

THE REPUBLIC OF TRINIDAD & TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2019-01499

IN THE MATTER OF THE JUDICIAL REVIEW ACT, No. 60 of 2000.

AND

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL
REVIEW
PURSUANT TO THE PROVISIONS OF THE JUDICIAL REVIEW ACT, No. 60 of 2000.**

BETWEEN

COLUMBUS COMMUNICATIONS TRINIDAD LIMITED

Claimant

AND

TELECOMMUNICATIONS AUTHORITY OF TRINIDAD AND TOBAGO

1st Defendant

TELECOMMUNICATIONS SERVICES OF TRINIDAD AND TOBAGO LIMITED

Interested Party

Before the Honourable Mr. Justice Frank Seepersad

Date of Delivery: 28 July 2021

Appearances:

1. Steven A. Singh instructed by Amanda Adinoolah, Attorneys-at-law for the Claimant.
2. Douglas Mendes, S.C. instructed by Gabrielle Gellineau, Attorneys-at-law for the Defendant.
3. Martin G. Daly, S.C., Christopher Sieuchand instructed by Sashi Indarsingh, Attorneys-at-law for the Proposed Defendant.

DECISION

1. Before the Court for its determination is the Claimant's Fixed Date Claim Form filed on the 19th of September 2019 by virtue of which the Claimant seeks the following relief:

- a. A Declaration that the Defendant/Respondent has acted in a manner that is procedurally unfair in that it has failed to satisfy or observe conditions or procedures required by law in:
 - i. failing, refusing and/or neglecting to enforce section 25 of the Telecommunications Act Chap. 47:31 against Telecommunications Services of Trinidad & Tobago Limited (“TSTT”);
 - ii. failing, refusing and/or neglecting to enforce Regulation 9 of the Interconnection Regulations against TSTT; and
 - iii. failing, refusing and/or neglecting to enforce Determination 2016/01 against TSTT.

- b. A Declaration that the Defendant/Respondent exercised its discretion unreasonably, irregularly and/or improperly in omitting, failing and/or neglecting to compel TSTT to implement Fixed Number Portability in compliance with the Act, Determination 2016/01, A42 of TSTT Concession Agreement with the Defendant/Respondent and Regulation 9 of the Interconnection Regulations.

- c. A Declaration that the Defendant/Respondent breached and/or omitted to perform its duties as prescribed by the Act.

- d. A Declaration that the Defendant’s/Respondent’s failure to act against TSTT is a breach of its mandate under the Act and/or a breach of the legitimate expectation of the Claimant/Applicant that if it complied with the implementation of all the necessary hardware, software and infrastructure for, Number Portability, which the Claimant/Applicant has done at significant expense, it would be entitled to Number Portability among itself and other concessionaires.

- e. A Declaration that by failing to act against TSTT, the Defendant/Respondent exercised its power in a manner so unreasonable that no reasonable person could have so done.

- f. An Order of mandamus compelling the Defendant/Respondent to enforce Determination 2016/01 against TSTT and/or any and all other concessionaires who fail to comply with the Fixed Number Portability directives under the Act, its Concession Agreement with the Defendant/Respondent and the Telecommunications (Interconnection) Regulations 2006.
 - g. Costs.
 - h. Damages.
 - i. Interest.
 - j. Such further and/or other relief as the Court deems fit and appropriate.
2. The evidence before this Court is contained in the following Affidavits namely:
 - a. the Affidavit of Kurleigh Prescod sworn to and filed on behalf of CCTL on April 11th 2019 (“the KP Affidavit”);
 - b. the Affidavit of Cynthia Reddock-Downes sworn to and filed on behalf of TATT on January 9th 2020 (“the CRD Affidavit”);
 - c. the Affidavit of Lisa Agard sworn to and filed on behalf of TSTT on November 16th 2020 (“the Agard Affidavit”);
 - d. the Reply Affidavit of Kurleigh Prescod sworn to and filed on behalf of CCTL on January 11th 2021 (“The KP Reply Affidavit”) and
 - e. the Reply Affidavit of Cynthia Reddock-Downes sworn to and filed on behalf of TATT on January 18th 2021 (“the CRD Reply Affidavit”).

PARTIES:

3. In this judgement the parties shall be referenced as follows:
 - a. The Claimant as “CCTL”

- b. The Defendant as “TATT “
- c. The Interested Party as “TSTT”.

The Operative Circumstances which predated the instant application:

- 4. CCTL is a concessionaire authorised, by section 21 of the Telecommunications Act Chap. 47:31 (“the Act”), to operate a public telecommunications network and/or provide public telecommunications services and/or broadcasting services in Trinidad and Tobago.
- 5. TATT is the Authority established as a body corporate under section 4 of the Act which is mandated, *inter alia*, by virtue of section 3 of the Act, to ensure that open market conditions exist for telecommunications services. It is also obligated to promote universal access to telecommunications services for all persons in Trinidad and Tobago, to the extent that it is reasonably practicable to provide such access.
- 6. In pursuance of its statutory obligation, TATT published its Implementation Plan and established the Number Portability Steering Committee (“the Steering Committee”) as well as various sub-committees to work through the requirements to support the implementation of Number Portability.
- 7. Following its establishment, the Steering Committee developed several documents to facilitate the implementation of Number Portability including:
 - a) Memorandum of Agreement for the Provision of a Centralized Solution for Fixed and Mobile Service Provider Number Portability for the Republic of Trinidad and Tobago ;
 - b) Contract for the Provision of a Centralized Solution for Fixed and Mobile Service Provider Number Portability for the Republic of Trinidad and Tobago and
 - c) Number Portability in Trinidad and Tobago – Customer Procedures.

