued anti-competitive conduct as alleged by Digicel.
126. This Court therefore says that the greater risk of injustice in the instant case lies in granting the interim relief sought, without the disputes raised in this Action first being submitted to the Authority for resolution.

Does the Court have jurisdiction?

127. The Court was referred to the decision of the Honourable Mr. Justice Breaux (as he then was) in Digicel v TSTT by Counsel for Digicel. The Court finds however that the Decision therein is distinguishable from the instant case, as the dispute in that case had already been ventilated by an arbitration panel before the parties were sent back to conduct their own negotiations, which ultimately failed, giving rise to the claim. Further, at the time of that dispute, there was no interconnection agreement in place as the telecommunications sector was just then being transformed from a virtual monopoly, with the entrance of Digicel into the market. The state of the market was thus different at that time.
128. The Court was also referred to the decision of Digicel (St. Lucia) Ltd. & Ors. v Cable & Wireless PLS & Ors by Counsel for Digicel in further support of his submission that the Court has jurisdiction. As submitted by Counsel for Digicel, jurisdiction was not therein disputed at all, presumably because the case concerned a PAUCA only claim. In that case there was no reference to nor reliance upon the Act and/or the terms of Digicel's Concession and/or the

Interconnection Regulations. This Court notes the recognition by Justice Morgan that any direct obligation as to interconnection falls under the Concession and/or guidelines issued by the Authority, thus inherently recognising the Authority as the custodian of affairs within the telecommunications sector, with which this Court agrees.

129. This ultimately brings the Court to the point of contention i.e. whether number portability is an aspect of interconnection. The Act makes specific reference to number portability. A conjoint reading of section 25 of the Act, the Interconnection Regulations made pursuant to section 78(1) of the Act, the terms of the Supplier Contract and/or the Customer Procedures and the individual Concessions lead this court to find that number portability is directly related to connectivity and is therefore an aspect of interconnection within the meaning of section 2 of the Act. Interconnection facilitates number portability which supports consumer choice. These concepts are inextricably linked.

130. Having made this determination, the Court then considers section 82(1) of the Act and whether same has the effect of the ousting the Court's jurisdiction.

131. In this regard, the Court was particularly assisted by the decision of the Honourable Madame Judith Jones (as she then was) in the case of Solomon Gabriel (*supra*). The Court finds that section 82(1) does not have the effect of ousting the Court's jurisdiction, but that it imposes a statutory obligation on the Authority to develop dispute resolution procedures in relation to all matters, inclusive of number portability. The aforementioned section in conjunction with *Regulation 31 and 32 of the Interconnection Regulations* have the effect requiring the Authority to carry out this statutory function. Having already determined that number portability is an aspect of interconnection, the Authority is well placed to put in place the processes and procedures to resolve the disputes raised in the instant case.

132. The Court agrees with Counsel for TSTT that the Telecommunications Act is a special Act which deals with the special subject matter of unfair competition in the telecommunications industry and is best regulated by the Authority and/or its specially composed tribunal. The Court accordingly finds that the wide panoply of powers given to the Authority as per the Act, specifically section 18 thereof, provide a sufficient basis for the resolution of this dispute by the Authority.

133. The Court is also mindful of the fact that the Authority has already been engaged by the parties in relation to other disputes regarding interconnection, as well as the present dispute and same is therefore best left at the door of the Authority. This will also allow the other concessionaires and/or Operators to be a part of any clarification process by the Authority.

134. The Court also notes Digicel's concern that TSTT may continue to engage in practices which are not competitive in the absence of injunctive relief. This Court finds, however, that any tribunal empanelled by the Authority does have the ability to provide Digicel with "interim arrangements" as necessary, pursuant to their powers under Regulation 33(1) of the Act.

135. Accordingly, the Court finds favour with the approach adopted in Solomon Gabriel.

*"In my opinion the Act provides that the dispute resolution process set up by the Authority pursuant to Section 82 of the Act must be exhausted before that dispute can be referred to the Court."*¹³

136. The Court accordingly orders as follows:

1. The Notice of Application filed herein on 29th June, 2020 is dismissed.
2. Pursuant to Rule 9.7(6) and/or Rule 26.1 (1)(f) of the CPR and/or the inherent jurisdiction of this Honourable Court these proceedings are stayed until such time as the Telecommunications Authority of Trinidad and Tobago has exhausted its Dispute Resolution Process under the Telecommunications (Interconnection) Regulations.
3. The Applicant/Claimant to pay the Respondent's/Defendant's costs, to be assessed by the Registrar in default of agreement, certified fit for Junior and Senior Counsel.

Nadia Kangaloo
Judge
14th September, 2020

¹³ Page 15, 4th paragraph