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# Digicel Trinidad and Tobago Ltd v Telecommunications Services of Trinidad and Tobago Ltd

**Id. vLex Justis** VLEX-792791441

**Link:** <https://justis.vlex.com/#vid/digicel-trinidad-and-tobago-792791441>

## Text

### High Court

Bereaux, J.

### Claim No. CV2006-3241

Digicel Trinidad and Tobago Limited  
and  
Telecommunications Services of Trinidad and Tobago Limited

## Appearances:

A. Fitzpatrick S.C. & T. Bharath for claimant.

M. Daly S.C., G. Simonnette & S. Indarsingh for defendant.

Interlocutory - Mandatory — No contract between plaintiff and defendant — Cause of action arose under the Protection Against Unfair Competition Act, No. 27 of 1996 — Balance of convenience in plaintiff's favour — Injunction granted.

Bereaux, J.

(1) The claimant is Digicel (Trinidad & Tobago) Limited ("Digicel"). It is a member of the Digicel Group which operates mobile telecommunications in twenty-one countries. The defendant is a company known as Telecommunications Services of Trinidad and Tobago Limited ("TSTT"). It is 51% owned by National Enterprises Limited which is quoted on the "Trinidad and Tobago Stock Exchange and which is majority owned by the Trinidad and Tobago Government. The remaining

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49% shareholding is owned by Cable and Wireless (West Indies) Limited.

(2) Digicel commenced mobile phone operations in Trinidad and Tobago in early 2006. Prior to its entry into the local telecommunications market, TSTT enjoyed a monopoly of both fixed line telephone services and mobile telephone services in Trinidad and Tobago. (I am not persuaded by the evidence of Miss Agard at paragraph 6 of her principal affidavit which sought to suggest otherwise.).

(3) It is a matter of public record that Digicel's entry into the Trinidad and Tobago market began a fierce public campaign between both parties for a controlling share of mobile phone services market which extended into the entertainment and sporting arenas in Trinidad and Tobago and not without controversy.

(4) The ensuing rivalry has resulted in at least three high Court proceedings including these proceedings. The parties just can't seem to get along. Nor do they appear to try. It is a pity. It seems to me that no genuine effort at settling the commercial issues arising between them has been made by either party and the accusations which each has directed against the other in these proceedings have more than a fair measure of validity. The result has been multiple legal proceedings which have not brought them any closer together.

## **The Application**

(5) Digicel seeks:

(a) An interlocutory injunction restraining TSTT, its servants and/or agents from "blocking" calls by the claimant's customers to the defendant's landline and mobile customers.

(b) A mandatory injunction requiring TSTT:

(i) to remove "the blocking" of such calls and to repair certain equipment so as to allow the free flow of calls from the claimant's users to the defendant's users.

(ii) to provide additional capacity circuits as specified in relief 5 of the notice of application filed on 30th October, 2006.

(c) An order pursuant to Rule 17.1(1)(c)(ii), (iii) and (iv) of the CPR that TSTT do permit it to collect certain data from TSTT's equipment as per relief (4) of the notice of application.

## **The Substantive Claim**

(6) Digicel has sued TSTT alleging that its conduct constitutes a breach of an implied contract between them which bound or required TSTT to:

(i) interconnect its cellular and landline network with Digicel's network;

- (ii) provide interconnection services between its networks and Digicel's;
- (iii) neither withdraw nor impair interconnection transit services between its networks and Digicel's;
- (iv) to allow the free flow of calls from Digicel's network to its network;
- (v) provide additional interconnection (trunk capacity) to Digicel in the same way that it is provided to itself.

(7) It claims that TSTT, in the course of its commercial activities, has acted in a manner which:

- (a) is contrary to honest practices within the meaning of section 4 of the protection Against Unfair Competition Act, 1996, as amended;
- (b) constitutes anti-competitive conduct within the meaning of section A 21 of TSTT's Concession issued to it on the 31st December, 2005;
- (c) is contrary to its general obligation to interconnect its network to Digicel's within the meaning of the Interconnection Guidelines contained in Schedule H Part 2 at sections 2, 3, 4, 5 and 8 of its concession;
- (d) constitutes a contravention of sections 24(1)(1), 25 (2)(d), (k) and (l), and 26(1), (2) of the Telecommunications Act, 2001;
- (e) constitutes a contravention and/or breach of sections 5(1) of the Telecommunications (Interconnection) Regulations, 2006.

(8) Digicel contends that the breach of all of these statutory and regulatory provisions and of the concessions has resulted in harm to it. It contends as well that it is part of the limited class of persons intended to be protected by the telecommunications regime because it is given certain rights and protections in relation to interconnection in the public interest. These are the causes of action within which Digicel contends it is entitled to injunctive protection until they are heard and determined. The evidence in support of and in opposition to the application is voluminous.

(9) The application is supported by the affidavits of Andrew Gorton and Leon Akong, both of which were sworn and filed on 30th October, 2006. Both deponents filed supplemental affidavits on 1st November and 30th October respectively.

TSTT has filed two affidavits in opposition, one each by Lisa Agard and Kurleigh Prescod each sworn and filed on 10th November, 2006, while Messrs Gorton and Akong filed answering affidavits on 15th November, 2006. Mr. Prescod has also put in a supplemental affidavit.

- (10) The affidavits (with the exception of Mr. Prescod's supplemental affidavit) are quite bulky, so too the many exhibits attached to them. They constitute a considerable body of paper which has been difficult to manage and quite tedious to read, despite the very commendable efforts of

attorneys on both sides to label and bind them in such a manner as to make for easy reference. Because of the nature of the application it is necessary to refer in some detail to the affidavit evidence in support and in opposition. In an effort to limit the size of this judgment I shall make little reference to Messrs. Akong's and Gorton's answering affidavits (except to say that I have read them in full) but shall set out as fully as possible the competing contentions of the four deponents in their principal affidavits.

(11) The evidence of Mr. Gorton and Mr. Akong is that TSTT has frustrated Digicel's efforts to compete with it by delaying for as long as possible, the actual physical interconnection between the two entities and, having effected a limited physical interconnection between them, it has through its servants and agents, blocked calls from Digicel's network to its network in a number of ways, to wit:

(1) by providing limited circuits or trunks to Digicel's network for its increasing clientele;

(2) by outrightly blocking calls to TSTT's network from Digicel's;

(2) by routing calls from Digicel's network through limited circuitry allowing for choking or by failing to repair problems on its network.