8. The Implementation Plan and the Steering Committee documents established dates for the implementation of Fixed Number Portability (FNP). TATT's Determination 2014/01 provided for an implementation date of 1st May, 2015 and thereafter its Determination 2015/01 specified a varied implementation date of 30th September, 2016 .
9. A final Determination 2016/01 was issued with dates of 31st October, 2016 and 28th November, 2016 for the "go live" of mobile and fixed number portability respectively. Mobile Number Portability (MNP) was implemented by concessionaires on the 31st October, 2016.
10. By TATT's Determination: Dominance in Retail Domestic Fixed Telephony Markets dated 12th March, 2010 TATT/2/10/2/2, TSTT was found to be the dominant provider of fixed voice services (i.e. land lines). Despite its dominance and Determination 2016/01, TSTT failed, refused and/or neglected to implement the FNP.
11. CCTL wrote to and had several meetings with TATT with respect to TSTT's non-compliance with Determination 2016/01 and requested TATT to act decisively to ensure compliance with the implementation of Fixed Number Portability. On the 24th November, 2017 TATT notified CCTL that it would commence enforcement of its Determination 2016/01, if concessionaires failed to implement Fixed Number Portability by 31st December, 2017.

The Procedural History of the instant matter:

12. By Notice of Application dated January 27th, 2020 TATT successfully applied for TSTT to be joined as a party to this action. After several months of litigation, the Court of Appeal, on August 10th, 2020 upheld this Court's ruling which joined TSTT as a party.

The Issues:

13. Having reviewed the procedural history as well as the evidence and the submissions, this Court holds the view that the joinder of TSTT is now *res judicata*. TSTT has been lawfully joined and the basis upon which the Court's decision was premised was expressed with clarity. The Court noted that natural justice mandated TSTT's presence so as to enable a comprehensive determination as to whether there existed a statutory obligation to implement FNP.
14. The Court also holds the view that TATT's decision to engage enforcement proceedings against TSTT is not a circumstance which can be reviewed by this Court in the instant action.
15. Consequently, this Court must first resolve the issue as to whether TSTT is legally obligated to implement FNP. If the Court finds that it is not, then, the Applicant's claim would be devoid of merit and would have to be dismissed. If however the Court finds that TSTT has a legal obligation to implement FNP, it would have to determine the nature and extent of any applicable relief to which the Claimant may be entitled.

Resolution of the Issues:

Issue 1: Whether TSTT is legally liable to implement FNP?

The Law:

16. The Relevant Legislative and applicable regulatory framework includes, *inter alia*, the following:

- a. Section 3 of the Act states that the Act's objective is to establish conditions for:
 - (d) promoting universal access to telecommunications services for all persons in Trinidad and Tobago, to the extent that is reasonably practicable to provide such access.
 - b. Section 25(1) of the Act provides that, a Concession for a public telecommunications network or a public telecommunications service shall include conditions obliging the concessionaire to provide among other things direct and indirect interconnection with the public telecommunications network or public telecommunications service of another concessionaire.
 - c. Section 25(2)(j) of the Act provides that, in respect of a concessionaire's obligations, TATT shall require a concessionaire to provide, to the extent technically feasible, number portability when required to do so and in accordance with the requirements prescribed by TATT.
17. Condition A42 of the concessions issued to all Operators in the Fixed Voice market provides that 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 provider of public telecommunications services.
18. Regulation 9 of the Interconnection Regulations made pursuant to the Act provides that a concessionaire shall configure its network to facilitate number portability between similar networks as and when directed by TATT.
19. By Regulation 2, number portability is defined as "the ability by a customer to retain the same telephone number on changing telephone service providers".

20. Parliament limited TTAT's powers and Section 81 of the Act addresses the issue of Forbearance and states as follows:

“The Authority shall refrain, in whole or in part and conditionally or unconditionally, from the exercise of any power or the performance of any duty in relation to a telecommunications network, telecommunications service, broadcasting service, radio-communication service or a class of service provided by a concessionaire or licensee, where the Authority finds that to refrain would be consistent with the agreed telecommunications policy objectives”.

The Implementation Plan:

21. In keeping with its mandate to regulate the telecommunications market and encourage competition, two rounds of public consultations were held and TATT thereafter published the “Implementation Plan on Number Portability for the Republic of Trinidad and Tobago” on September 20th, 2012 (The Implementation Plan). The rationale for implementing number portability was set out in the introductory paragraphs of the Implementation Plan as follows:

“The Authority (Defendant) now considers it opportune to deepen competition in the fixed line and mobile markets.

Competition can be further promoted by introducing number portability. There are three types of number portability namely: location number portability, service number portability and service provider number portability. These three types of number portability basically enable consumers to switch either location, service or service provider without changing their telephone numbers...

Currently, users who wish to change concessionaire, location (outside the rate area) or service type are required to change telephone numbers. This is likely to cause

substantial inconvenience. For example, corporate users may well incur costs associated with the production of new branding and information material so as to reflect the change in telephone contact information. This may act as a deterrent to changing service providers.

Number portability brings benefits to both the users who wish to port as well as to those who do not wish to port by encouraging concessionaries to offer improved packages to their subscribers in order to retain them. More attractive packages and improved quality of service are benefits which the users in Trinidad and Tobago may enjoy as a result of the introduction of number portability. Accordingly, the Authority is now proposing to introduce service provider number portability on the Republic of Trinidad and Tobago.”

Determination No 2016/06 dated October 4 2016:

22. After continued consultations with Operators, TATT published Determination No 2016/01 effective October 4th, 2016 which provided as follows:

i) DECLARATION OF COMMENCEMENT DATE FOR IMPLEMENTATION OF MOBILE TO MOBILE NUMBER PORTABILITY IN TRINIDAD AND TOBAGO

The date by which Operators shall implement mobile to mobile number portability, namely the “go-live” date shall be October 31st, 2016 and all Operators who are so required shall comply.

ii) DECLARATION OF COMMENCEMENT DATE FOR IMPLEMENTATION OF FIXED TO FIXED NUMBER PORTABILITY IN TRINIDAD AND TOBAGO

The date by which Operators shall implement fixed to fixed number portability, namely the “go-live” date shall be November 28th, 2016 and all Operators who are so required shall comply.

iii) DECLARATION OF END OF EXERCISE OF SECTION 80 (81) POWERS AS REGARDS NON-COMPLIANCE WITH DETERMINATION ISSUED PURSUANT TO SECTION 25(2)(J)

The Authority hereby acknowledges that it has been exercising considerable forbearance as regards the implementation and launch of service provider number portability in Trinidad and Tobago pursuant to section 80 of the Act and recognizes that it has continues to reasonably forbear to allow Operators to come into compliance with Determination 2014/01 and Determination 2015/01. The Authority hereby declares that it shall cease forthwith to exercise such forbearance on non-compliance by operators subject to this DETERMINATION.

23. TATT proposed amendments to the Regulations and its justification for the proposed modifications to the Interconnection Regulations are set out under the rubric “Rationale for Modification”, as follows:

“In summary, the modifications proposed are geared to:

(iii) (Clarify the distinction between network preparation for interconnection and the provision of interconnection services, and obligation of concessionaires, and modification of networks to support specific requests for interconnection outside of the standard preparations of the concessionaire. In making this distinction, the amendments seek also

clarify the responsibilities for bearing the cost of these distinct activities and functions.”

24. There was a proposed amendment to Regulation 9 which was explained as follows:

“4. Regulation 9 has been modified as Sub-Regulation 9(1), so as to (i) create a requirement for administrative and technical procedures for number portability, and (ii) empower regulatory instrument in the form of a determination which would formalise the means by which the Authority directs concessionaires to facilitate number portability. A Sub-Regulation 9(2) is further inserted to set out the scope of any determination made by the Authority in respect of number portability directions.”

25. By the Concession dated December 31st, 2015 made between TATT and TSTT (“the TSTT Concession”), TSTT was authorized, subject to the conditions of the Concession, to operate a Public Domestic Fixed (Wired) Telecommunications Network and provide a Domestic Telecommunication Service

The law as to the Court’s interpretative approach to legislative provisions:

26. In **Attorney General of Belize and others v Belize Telecom Ltd and another [2009]**

UKPC 10 Lord Hoffman stated as follows at paragraphs 16 to 18:

“16. Before discussing in greater detail the reasoning of the Court of Appeal, the Board will make some general observations about the process of implication. The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more

reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912-913. It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.

17. The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.

18. In some cases, however, the reasonable addressee would understand the instrument to mean something else. He would consider that the only meaning consistent with the other provisions of the instrument, read against the relevant background, is that something is to happen. The event in question is to affect the rights of the parties. The instrument may not have expressly said so, but this is what it must mean. In such a case, it is said that the court implies a term as to what will happen if the event in question occurs. But the implication of the term is not an addition to the instrument. It only spells out what the instrument means.”

27. In **Investors Compensation Scheme Ltd. vs. West Bromwich Building Society** [1998] 1 WLR 896 the court opined that one must consider not only the words in their natural and ordinary meaning but should also consider the meaning held by a reasonable person seized of all the background information and the attendant circumstances.