! (12) The effect of this has been that its customers are unable to complete their calls to TSTT's network in particular its mobile network with serious negative consequences for its reputation and its financial position. It is agreed between the parties that the process of interconnection involves at least two things:

(1) the execution of a physical interconnection agreement between the parties wishing to interconnect;

(2) the actual physical interconnection by which the networks of both parties are physically connected. Without it each network's customers will be confined to calls on their own network, with it each network's customers can call the other's.

! (13) It is this process of interconnection that has been the genesis of all the disputes between the parties. TSTT contends that there can be no true interconnection without an interconnection agreement and there is as yet no such agreement. What has been effected has been a limited physical interconnection confined to domestic calls only. As I understand TSTT's evidence the limitation is both as to domestic calls and to circuitry provided for such use until the actual agreement spelling out terms such as to cost of calls between the parties and cost of circuitry is concluded. The provision of limited circuitry necessarily limits the number of calls Digicel can make to TSTT's network. Digicel contends that as well, it causes choking of calls from its network to TSTT's, resulting in call failures. Until the interconnection agreement is effected, there is in place a "sender keep all" arrangement by which the network sending calls which successfully terminate on the receiving network keeps the revenue generated therefrom.

· (14) Digicel's case is that there is an implied contract between them as evidenced by the provision of valuable consideration in the form of a \$9.5 million dollar payment to TSTT for

equipment and payment per month of a sum of money as rental for the use of TSTT's trunks. It also alleges that TSTT is guilty of the breaches to which I have referred at paragraph 3 above.

- i (15) It is next necessary to refer to the evidence upon which the application is based and opposed. This requires a review of the evidence of Mr. Akong and Mr. Gorton for Digicel and Miss Agard and Mr. Prescod for TSTT. The deponents are all eminently well qualified. Mr. Leon Akong has been employed by Digicel as its switching manager since June 2005. He is an engineer by profession. Prior to his employment at Digicel, Mr. Akong had worked at TSTT for a number of years. He is in charge of Digicel's switching centre by which calls are facilitated via cellular phone to other cellular users and to various landlines. Mr. Andrew Gorton is employed as Digicel's Legal and Regulatory Director. Miss Agard is Vice President of Legal Regulatory and Carrier Services of TSTT and a member of the English Bar. Mr. Prescod is Head of Carrier Services at TSTT and is an electrical engineer with an excellent academic history.

### **Mr. Akong's Evidence**

- i (16) Mr. Akong deposed as follows:

(a) prior to the commissioning of the interconnection equipment at the request of TSTT, he compiled a forecast which was sent to TSTT on 28th September, 2005 listing the quantities of circuits which Digicel would have required over a period of thirty-six (36) months to facilitate the increase in calls being made from Digicel's cellular users to TSTT's customers and vice versa.

(b) pursuant to Digicel's request made in that report TSTT was supposed to add more circuits or trunks so as to increase Digicel's capacity to facilitate more calls being made by Digicel's customers to TSTT's customers as time progressed. Between Digicel's network and TSTT's network there is room for approximately 3,654 more circuits to be installed to facilitate more access to TSTT's cellular users and landline users.

(c) Digicel has approximately 410,000 customers and through his monitoring of the system over different periods of time spanning 1st October, 2006 to date he is aware that there are no more than 500,000 calls made by Digicel's customers per day to TSTT's customers. Several complaints have been made to TSTT regarding the absence of the circuits or trunks but the additional trunks have not been provided.

(d) on or about 18th September, 2006, Digicel began to experience a higher call failure rate rising to a significant level by 5th October, 2006. Out of the calls being made from Digicel's network to TSTT's customers, 68% of these calls on average would fail.

(e) as at the date of his affidavit, there remained a high failure rate of calls made from Digicel's network to TSTT's network. The call failure rate fluctuates throughout the day and at certain times during the day; the rate of call failure has been as high as 95.6%. The average daily rates are based on a compilation of the call failure/success rates throughout the day to both fixed and mobile networks and an average taken thereof.

(f) In July, 2006 Malcolm Tott visited Trinidad and Tobago. He is a Director of Klarus Communications Limited which provides technical, commercial and contractual telecommunications consultancy services internationally. He acquainted himself with the problems experienced by Digicel and prepared a written report based on a sample of 28,371 calls representing a time period of 18 minutes from an instrument known as a Protocol Analyser which captures data and translates it into readable form.

The report stated:

(i) that 81% of all calls originating from TSTT'S landline or cellular user terminated successfully on Digicel's side with a successful connection to a Digicel's cellular phone user or their voicemail.

(ii) calls made from Digicel's cell phones to TSTT's landline or cellular phone users resulted in only 46.86% thereof being successful, in that, 43.24% of all calls made by Digicel's users to TSTT's users were unsuccessful in getting answered or receiving a voicemail message. (Mr. Akong uses 43.24% that must surely be 53.24%.)

(iii) when a successful call is made by one of Digicel's cellular users to a TSTT's customer, at the end of the call a normal release signal is sent from TSTT's network to Digicel's which indicates that the call has been terminated and also the reason for the termination. There was an unusually high and disproportionate amount of release messages in relation to the number of calls answered by TSTT's users. That is to say, he found that out of 100% of sampled calls examined, 46.87% of all calls made by Digicel customers were successfully answered by TSTT's users or a voicemail message received. When those calls were finished instead of receiving release messages indicating that 46.87% were terminated normally as should have been the case, Digicel's network received from TSTT's network release messages indicating that 65.26% of the calls made were terminated normally. Mr. Tott concluded that it was not usually possible for the percentage of normal clearing release messages to far exceed the percentage of answered calls. This could point for example to release messages being sent and calls being terminated even if a call had not been set up between Digicel and TSTT's customer which should not be possible in the normal course of events.

(iv) the conclusion drawn by Mr. Tott was that the anomalies could be caused by incorrect or spurious software scripts loaded on TSTT's interconnect switch.

(g) on or about 1st August, 2006, complaints were received from visitors to Trinidad using their cellular phones to make calls on Digicel's network to TSTT's network and other users. These persons were using a cellular service provider in a foreign country and were utilizing a roaming facility which Digicel had entered into with that foreign provider to provide access to its network in Trinidad. Digicel discovered that persons roaming in Trinidad and phoning certain numbers including but not limited to landlines with numbers 672, 673, 624 and 655 as the area code, were being permanently blocked from completing those calls successfully. That is to say, the roaming user dialing any of those numbers would have received a busy or other signal which indicated that the call was unsuccessful and no matter how many attempts were made to re-try the calls they were all unsuccessful. On investigation, he



discovered that calls made on TSTT's network with the Calling Line Identification (CLI) or Caller ID which carried a foreign number would be blocked from getting through to the aforesaid defendant's numbers. He further discovered that when the Caller ID was removed from these foreign numbers (which Digicel can do on its system), the calls were completed successfully. Mr. Akong opined that the fact that the Caller ID, when removed, permitted calls to be made, suggested that the actions in blocking the calls were deliberately designed to prevent certain calls bearing foreign numbers from successful termination to TSTT's customers. It is possible to reduce the number of calls which are successful to TSTT's customers in this manner by analyzing the Caller ID and prematurely releasing calls on TSTT's side as soon as the Caller ID shows up a foreign number. This would have the effect of preventing Digicel from successfully terminating international calls onto TSTT's network.

(h) in October 2006 there was a marked increase in complaints received about its users inability to successfully make calls to TSTT's cellular users and landlines. A large number of calls to TSTT's network from Digicel's were unsuccessful in getting answered or receiving a voicemail message. In examining data from the Protocol Analyser a large number of calls made to TSTT's network from Digicel's customers was found to have been unsuccessful in getting answered or receiving a voicemail message. There was no substantial increase in the number of calls made during this period. On the other hand, he examined calls coming from TSTT's network into Digicel's network and has observed that the success rate during the period 1M October, 2006 the date of swearing of his affidavit was approximately 82%. Digicel should be able to attain the same call success rate in respect of calls to TSTT's network (with calls being answered by a person or voicemail) based on his knowledge of the equipment which TSTT possesses as part of its network.

(i) since the beginning of October, 2006, the situation has been nothing short of critical with the call success rate varying throughout the day to as low as between 5% to 20%, so that at these times for every 100 calls made on Digicel's network, between 5% to 20% thereof achieves a successful connection to TSTT's landline or cellular phone user.

(j) the fault for the low success rate in calls being made lies squarely on the shoulders of TSTT in that, the data obtained from the protocol analyser shows clearly that calls from Digicel's network are getting through to TSTT's network but are being blocked on TSTT's network.

(k) at present, Digicel has received from TSTT 567 trunks for landlines and 600 trunks for cellular calls. This essentially means that at any given time up to 1,167 calls could be accommodated through the circuits towards TSTT's system. At its busiest times during the day there has been observed as much as 10,000 call attempts to TSTT's customers and only 1,167 of them could be accommodated through to TSTT's system. Digicel therefore requires the additional capacity of trunks as claimed to allow more of its customers to access TSTT's network. The analysis of data regarding the call success/failure rate which has been occurring, has been done on calls which make it through the trunks/circuits and are bound for TSTT's customers. The fact that there are not enough available circuits has no bearing on the deliberate call blocking

designed inaction of TSTT. The failure to provide circuits is a simple means of restricting capacity to accommodate calls without any mechanical or technical intervention. By so doing TSTT has placed a limit on the number of calls that can go through to its network.

(l) the various means of deliberately causing the current problem experienced by Digicel to occur, that is to say a return signal which says "user busy" or "no circuit available" is to programme the switch on TSTT's side to treat certain calls in a particular manner and others in another. TSTT's switch can be programmed to send a certain number of calls originating on Digicel's network to particular circuits on TSTT's network which are inadequate to handle the calls. The result is that the switch sends a release signal back to Digicel's network saying in effect that the call is returned because the circuits are overloaded. Another method would be to release a certain number or type of calls without attempting to send them to the intended recipient. In technical terms this is called a "treatment". A classical example of which has been the case with respect to calls bearing an international ID number are blocked on TSTT's network and not completed.

(m) during the period 15th August, 2006 to 18th October, 2006, he communicated via e-mail with Mr. Kurleigh Prescod regarding various problems Digicel experienced on the network. He also communicated via e-mail with TSTT's Natasha De Coteau about these problems. TSTT has not responded with any solution to Digicel complaints nor has it provided any explanation therefore.

(n) the actions of TSTT in failing to address Digicel's complaints on numerous occasions can only suggest that TSTT has either deliberately configured its system to block calls from Digicel's customers or to harm Digicel in its business. It has neglected or refused to repair a malfunction in their equipment which has the effect of seriously crippling the service which Digicel provides to its customers to the extent that it is irreparably damaging Digicel's reputation and goodwill.

(o) having worked on some of TSTT's landline switches in their network during the course of his employment with TSTT, he is aware that there is a different programming in the Tandem Switch based on TSTT's requirements and specifications for landline and mobile calls. The programming for both is separate so calls made to a landline from Digicel's network and entering the Tandem Switch should be routed on circuits going to the landline network and calls made to a cellular user of TSTT should be routed through circuits which go to the cellular network. The fact that both graphs from the 25th and 28th October, 2006 (exhibited to Mr. Akong's affidavit to buttress his evidence) more or less mimic each other for landline and cellular calls is indicative of the fact that both sets of calls are being routed on one set of circuits or being treated in the same way. That is another way of manually choking the system by human intervention causing calls to prematurely fail. One would expect to see different results for landline calls as opposed to cellular calls because they are sent through different networks. The fact that they mimic each other closely in the time the call success and failure rates very, suggests that the treatment of both is deliberately tailored for a particular result.



(p) Mr. Tott, in an addendum to his 12th August report took a sample of calls made from Digicel's cellular network to TSTT's cellular network on 10th October, 2006 over a thirteen minute seven second period. Completion from TSTT's network to Digicel's increased from 81.4% to 94.5% and Digicel's call success rate fell from 46.8% to 24.1%.

Mr. Tott concluded that TSTT was at that time routing Digicel's call traffic through a route that was too small to handle the traffic volume which is often referred to as a choke route and commonly used to block the flow of traffic during periods of high volume as for example during a television phone-in or voting programme so that it does not use up other resources.

(q) during the period 13th October, 2006 to 18th October, 2006 several mobile codes result in a release with cause "no route to destination" being returned from TSTT's point of interconnection switch. Also a large percentage of calls to both TSTT's mobile and fixed line networks were resulting in a release with cause "no circuit/channel available" being returned from TSTT's point of interconnection switch. In a subsequent email to Mr. Prescod also provided a sample of ISUP messages taken from the signaling links used for ISUP messaging between Digicel and TSTT between 23:20 hrs. on 13th October, 2006 and 07:27 hrs. on 14th October, 2006. An analysis showed that approximately 52% of calls to TSTT's mobile network were failing with a cause "No Route To Destination". This meant that traffic from Digicel to TSTT was being choked within TSTT's network which supports Mr. Tott's conclusion that the calls are being choked.