The Evidence and Arguments Relied Upon:

The Claimant's position:

28. CCTL contends that TATT mandated all operators/ concessionaires to implement fixed to fixed and mobile to mobile service provider number portability and to offer the said service to consumers in Trinidad and Tobago. This requirement, it says, was contained in the Memorandum of Agreement which was signed by representatives of TATT and TSTT. CCTL outlined that it fully complied with Determination 2016/01 and spent approximately TTD\$5million to ensure its compliance.
29. From 2017, CCTL says it brought TSTT's non-compliance to TATT's attention and was advised that TATT was "actively pursuing" the issue of compliance with Determination 2016/01.
30. CCTL rejects TSTT's assertion that there are no clear and legally binding regulatory procedures and it maintains that the Number portability documents and the output form from the Steering and Technical and Operational Sub Committee adequately informs and regulates the dynamics of Mobile number portability. CCTL holds the view that TATT has not discharged its statutory mandate as it has been tardy in enforcing its own determination. CCTL also asserts that as a consequence of TATT's failure to ensure that TSTT implements FNP, it has suffered loss.

TSTT's position:

31. By letter dated June 13 2019 TSTT wrote to TATT and said as follows:

“...The general tenor of your letter suggests that TSTT bears the singular responsibility for the implementation of Fixed Number Portability (FNP). Any such notion is soundly rejected by TSTT, and the Authority is hereby put to strict proof regarding the existence of any such legal or regulatory obligation, and the particulars of its allegations of any breach thereof....

...What is apparent from the foregoing is that while the Authority is attempting to make the case for a failure to “implement” FNP, the legislative and regulatory regime governing Number Portability imposes no such obligation on any operator, least of all TSTT. There is merely the duty imposed on each operator to have its network in a state of preparedness to facilitate NP.”

32. TSTT contends that Regulation 9 of the Interconnection Regulations do not require concessionaires to implement FNP nor does it identify the requirements associated with technical and administrative procedures for the implementation of number portability. These deficiencies, it says, were recognized by TATT and the authority proposed amendments to the Interconnection Regulations.

33. TSTT argues that the Regulations required concessionaires to configure their networks to facilitate FNP but no obligation to implement FNP was imposed.

34. TSTT further argues that TATT has failed and/or refused to prepare and/or publish any regulations whatsoever in relation to FNP and there exists no sufficient regulatory framework for the implementation of FNP.

35. TSTT says that it is ready to facilitate number portability but it cannot do so in the absence of an appropriate regulatory framework.
36. In response to the KP Affidavit which outlined that it refused to facilitate end-to-end testing, TSTT says that there is simply no specific legislative or regulatory requirement for such testing.
37. TSTT emphasizes that it sought to conduct testing with all concessionaires and it communicated with several concessionaires so as to commence testing.
38. TSTT also outlines that at a cost of approximately TTD\$5 Million, it configured its network and is technically ready to facilitate FNP.
39. TSTT complains that the Number Portability (NP) Regulatory Procedures and the Draft Procedures were not submitted for public consultation.
40. By letter dated September 12 2014 exhibited to the Agard Affidavit and marked "LA3", TSTT says it sought clarification on the draft number portability Regulatory Procedures to confirm the extent to which its extensive contributions thereto had been considered and integrated.
41. TSTT also joins issue with the assertion that the revised draft of Regulation 9 elaborates and simplifies the old version and points out that it specifically introduces requirements which were plainly absent from the initial version.
42. TSTT contends that TATT's issued determinations were premature and asserts that TATT has adopted a laissez-faire approach to Number Portability as it delayed in securing a Clearinghouse Supplier.

43. TSTT disputes that the Draft Procedures were finalized and approved and it pointed out, *inter alia*, that the footnote on page 1 of the Draft Procedures makes it quite clear that those Draft Procedures were to be finalized upon conclusion of negotiations with the proposed suppliers.
44. TSTT also disputes that there was an agreement to move forward with the implementation of FNP without the appropriate regulations. It maintains that the regulations are integral to TATT's regulatory functions and cannot be eschewed because other regulated concessionaires do not require TATT to perform its regulatory function. TSTT points out that Section 12.1(d) of the Porting XS Contract makes it plain that the Customer Procedures were agreed for the purpose of the "start" of the project.
45. The Draft Procedures, which are exhibited to the Porting XS Contract, it says, contain several errors and asked the Court to note that some of these errors actually formed the subject of litigation between it and another operator in relation to the implementation of Mobile Number Portability ("MNP") namely *Digicel (Trinidad and Tobago) Limited v. Telecommunications Services of Trinidad and Tobago Limited CV 2020-01617*.
46. TSTT further argues that there are significant deficiencies in the purported regulatory framework for number portability and these were extensively outlined in its submission. The absence of the requisite regulatory procedures in respect of the technical and administrative requirements for FNP is a critical issue for TSTT.
47. TSTT is also concerned about the possibility of anti-competitive conduct by other concessionaires if FNP is allowed to be implemented, without having in place comprehensive and balanced regulations.

TATT'S arguments :

48. TATT argues that one must consider all the background facts and information and notes that Regulation 9 does not stand alone. The regulation is part of a legislative and contractual framework and it must be read in conjunction with, *inter alia*, the Act, the Concession, the Implementation Plan, the Contract with Porting XS, the Customer Procedures and Determination 2016/01.
49. TATT rejects TSTT's assertion that it failed to put in place the proper regulatory framework and outlined that all the requisite regulatory procedures were covered in the technical working groups and the Customer procedures. TATT further submits that all the matters addressed in the proposed amended Regulation 9 have also been addressed.
50. At paragraph 14 of her principal affidavit and paragraph 28 of her Reply, CRD sought to address the issue as to whether Determination 2016/01 was issued prematurely and she outlined that the appropriate framework was in place and that TATT's Consultant confirmed that the operators' were ready for implementation.

Resolution:

51. By its execution of the Concession, TSTT agreed to be expressly bound by the regulations established by the Act and accepted that it was bound by the terms and conditions of the Concession including Condition A42 (supra) , Conditions A2 and A3. These conditions are as follows:

Condition A2

“The concessionaire shall comply with the Act, all regulations or other instruments made under the Act, the conditions of this Concession, and all laws in force from time to time in the Republic of Trinidad and Tobago.”

Condition A3

“The Concessionaire shall, without delay, comply with any lawful decisions or directions made by the Minister or the Authority under the Act.”

52. The Court also considered, *inter alia*, Section 25(2) (j) of the Act, Regulation 9 and the definition of number portability at Regulation 2. In addition the Court reviewed the Implementation Plan and finds that the document comprehensively explained the laudable rationale upon which number portability was premised and it outlined a road map for the roll out of number portability.
53. The Court carefully reviewed Determination No 2016/01 and finds that its language was pellucid and devoid of ambiguity.
54. Based on the evidence, the Court is satisfied that TATT acted within its statutory mandate and displayed procedural fairness as it methodically addressed all the material and relevant considerations attendant to the implementation of FNP.
55. TSTT’s complaint in relation to its dominance acting as a bar to FNP implantation and the risk of anti competitive competitor behaviour, lacks substance and the Court formed the view that the CRD reply affidavit at paragraphs 4 to 7 adequately addressed these concerns. It is this Court’s view that TSTT is not prevented from implementing its own promotions or from actioning against any future anti-competitive behaviour.
56. TSTT’s assertion that its fixed voice market is dying seems to be a generalised position and the requisite statistical and/or empirical evidence to support the said assertion was not put before the Court. In fact, it appears that given the increased post pandemic need for home internet facilities and having noted that a fixed line is still required by many providers to facilitate internet connectivity, it is unlikely that the fixed line market is declining.

57. The Court is also disinclined to accept TSTT's assertion that Interconnection testing cannot be effectively undertaken due to the current prevailing circumstances. CRD's response at paragraph 14 of her reply affidavit effectively addressed this assertion and the position outlined therein is rationale and plausible. Exhibit CRD 22 to the said affidavit further reassures the Court that TSTT's concerns as to numbering fees were adequately addressed by TATT.
58. At paragraphs 22 to 24 of the CRD reply affidavit, the deponent methodically and convincingly negated the issues raised by TSTT in its letter of 13 June 2019.
59. Based on CRD's uncontradicted evidence, it is evident that TSTT was represented and participated in several Number Portability Steering Committee Meetings and in the Technical working groups which collectively led to the generation of the Customer Procedures.
60. Regulation 9 is worded clearly and the proposed amendment to Regulation 9 simply elaborated and simplified the obligation upon the Concessionaires to implement FNP when called upon to do so. Notably both Regulation 9 and the proposed amendment require the concessionaires to configure their networks to implement FNP.
61. The evidence establishes that the Customer Procedures were adopted and accepted by the operators who were parties to the contract with Porting X.S.B.V dated 16 February 2016. These are not draft procedures and they were used to implement MNP since 31 October 2016. This view was also expressed by another court in **CV2020-01617 Digicel Trinidad Limited v Telecommunications Services of Trinidad and Tobago.**
62. Consequently, the assertion that there is no proper regulatory framework to facilitate the implementation of FNP, must be rejected.
63. In any event none of the relevant and operative statutory provisions mandate the effecting of regulatory rules as a condition precedent to the implementation of FNP. It

appears that TSTT engaged in a game of semantics as it maintained its impractical distinction between facilitation and implementation. TSTT's interpretation of the proposed amendment to Regulation 9 disregards the established interpretative requirement to avoid an interpretation which is absurd and its position defies common-sense, commercial logic and is devoid of practicality.

64. TSTT's submission that it has been deprived of its legitimate expectation to address TATT on the issue as to whether it is obliged to implement FNP is equally unsustainable and this position is diametrically inconsistent with the contents of its letter dated 13 June 2019.

65. The Court on the adduced evidence accepts TATT's position, that TSTT was the only operator in relation to whom complaints were received from customers in relation to the refusal to implement FNP and it therefore rejects TSTT's assertion that it was treated in a discriminatory manner when it was added as a party to the instant action.