(r) TSTT has stated that the decommissioning of its TDMA network had caused the low call completion rate and further that the problems associated therewith had been rectified. This is not so; the same chronic low call completion rate has persisted in respect of calls from Digicel to TSTT's network. This meant that TSTT's explanation was no basis for explaining the call blocking that was being experienced by Digicel.

(s) Mr. Prescod sent an email on 20th October, 2006 which provided no substantive explanation as to the basis for the high call failure rate. Instead, TSTT asked for information that was already in its possession with respect to call completion rates on its own network. TSTT has, from its actions shown that it is not interested in correcting the chronic choking problem which exists on its network.

## Mr. Gorton's evidence

' (17) Mr. Gorton's evidence, which went essentially to cataloging the sequence of what he considered to be TSTT's efforts at delaying the signing of an interconnection agreement as well as the actual physical interconnection, is as follows:

(a) on the 23rd June, 2005, Digicel was successful in its bid to secure the spectrum required to operate a domestic mobile telecommunications service in Trinidad and Tobago. The granting of the spectrum gave effect to government's policy of full and effective liberalization of the telecommunications sector with the attendant benefits to the citizens of

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Trinidad and Tobago that competition would bring.

(b) crucial to the establishment, launch and operation of Digicel's mobile telephone network in Trinidad and Tobago is interconnection with TSTT's existing network. Without interconnection of the two (2) networks, subscribers to Digicel's network cannot call subscribers to TSTT's fixed and mobile network and subscribers to TSTT's network cannot call subscribers on Digicel's network.

(c) the interconnection process comprises two main elements, (1) the execution of an interconnection agreement and (2) the actual physical interconnection. As to (1) some sixteen months have elapsed since Digicel had successfully secured the spectrum from TATT but Digicel has not yet signed an interconnection agreement with TSTT. As to (2), that was partly completed on 31st March, 2006. A major point of contention with respect to interconnection was whether Digicel could interconnect with TSTT's legacy network or TSTT's Next Generation Network switch once expanded. TSTT, through its agents Mr. Carlos Espinal, Chief Executive Officer and Miss. Agard have given such contradictory statements as to which network it would permit interconnection to the extent that the chairman of TATT had accused TSTT's agents of lying about previous assurances going so far as to say that "one party is hell bent on stalling (the interconnection process)". On or about early October 2005 TSTT's representative, Elizabeth Camps, sent a partial draft Reference Interconnection Offer (RIO) to Digicel. Crucially, this partial draft excluded interconnection rates. Interconnection rates are, in Digicel's experience, the most contentious aspect of an interconnection agreement and the matters that take most time to agree. TSTT would not ever discuss the issue of interconnection rates in a subsequent series of meetings with Digicel about that RIO and continued to refuse to do so until late January, 2006. In contrast, Digicel indicated that it was at all times ready to discuss rates provided both parties would put forward their initial proposals at the same meeting as is standard practice in commercial negotiations.

(d) a re-draft of the RIO containing numerous amendments was sent to him by Miss Agard, by email dated 29th August, 2006. In order to interconnect with TSTT, it was also necessary to dig a trench between Digicel's switch site in Chaguanas and the nearby highway where TSTT's fibre optic ducting ran. Prior to digging the trench it was necessary to provide engineering drawings to the relevant authorities. Only TSTT had the ability to provide those drawings and could be created within hours or no more than a few days. However, TSTT would not give Digicel the drawings until the permits obtained to do the work on the roadway. There was no justification for not providing the drawings on that basis. In fact, the drawings were needed to obtain the permits. Digicel has thus been unable to start the trenching work itself. The delay in providing those drawings therefore contributed to further delay to the interconnection process.

(e) by letter dated 1st November, 2005, Ms. Agard told Digicel that it would have to pay approximately \$9.5M for interconnection equipment. Despite being of contrary view (the matter has been referred to TATT as a dispute.) Digicel felt compelled to make the payment so as not to further delay interconnection.

(f) by email dated 6th December, 2005 Mr. Prescod, TSTT, claimed that there was no spare optical fibre that could be used to connect Digicel's interconnection "switch" in Chaguanas

with TSTT's interconnection "switch" in Port of Spain. TSTT had claimed that in order to connect our switches with optical fibre Digicel would need to pay to it about \$2.5M. After Mr. Gorton himself challenged that assertion TSTT admitted that it did have some fibre available along the primary and backup routes in question. TSTT then significantly reduced its quote for the optical fibre connections to about \$300,000.00 by letter dated 14th December, 2005 which Digicel paid by cheque on 19th December, 2005.

(g) as TSTT had not indicated that it was prepared to discuss interconnection rates despite multiple requests by Digicel from October, 2005 to mid-January, 2006 and as there were also a number of other areas of contention in relation to the draft RIO supplied by TSTT that could not be resolved, Digicel decided to refer the matter to TATT as an interconnection dispute. TSTT subsequently provided proposed interconnection rates on or about 27th January, 2006.

(h) TSTT was fully aware of the imperative to expedite the interconnection process not least because of TATT's requirement that it should have been completed by 30th November, 2005. But as a means of delaying interconnection further, Mr. Prescod ordered certain equipment by ship rather than airfreight further delaying the process. When TSTT's personnel and in particular Mr. Prescod were asked about the whereabouts and the delivery times of the various equipment they would avoid providing a clear answer.

(i) on or about 31st March, 2006 TSTT advertised in the daily newspapers in Trinidad and Tobago that it had delivered as promised on interconnection. However TSTT never in fact switched on the full complement of circuits required based on the traffic forecast that Digicel had sent to TSTT.

(j) on 19th January, 2006 a dispute as regards the rates to be charged for interconnection was referred to TATT which appointed a panel of arbitrators, comprising Mr. Rory Macmillan, Dr. Shahid Hussain and Dr. Ronald Ramkissoon to arbitrate inter alia, on the issue of interim interconnection rates. On 31st March, 2006 the panel ruled that it had the power to set interim rates.

(k) TSTT successfully challenged this decision in the High Court which held that although the panel had power to grant and hear an application for interim rates, it had no power to hear and determine an interlocutory application for interim rates pending the determination of the issue of interim rates. The Court did not however deal with another decision of the panel of the same date 31st March, 2006 that the most recent draft reference interconnection offer (RIO) between the parties, including all of its appendices, annexes and the like, shall apply while the sender keeps all principle applies.

(l) on 16th August, 2006 the arbitration panel ruled on a number of issues but did not make any findings on interim rates even after the full hearing of the dispute which lasted about seven (7) months in total. Instead, it asked the parties to the dispute to revert to negotiation. However, negotiation proved unsuccessful. Consequently the two (2) parties have not signed any interconnection agreement even though interconnection services have been operational to some extent since 31st March, 2006.

(m) the current situation which exists is "sender keeps all". This means that whatever

monies Digicel or TSTT makes from their network subscribers when they originate calls, these monies are kept by Digicel and TSTT respectively. In a “sender keeps all” environment where no payments are made from TSTT to Digicel or vice versa, TSTT in its position as an incumbent dual fixed and mobile operator, has great incentives to indulge in blocking traffic from the new entrant claimant to TSTT but lesser incentives vice versa. This is because TSTT earns revenue in respect of calls made from TSTT's network to Digicel's network, and in respect of which Digicel incurs a cost to forward the calls to its customers. In contrast, TSTT is not paid for and incurs costs in respect of traffic from Digicel's network to TSTT's network. In addition, by blocking traffic from Digicel's network to TSTT's network it is starving Digicel of revenues and weakening Digicel very significantly as a competitive force. Moreover, this practice discourages customers from switching to Digicel and encourages Digicel's customers to revert to TSTT.

(n) once the rates for interconnection are finally settled, there will be monies owed by TSTT to Digicel. Digicel will be a net recipient of interconnection payments owed as a result of the traffic that will flow between Digicel and TSTT on an ongoing basis.

(o) the cost of the fibre optic links and associated ducting in the sum of twenty thousand, five hundred and eighty-two dollars and ninety-one cents (\$20,582.91) since 1st May, 2006 has been billed to Digicel and continues to be billed to Digicel on a monthly basis.

(p) in a meeting of 19th April, 2006 as detailed in a letter from Digicel to TSTT on 21st April, 2006, TSTT, through its agent Mr. Prescod, told Digicel that the reason it was not prepared to open up circuits specifically designated for the purpose of carrying international traffic inbound to TSTT's network via Digicel's network was because TSTT was not being paid for the costs it incurred in receiving those calls. Accordingly, Digicel proposed in its letter of 21st April, 2006 that to meet TSTT's concerns, Digicel would agree that in respect of all traffic flowing between the networks, interconnection payments would be made retrospectively. In its letter of response on 3rd May, 2006 TSTT simply stated that retrospective recovery was not practical or feasible by TSTT. It was unreasonable to refuse Digicel's suggestion to apply retrospectivity without discussing with Digicel how it might reasonably work between the parties, which might have been for example with the aid of interim interconnection rates.

(q) in response to Digicel's letter of 21st April, 2006, Miss Agard, by letter of 26th April, 2006, made a blanket statement that it would refuse to provide any additional interconnection facilities (including circuits) in the absence of an interconnection agreement.

(r) Between 24th April, 2006 to 2nd May, 2006 there was correspondence between Digicel and TSTT regarding international calling and the fact that Digicel has permitted calls to be routed to TSTT's network. TSTT in its letter dated 1st December, 2005 accepted Digicel's traffic forecasts of 28th September, 2006 which included provision for circuits to route international traffic to TSTT.

(s) Mr. Akong has advised that due to the increased level of traffic, Digicel requires more circuits than was originally provided in his forecast of 28th September, 2005. Digicel, through Mr. Kevin Barrins, asked Mr. Prescod for 55T1 interconnection circuits to be

provided to Digicel to send international traffic to TSTT on 19th April, 2006 but TSTT has ignored the request. Mr. Akong has also advised that the fibre optics cable being provided to Digicel at present can easily support the installation of 3654 more circuits so that there is no physical reason why the circuits have not been provided to Digicel.

(t) call failures increased severely in early October, 2006 to an extent which can only reasonably be described as catastrophic in commercial terms. Digicel wrote to TSTT on 10th October, 2006 indicating that at times up to 95% of the calls from Digicel's to TSTT's customers were failing and asking for the problem to be fixed immediately. This call blocking had the effect of exerting extreme financial hardship on Digicel and weakening it as a competitive force. This further call blocking resulted in calls being blocked largely in a one-way manner that is to say, from Digicel to TSTT but not from TSTT to Digicel. While completely shutting down the interconnection links would have the most profound and disastrous effects on Digicel's business, the extent of the blockage of calls as indicated above and in the affidavit of Leon Akong has the effect of undermining severely Digicel's ability to compete and of weakening confidence in Digicel's services to the detriment of its goodwill and reputation.

(u) TSTT controls all of the residential and commercial landlines in Trinidad and Tobago which number over 324,000. It has advertised in the media that it has over one (1) million mobile subscribers in Trinidad and Tobago which is just 400,000 short of the approximate total population. In contrast, Digicel has approximately 410,000 cellular customers. On a daily basis, the typical cellular user needs to contact his home, his place of employment, businesses, his family and other cellular users on TSTT's network. The blocking of calls from Digicel's subscribers to TSTT's subscribers or the deliberate non-action in repairing the obvious problem on TSTT's network has caused a plethora of complaints to be lodged with Digicel's outlets throughout Trinidad and Tobago. These complaints have during the period 1st October, 2006 to today's date, numbered in excess of 10,000. Complaints were also received during the period of call blocking in the month of April, 2006 and this was again very substantial.

(v) Digicel has waited until this time to apply to the Court for relief because it has until now sought to exhaust every reasonable avenue of redress before coming to Court. It has been pursuing action via the national authority responsible for regulation of the telecommunications sector, TATT. It has written correspondence to TSTT including its chairman. When these avenues failed to produce a result Mr. Gorton deposes that he, with Digicel, consulted attorneys to seek urgent relief before the Court.

(w) the continued poor service will continue to damage irreparably the goodwill and reputation of Digicel. If a cellular caller cannot access TSTT's network, it is Digicel's service which will be terminated if the customer is dissatisfied. The cash flow that Digicel requires to fund its daily operations in Trinidad and Tobago is substantially dependent on the revenue from mobile calls made on its network especially in the absence of interconnection revenues which in the normal course of events would be received for terminating calls. In the absence of that cash flow over an extended period Digicel's business would be seriously jeopardized. Digicel has invested approximately 1.9 billion dollars in Trinidad and Tobago and if the continued irreparable damage caused by the wrongdoing of TSTT is allowed to continue over an extended period it would seriously jeopardize the success of



the business of Digicel.