66. Monopolistic operations should be discouraged and they have no place in a free market capitalist state. Citizens deserve an open telecommunications market characterized by competitiveness of price, quality and service. TSTT's resistance to the implementation of FNP must be strongly condemned and its behaviour instilled, in the Court, a feeling that it was prepared to engage in protracted and wilful defiance so as to protect its market share. FNP implementation is an important national issue which affects citizens in a fundamental way. In this pandemic, the need for effective and efficient communication avenues cannot be marginalised and the ability of a customer to change service providers but retain the same fixed line telephone number is paramount. Many citizens, corporate and private, have used the same fixed line telephone numbers for decades. These numbers are an integral part of their existence and a change of number can occasion significant distress, inconvenience and expense, especially for corporate citizens whose advertisements and marketing campaigns may have to be revised. Citizens should not be forced, frustrated or blackmailed into staying with a

telecommunications provider because of fear of inconvenience or uncertainty. TSTT's behaviour has been callous and calculating and must be roundly rejected.

67. Based upon the multiplicity of reasons as outlined, this Court is therefore resolute in its view that TSTT is legally obligated to implement FNP.

68. Having determined that TSTT is legally obliged to implement FNP, the Court must now determine the applicable relief, if any, to which the Claimant may be entitled.

Issue 2: Whether the Claimant is entitled to any relief and if so what is the nature of the relief which should be granted.

The Law:

69. Administrative law generally acknowledges that relief is likely refused where the applicable remedy would serve no practical purpose. **Judicial Review – Principles and Procedure Auburn, Moffett and Sharland (Oxford University Press)** states at Para. 32.49:

“Where a claim is not entirely academic, but a final remedy would serve little practical purpose...the court will generally be reluctant to grant a final remedy...”

70. Where a public authority accepts that it has a duty to act, the grant of relief simply to acknowledge that duty can be refused in the Court's discretion. In **R v. Inner London Education Authority ex parte Ali and Murshid (1990) 2 Admin LR 822**, the Court said (at pages 836-837):

“In addition, this is a case where what is complained of is inactivity on behalf of the education authority. In such circumstances, on an application for judicial review

as in ordinary civil proceedings, the Court is in difficulty in providing mandatory relief in the ordinary case, as I have explained. Merely to order a public body to perform its statutory duty does not add anything to that duty...

Furthermore, in this case it is clear that a declaration would not assist. To declare that the public body should perform its duty does not add to or clarify the public body's obligations where, as here, that body accepts obligations. At this stage it is possible to say that there are not in this case any specific steps which will be able to be identified which it can be said that the public body is not taking which it should take. The only purpose of continuing the proceedings would be to ascertain whether or not the authority was capable in reaching the present unsatisfactory situation. Inquests of that sort are not the purpose of judicial review.”

71. The Court may also refuse relief on judicial review where there exists an alternative remedy. In **R (Bancoult) v Secretary of State for the Foreign Commonwealth Office (2001) QB 1067** at paragraph 27 the court said:

“But such a position is in truth a paradigm of a familiar rule of discretion, namely that judicial review is a legal recourse of last resort; and an applicant must exhaust any proper alternative remedy open to him before the judicial review court will consider his case.”

72. Courts have consistently acknowledged that, in judicial review proceedings, the principle of legitimate expectation impacts upon the concept of procedural fairness. In **Attorney-General of Hong Kong v Ng Yuen Shiu (“the Hong Kong case”) [1983] 2 AC 629**, Lord Fraser said at page 638:

“The justification for it is primarily that, when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should

act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty.”

73. In **Francis Paponette and Others v The Attorney General of Trinidad and Tobago [2010] UKPC 32**, the Privy Council at paragraph 37 opined on the principle of legitimate expectation and said as follows:

“The initial burden lies on the applicant to prove the legitimacy of his expectation. This means that in a claim based on a promise, the applicant must prove the promise and that it was clear and unambiguous and devoid of relevant quantification. If he wishes to reinforce his case by saying that he relied on the promise to his detriment, then obviously he must prove that too...”.

74. In **United Policy Holders Group and others v Attorney General of Trinidad and Tobago [2016] UKPC 17**, Lord Neuberger related the concept of legitimate expectation to acts by public bodies. At paragraph 37 the Board said:

“in the broadest of terms, the principle of legitimate expectation is based on the proposition that, where a public body states that it will do (or not do) something, a person who has reasonably relied on the statement should, in the absence of good reason, be entitled to rely on the statement and enforce it through the courts”.

75. In **R v North and East Devon Health Authority Ex. P Coughlan [2001] QB 213** at paragraph 57 Lord Woolf MR stated:

“Where the court considers that a lawful promise has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the

court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy”.

76. In **HTV Ltd v Price Commission [1976] ICR 170, 185**, the court at letters G-H said::
“a public body, which is entrusted by Parliament with the exercise of powers for the public good, cannot fetter itself in the exercise of them. It cannot be estopped from doing its public duty. But that is subject to the qualification that it must not misuse its powers: and it is a misuse of power for it to act unfairly or unjustly towards a private citizen when there is no overriding public interest to warrant it.”

77. In relation to the issue of damages in Judicial Review matters in **M v Home Office (1994) 1 AC 377 at 412 to 413 A** the court stated that there is *“no reason in principle why, if a statute places a duty on a specified minister or other official which creates a cause of action, an action cannot be brought for breach of statutory duty claiming damages or for an injunction”*.

The Claimant's Case:

78. The Claimant contends that the TATT’s election to neglect and/or refuse to compel TSTT to comply with the requirements of legislation and Determination 2016/01 is unreasonable, irregular and/or an improper and/or unfair exercise of its discretion. Further, CCTL submits that TATT has not acted in the public interest.

79. In addition, the Claimant noted that TATT, by its own admission, acknowledged that it had been exercising forbearance with regard to the implementation and launch of service provider number portability in Trinidad and Tobago and declared that it would cease to exercise such forbearance as at 31st March 2016. Concessionaires failed to comply with the said 31st March, 2016 deadline and this resulted in TATT issuing

Determination 2016/01 whereby the time “to go live” with fixed number portability was extended to the 30th September, 2016.

80. From 2017 CCTL says it repeatedly brought TSTT’s non-compliance to TATT’s attention and was advised that the Authority was “actively pursuing” the important matter of compliance with Determination 2016/01. By letter of 1st June, 2018 CCTL was assured that TATT intended to enforce its Determination 2016/01.

81. According to the Claimant, TATT sought to reassure all fixed line operators of TSTT’s “technical readiness” and its unreserved preparation to collaborate with TATT and all other fixed line operators to successfully implement fixed number portability. However, this has not materialized and TSTT continues to block porting requests.

82. Consequently, the Claimant contends that it has a legitimate expectation to rely upon TATT’s obligation to enforce Determination 2016/01 as it has invested significant resources but continues to suffer loss by virtue of TATT’s failure to enforce the aforesaid determination against TSTT, for its failure to implement FNP. In the circumstances, the Claimant argues that it is entitled to the relief claimed.

TATT’s case:

83. TATT rejects the assertion that it has been inactive in the face of TSTT’s recalcitrance and drew the Court’s attention inter-alia to the following:

- i) That the KP Affidavit outlined the detail correspondence which passed between CCTL and TATT.
- ii) In response to the pre action protocol letter, TATT’s then Chief Executive Officer Mr. John Prince stated as follows:

“Please be assured that TATT intends to enforce its Determination 2016/01.”

- iii) At a meeting held on 12 September 2018, CCTL’s representatives were informed that TATT was planning to seek enforcement through the Magistrate’s Court, however it was noted that the remedies before that court were limited to one off fines and it was discussed that moral suasion may have been more effective.
- iv) By letter dated 3 June , 2019 TATT wrote to TSTT and informed that the present action had been filed and it called upon TSTT to immediately implement FNP and TSTT responded by letter dated 13 June 2019 and stated that they were technically ready to implement FNP but would not actually do so.
- v) By e-mail dated June 21st, 2019, Attorney-at-Law for TATT wrote to Attorney-at-Law for CCTL and forwarded the TSTT’s letter.
- vi) By letter dated 10 July 2019 CCTL wrote to TATT and requested an update on the status of the fiat. TATT responded and indicated that they were finalising some highly technical aspects of the Statement of Case and once this was completed it would be forwarded to the Attorney General.
- vii) During this period TATT received certain advice from Senior Counsel which resulted in the issuance of certain instructions on July 22nd, 2019 and TATT indicated same CCTL by e-mail.
- viii) TATT thereafter wrote to the Attorney General and requested his fiat to take enforcement action against TSTT and attached a draft Claim Form and Statement of Case which included a request for the following relief:

“An Order of Mandamus compelling the Defendant to immediately facilitate and implement fixed to fixed number portability in accordance with Determination 2016/01.”

- ix) By Notice of Application dated January 27th, 2020 TATT formally applied to this Court for TSTT to be joined as a party to this action.

84. Accordingly, TATT contends that it has been proactive in the face of TSTT’s defiance and that it duly informed the Claimant of the action it was taking. TATT accepts that it has a duty to act and maintain that it is discharging its statutory obligations.

TSTT’s case:

85. TSTT contends that the Claimant has pursued relief which it has already obtained i.e. TATT’s pursuit of enforcement action against TSTT and it says that CCTL’s application for judicial review is completely academic.

86. TSTT submits that CCTL’s election not to challenge it directly for a breach the condition in its concession which CCTL claims obliges TSTT to implement FNP and CCTL’s failure to raise such a complaint with TATT is indicative of their attempt to avoid TATT’s exclusive dispute resolution procedures.

87. TSTT referred to Condition A48 of CCTL’s concession, made pursuant to sections 22(3)(f) and 25(2)(h) of the Telecommunications Act and regulation 32 of the Interconnection Regulations, which it contends is also mandatory. These require disputes between concessionaires relating to any aspect of interconnection to be submitted to the TATT for prompt resolution.

88. The requirement for disputes to be resolved by TATT is undoubtedly prescribed because of (i) TATT's unique capacity to treat with such disputes and its specific jurisdiction to regulate the telecommunications sector, (ii) its specific and expert capacity to treat with technical issues arising in that sector by virtue of its composition, and (iii) the specific remedies and matters to be considered by TATT for non-compliance and the special features of the Telecommunications Act, all of which make TATT the most effective and efficient forum for treating with such disputes.