### **Affidavits in reply — Miss Agard's evidence**

- (18). Miss Agard's evidence is succinctly expressed at paragraph 76. She states that the status quo between the parties is as follows:
- (i) until December 31st, 2005 TSTT was under no legal obligation to interconnect Digicel.
  - (ii) in the absence of an interconnection agreement, TSTT remains under no legal obligation to interconnect with Digicel.
  - (iii) the absence of an interconnection agreement putting TSTT's case at its lowest cannot be said to be exclusively the result of acts or omissions on the part of TSTT. Digicel's rejection of the Panel's decision on the principle of reciprocity is the cause of the present impasse regarding an interconnection agreement.
  - (iv) in the absence of an interconnection agreement, TSTT is not obliged to carry international traffic for Digicel on its network or to allow Digicel to terminate international traffic destined for TSTT's network.
  - (v) there is nothing more in place between the parties than a loose and legally uncertain working arrangement which TSTT was willing to attempt in the public interest notwithstanding the absence of an interconnection agreement which is a pre-requisite to interconnection under the Act.
  - (vi) TSTT is doing its best to carry the domestic traffic generated by Digicel's mobile user's and there are competing engineering explanations with respect to what is now a passed period of low call completion rate.
- (19) She denies that TSTT is guilty of unfair competition, dishonest practices or anti-competitive conduct or of any breach of any kind, whether breach of contract, breach of its concession, breach of the Act or the regulations. She alleges that:
- (i) The causes of action other than the purported cause of action in implied contract (which is not sustainable at all) are not sustainable unless TSTT has some legal obligation to Digicel in respect of interconnection (and not a loose legally uncertain arrangement for physical interconnection) in the admitted absence of an interconnection agreement. Digicel has not made out a case that TSTT is wrongfully interfering with operations to which Digicel, not being a party to an interconnection agreement under the Act, has some other legal right; and/or
  - (ii) In the circumstances of this case, Digicel ought not to be permitted to pursue this matter including this injunction application when it has available the alternative remedy of dispute resolution set down in the concessions of both parties;
  - (iii) In the circumstances of this case, there is no basis for the Court to grant any



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interlocutory injunction, whether prohibitory or mandatory at this stage.

1 (20) The rest of her evidence may be summarized as follows:

(a) TSTT has no improper motives nor has it stalled or obstructed interconnection. Rather, her experience has been that new entrants to a liberalised telecommunication environment such as Digicel, negatively portray the incumbent operator and lobby the regulator and government ministers to pressure the incumbent. Digicel has been especially aggressive in its attacks on TSTT and this is reflected in the Gorton affidavits.

(b) TSTT has reasonably facilitated physical interconnection despite the lack of an adequate regulatory environment and the lack of an interconnection agreement.

(c) Digicel as a new entrant has every incentive to seek high interconnection rates as it is a mechanism to boost revenues and subsidize the cost of calls on its own network.

(d) high interconnection rates in Trinidad and Tobago will lead to increased prices of TSTT's fixed and mobile customers. Retail rates will have to be significantly increased to recover the cost of terminating a call on Digicel's mobile network. This undermines the benefit of competition to the consumer and tilts the playing field unfairly against the incumbent. A customer is likely to simply compare rates and choose the competitor with a lower retail rate.

(e) up to December, 2005 there was no proper regulatory framework for interconnection despite TSTT's concerns expressed to TATT as early as May 2005.

(f) It was not until 9th May, 2006 that the Telecommunications (Interconnection) Regulations, 2006 were published. They did not take effect until the end of August 2006. Until the grant of its concession TSTT was guided by the Act in all of its dealings with Digicel and TATT.

(g) in the absence of concessions under the Act, TSTT considered it was under no legal obligation in 2005 to interconnect with Digicel.

(h) there was no delay on TSTT's part between August, 2005 and February, 2006 because during that period the parties were continuously "meeting and treating".

(i) the parties signed a non-disclosure agreement on 30th August, 2005 which expressly provides that they shall not be bound to a business relationship without a mutually satisfactory definitive agreement signed by the parties.

(j) on 21st September, 2005, TSTT submitted a draft Reference Interconnection Offer (RIO) to Digicel and discussions/negotiations ensued regarding aspect of the RIO towards arriving at an interconnection agreement. When those discussions appeared to be progressing Digicel indicated its intention to refer the matter of failing to reach an interconnection agreement to TATT. It served a notice of dispute on TSTT on 19th January, 2006 seeking to resolve inter alia:

(a) the basis of charges

(b) other services

(c) outstanding issues on the reference interconnection offer

(d) failure to conclude an interconnection agreement.

(k) the arbitration process eventually concluded on 16th August, 2006 and the panel delivered a decision after an extensive hearing. TSTT and Digicel exchanged letters with a view to further discussions on an interconnection agreement. The parties subsequently met on two occasions in August 2006. Thereafter Digicel's Chief Executive Officer, by letter of 1st September suggested that the breakdown of negotiations at the meetings were TSTT's fault. This was refuted by letter of 4th September by TSTT's chairman. Indeed the minutes of those meetings demonstrated that Digicel's letter completely misrepresented the manner in which the meetings progressed.

(l) Digicel refused to accept the panel's decision on a key issue relating to the interconnection agreement and sought to bypass the decision (which expressly bound the parties) by lobbying the Minister of Public Administration and Information who sought to mediate between the parties and proposed, as a solution, the adoption of an asymmetric mobile termination rate as the basis of the mobile termination rates. This was contrary to the decision of the panel.

(m) it was only after Digicel failed in its efforts to evade the panel's decision that it sought an application for judicial review filed on 23rd October, 2006, some two months after the panel's decision. It was only in his second affidavit that Mr. Gorton told the Court about its challenge nor did he inform the Court that Digicel also on 13th March, 2006 filed another dispute with TSTT concerning fixed and transit interconnection rates. That matter is not yet concluded.

(n) any delay in respect of Digicel's switch site or fibre optic ducting to the site arise primarily as a result of Digicel's changing of the location of its switch from Nicholas Towers in Port of Spain to Chaguanas, a considerable distance away from the Nelson Exchange in Port of Spain which is the point of interconnection.

(o) in order to assess the requirements for the works to Digicel's point of presence, TSTT was required to, and did conduct a site visit to Digicel's site. TSTT then needed to develop high level schematics to determine how the fibre could be brought to Digicel's site and had also to re-evaluate the estimated costs. Detailed engineering points could not be prepared until relevant approvals were obtained from Town & Country Planning and from the Ministry of Works.

(p) Digicel agreed to pay for the optical equipment required to provide interconnection to it. Mr. Gorton himself agreed to the payment in a number of meetings (something he has also failed to tell this Court.) TSTT not only informed Digicel of the necessity to pay the US \$1.49 million for the equipment but submitted a budgetary proposal which was clear that the proposal fees did not include the optical equipment required for the expansion of the core network to support the call traffic. It was only at a meeting in November 2005 that Digicel indicated that it was no longer willing to pay for the equipment since it now had a

concession. Digicel has now filed a complaint with TATT seeking a refund of the monies paid.