89. TSTT contends that because an alternative remedy exists, CCTL's judicial review application against TATT for an order and associated relief which relates to TSTT's alleged breach of its concession, is inappropriate.

Resolution:

90. The Court noted the contents at paragraphs 47 and 48 of the CRD affidavit and TATT has accepted that it is obligated to engage enforcement action against TSTT.

91. TATT says that it had to carefully determine the most effective enforcement avenue as it also has an obligation to mitigate against any overtly oppressive action which may occasion detriment to the general public.

92. Notably, TATT has the power to implement a cessation of any concession but this course would invariably require a suspension or termination of TSTT's licence and the fallout from any such decision can be monumental.

93. TSTT's submission that there was an alternative remedy because the dispute was with them is incorrect. The dispute resolution process envisaged under section 82 of the Act and under the Interconnection Regulations is not for disputes between concessionaires. Neither the Act nor the Regulations cater for a dispute between a concessionaire and

the Regulator. CCTL had every right in these circumstances to mount an action against TATT on the concern of its tardiness. In the circumstances of this case judicial review is the most appropriate action against TATT to enforce a determination which had already been made, to do otherwise would be to make a mockery of TATT's determination. There was never any need for CCTL to mount a dispute against TATT by virtue of the concession and regulations.

94. The evidence has established that TSTT is this Republic's dominant fixed line service provider. Consequently, the majority or at least a significant portion of the citizenry, through no fault of their own, would be deprived of their fixed line phone service if any suspension or termination is imposed. Such a course may be both disastrous and debilitating as it could negatively impact upon society's tenuous and evidently weakened socio economic health. It may also pose as a threat to National Security and so any such decision should be effected as an option of last resort.

95. Pursuant to sections 65 and 71 of the Act, TATT can also initiate criminal proceedings against TSTT. This process if successful can result in a one off or continuous fine but even upon conviction TSTT could maintain its refusal to implement FNP.

96. The third option available is the one which has been activated by TATT i.e. its application for a Fiat.

97. The Court considered the fact TSTT's joinder in the instant matter, enabled the Court to hold that TSTT is legally obligated to implement FNP and as a consequence TSTT's misapprehension, whether genuine or by convenient design, as to whether it was legally mandated to implement FNP, has been corrected.

98. On the operative factual matrix, after its receipt of TSTT's letter of the 13 June 2019, TATT in pursuit of the public interest, should have invoked the jurisdiction of the

Supreme Court so as to determine the issue as to whether TSTT was legally obligated to implement FNP.

99. It is also evident that TATT applied a significant degree of elasticity and extended an unusual and unexplained degree of forbearance to TSTT after it failed to comply with Determination 2016/01 given that it took TATT almost eighteen months after the varied 'go live' date, to request a fiat.

100. The evidence and procedural timeline strongly suggests that this eventual course was likely prompted by the Claimant's persistent pursuit of TSTT's defiance of Determination 2016/01 and its invocation of the Court's jurisdiction.

101. TATT is entrusted, by Parliament, with enforcement powers which must be exercised for the public good but it did not activate same for nearly three years. This inaction has instilled some disquiet in the Court's mind and it harbours a concern as to whether TATT may have factored into its extended forbearance, the fact that the Government of Trinidad and Tobago is TSTT's majority share holder. Such a circumstance, if it occurred should catalyse a review of the approach by statutory bodies charged with the obligation to regulate entities which may be owned by the State or in which the State has an ownership stake. The existence of these types of arrangements can lead to conflicts of interest, violate the tenets of good governance and compromise the public's best interest.

102. Given the prevailing and operative circumstances and mindful of its discretion, this Court holds the view that its determination that TSTT has a legal obligation to implement FNP has removed the pre-litigation uncertainty upon which TSTT relied. In light of TATT's fiat request, the Court is fairly confident that TATT would now actively discharge its statutory obligations, in the public interest, and pursue with determination its elected enforcement method.

103. In the circumstances, the Court holds the view that no practical purpose would be achieved by declaring that TATT has a statutory enforcement obligation or by mandating that it must take enforcement action against TSTT, when it has engaged that process.

104. Trinidad and Tobago is functional democracy which upholds the Rule of Law and the Court feels, with a high degree of assurance, that the Attorney General will discharge his constitutional obligation and notwithstanding Government's shareholding interest in TSTT, the Court has no reason to doubt that he will expeditiously, rationally and reasonably consider the fiat request made since 2019.

105. In the circumstances it cannot be said that the Claimant's application was devoid of merit or that it occasioned abuse to the Court's processes or that the claim was academic. However, other than to issue a declaration that TSTT is legally obligated to implement FNP, the Court is disinclined to grant any other relief.

106. While it is undisputed that the Claimant incurred expense as it complied with Determination 2016/01, the said expense is not recoverable and any alleged loss is speculative.

107. For the reasons outlined the Court hereby declares that TSTT is legally obligated to implement FNP and the parties shall be heard on the issue of costs.

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FRANK SEEPERSAD

JUDGE