(q) physical interconnection between the parties involves more than the purchase of interconnect specific equipment for which Digicel paid. TSTT was required to upgrade its core network to accommodate the volume of traffic anticipated, the cost of which is estimated at one hundred and ten million dollars (\$110,000,000.00). At all times the cost of upgrading was to TSTT's account, although all concessionaires will benefit from it. The upgrade is necessary to provide the capacity to carry the traffic forecasted by the other concessionaires. There has been a delay in the upgrade of which TATT is aware.

(r) the original proposal provided by TSTT to Digicel, clearly stipulated that no spares have been included in the proposal. During the engineering of the interconnection TSTT managed to realize considerable savings in the original quotation provided by its vendor. It was when these savings were realized that TSTT offered to purchase the spares. After completion of the implementation of interconnection, TSTT has determined an eventual excess of US\$120,361.80 which TSTT will credit to the account of other services provided to Digicel at present.

(s) it was not possible to discuss interconnection rates during the last quarter of 2005 as TSTT was still doing work on its cost model.

(t) from October 2005 to mid January 2006 TSTT was not in a position to discuss interconnection rates because it was still in the process of developing its cost model and had not yet received complete information as to the outputs of the model to ascertain figures for determining rates. As at mid January 2006 TSTT was still awaiting the results of testing of its model from its economic experts NERA Consulting. TSTT's cost model was completed in late January 2006.

(u) TSTT did advertise that it had delivered as promised on interconnection. This was consistent with what was promised by TSTT to Digicel in the absence of an interconnection agreement. As to the allegation that TSTT never switched on the full complement of circuits requested by Digicel based on the traffic forecasts sent to TSTT by Digicel, Digicel is fully aware that the full complement of switches are not switched on and will not be switched on in the absence of an interconnection agreement and in the absence of agreement between the parties as to the rates to be paid to each other for the provision of these interconnection services. In the event that TSTT does supply all the requested circuits to Digicel to facilitate the full array of interconnection services with no payment for these services there will never be any incentive on Digicel's part to conclude an interconnection agreement with TSTT since an interconnection agreement will cause them to have to pay for services which they are currently receiving for free.

(v) the terms of the negotiation for interconnection on a sender keep all basis have been the subject of several letters passing between the parties in March, April and May 2006 which Mr. Gorton has failed to disclose or highlight to the Court. By letter dated March 17, 2006 Digicel offered TSTT specific interim commercial rates for interconnection (Exhibit LA25). TSTT facilitated physical interconnection in the absence of an interconnection agreement provided that traffic on TSTT's network was limited to domestic interconnect traffic between

the parties' subscribers. Moreover, any disagreement between TSTT and Digicel concerning the carriage of international traffic cannot now be represented to the Court as an urgent matter because the dispute is seven months old.

(w) the relevance of the international traffic issue appears from TSTT's letter to Digicel dated 26th October, 2006 (exhibited as "A.G. I" to the second Gorton affidavit). The relevance of the correspondence of April and May, 2006 appears from TSTT's letter to TSTT, copied to Digicel, dated 30th October, 2006. The attention is also directed to the letters of 23rd March, 2006 from TSTT to Digicel and of 27th March, 2006 from Digicel to TSTT (which are not disclosed to the Court and which are exhibited as LA26).

(x) on April 20, 2006 TSTT wrote to Mr. Gorton indicating its findings that Digicel was in contravention of TSTT's offer to facilitate physical interconnection and was carrying international traffic on the trunks specifically designated to carry domestic interconnection traffic only and referred to an admission made to TSTT by representatives of Digicel (including Mr. Gorton) to that effect at a meeting on April 19, 2006.

(y) by a further letter dated April 26, 2006 also addressed to Mr. Gorton, TSTT reminded Digicel that physical interconnection in the absence of an interconnection agreement was conditional upon Digicel executing an interconnection agreement with TSTT and was limited to domestic interconnection. TSTT also denied that it was engaging in anticompetitive behaviour.

(z) by the letter of May 3, 2006 referred to at paragraph 36 of the Gorton affidavit but attached as "LAH 8" to the affidavit of Leon Akong, TSTT sought to address with Digicel its complaint of congestion on the network and once more reiterates the cause of this congestion being attributed to Digicel bringing international traffic onto the network in contravention of the basis upon which TSTT offered to facilitate physical interconnection between the parties.

(ai) regarding the allegation that TSTT is subject to an implied term to provide to Digicel "interconnection under the same terms and conditions and at the same quality ... of any other concessionaire", it would not be possible for TSTT to so do for Digicel in the absence of an interconnection agreement. TSTT is at all times under an obligation to provide these services to all concessionaires (not just Digicel) in a non-discriminatory manner.

At present TSTT has signed interconnection agreements with Laqtel Limited as at 29th May, 2006 and with Three Sixty Communications as at September, 2006.

(aii) it is not accurate to say that once the rates for interconnection have been finally settled there will be monies owed by TSTT to Digicel.

## Mr. Prescod's evidence

(21) Kurleigh Prescod in his affidavit in reply on behalf of TSTT succinctly summarises his evidence at paragraph 52. He maintains that call failures or low call completion which Digicel has encountered have been materially affected by:

- (i) the recent decommissioning by TSTT of its TDMA network. TSTT continues to examine the problem in order to effect its full resolution and the effect has been mitigated.
- (ii) the limitations of TSTT's core network which is being upgraded. The upgrade will facilitate additional traffic to be brought onto TSTT's network by other concessionaires including Digicel as well as TSTT's own traffic which is equally affected by the present state of the core network.
- (iii) although the parties have no signed interconnection agreement between them, the unauthorized bringing of international calls onto TSTT's network through circuits designed only to accommodate domestic traffic;
- (iv) failure by Digicel to respond to TSTT and to provide relevant or timely information to facilitate adequate investigation by TSTT of the problems on its network of which Digicel has complained.

**He deposed to the following additional facts:**

- (a) TSTT has provided Digicel with a total of 1,167 circuits and Digicel also has 42 circuits to facilitate cellular calls from its mobile network to emergency circuits. TSTT has 1,185 circuits from TSTT's network to Digicel's network.
- (b) Digicel's September 28, 2005 forecast for the first year of interconnection (the period April 2006 to March 2007) requested 5,129 circuits which includes the 1,209 circuits from TSTT to Digicel and the 1,185 circuits from Digicel to TSTT.
- (c) regarding Digicel's complaints about the lack of circuits, Digicel has failed to mention that after it complained on 10th April, 2006, TSTT provided it with the majority of its additional circuits for the first quarter despite there being no interconnection agreement between the parties
- (d) thereafter TSTT's observed that Digicel was bringing international traffic onto TSTT's network. This was admitted by Digicel's representatives (including Mr. Gorton) at a meeting of 19th April, 2006. TSTT's position has been that it was providing physical interconnection on a "sender keep all basis" for domestic traffic only.
- (e) Digicel never specifically reported to TSTT the call failures of which Mr. Akong complained. TSTT is unable to collect sufficient data through its existing network monitoring activities to see the facts and matters of Mr. Akong has set out in his affidavit. Once TSTT was made aware of Digicel's complaints, it sought to determine the causes.
- (f) TSTT has been carrying out upgrades to its core network to facilitate the level of traffic it expects will be passing on its network by entry into the telecommunications market by other concessionaire. TSTT is engaged in both signaling and circuit upgrades but until completed TSTT continues to experience congestion at peak periods and network failures within its core network.
- (g) at a meeting with TATT's Executive Director (Dr. John Prince) and Deputy Executive

Director, Mr. Prescod was shown a report which revealed that call completion rates to TSTT's networks improved considerably on or about 23rd and 24th October, 2006. The report came from Digicel's officers

(h) The head of Quality Assurance at TS I T that has advised:

(i) Mr. Tott, by disregarding the actual customer base of the different companies as factor for Answer Seizure Ratio difference, has dismissed a very relevant factor in determining the answer seizure ratio since the more customers on a network given similar spectrum and build out would directly affect the ability of a network to terminate calls.

(ii) there was also no assessment of customer usage patterns.

(iii) as to section 2.4 of his report, Mr. Tott also assumes that all customers of TSTT's network are served by voice message systems. Approximately 75% of TSTT's landline customers do not have voice mail as this is an additional service which fixed line customers must pay for. Only 60% of TSTT's mobile customers had active mail boxes.

(iv) Mr. Tott does acknowledge that a major contributing factor to the high volume of busy signals returned from TSTT's network could be poor TSTT coverage compared to Digicel. At the time of Mr. Tott's study, the majority of TSTT's mobile customers were served solely by TSTT's 1800 MHZ network which experiences coverage limitations as compared to the 850/1900 MHZ network that Digicel possesses.

(v) Mr. Tott's analysis does not take into account any failures or trunk constraints that TSTT's network may experience or possess.

(i) TSTT performs its own periodic monitoring activities which would capture an indication of the number of attempted and answered calls from TSTT's networks to Digicel's network as well as call seizures and failures from Digicel's network to TSTT's networks. However, due to the nature of the circuits TSTT's existing monitoring activities are incapable of determining the number of answered calls from Digicel's network to TSTT's networks. As such, the data shown on Mr. Akong's affidavit at "LH5" was unknown to TSTT and could not be discovered through TSTT's existing monitoring activities.

(j) TSTT is passing international calls through Digicel's network pursuant to Digicel's request. Digicel had indicated that it would be unable to establish interconnection arrangements with all of its overseas carriers upon launch and would require TSTT to allow calls to its customers. TSTT has acceded to this request in the interest of not advantaging Digicel's customers from receiving international calls.

**He deposed to the following additional facts:**



(22) I have sought fully to ventilate the factual matters deposed by the contending deponents in this case. The only matters on which they are agreed is what constitutes interconnection and the fact that there has been no interconnection agreement. There appears to be a dispute about virtually everything else (including whether Miss Agard is employed by TSTT or Cable and Wireless). Both sides point to the other for the non-execution of an agreement. It is no surprise therefore that with such intransigence no interconnection agreement has been executed. It does not appear that execution of an agreement is likely any time soon. Against that scenario one would have expected that the arbitration panel (after a full hearing which lasted over a period of seven months,) would have made a definitive decision on interim rates. Rather than do so it tossed the hot potato back to the parties asking that they revert to negotiation. Not surprisingly, negotiation has failed. Digicel has now come to this Court and the contest is now likely to continue all the way up to the highest level. In the interim, the consumer must manage as best as he she or it can.

(23) Digicel's position can be summarized thus; it is TSTT's fault that no agreement has been executed. TSTT has succeeded in delaying physical interconnection for as long as it can. It continues to drag its feet on the execution of an interconnection agreement. It has blocked our calls deliberately or failed to repair faults in its system. It continues to limit the number of traffic which we can put through TSTT's network by limiting the number of circuits available to us and by blocking international calls.

(24) TSTT's position is this: We have done our best to facilitate interconnection *moreso* in the absence of an express agreement (the conclusion of which Digicel has stalled by referring the matter to arbitration) and even *moreso* in an environment which was initially unregulated by any statutory or concessionary scheme. It is they who have delayed the process by lobbying the politicians in an attempt to evade the decision of an arbitration panel (which they help set up by prematurely reporting a dispute to TATT). Worse they have been slow to inform the Court of their action. Further, call failures are due to (1) systemic inadequacies in our network (which we are of course actively upgrading for the public good) and are not the result of any deliberate act of call blocking; (2) Digicel's clogging of the system by passing international calls through circuits designed to accommodate domestic calls only, when they well knew that we have agreed (in absence of an interconnection agreement) to interconnection for domestic traffic only.

(25) It is those two contending factual positions upon which I must ultimately adjudicate. Both versions are highly probable and both have been adroitly and lucidly put forward by Mr. Fitzpatrick for Digicel and Mr. Daly for TSTT. Because I am at the interlocutory stage I am not yet required to make any factual findings.

## Law

(26) I do not propose to embark on any great exposition of the law if only for reasons of brevity. But in any event I am bound by the two decisions I consider applicable to this case, the purport of which Mr. Fitzpatrick has quite accurately summarized in his written submissions. The decisions are well known and require no great repetition. I shall add that because the matter is interlocutory I am also not required to conduct any indepth analysis of the Digicel case. It will be sufficient that

I find it to be arguable.

' (27) The principles of law governing the grant of interlocutory, restraining and mandatory injunctions can be summarized as follows:

- (i) The applicant must establish that he has an arguable case or triable issue.
- (ii) If the applicant establishes that he has an arguable case, the Court will then consider the balance of justice and would ask the question "where does the greater risk of injustice lie in granting the injunction or refusing it?"
- (iii) In the case of mandatory injunctions, the strength of the applicant's case and the consequences of refusing the interlocutory injunction are matters which the Court will take into account in determining where the balance of injustice/justice lies.

See [\*Jetpak Services Ltd v BWIA International Airways Ltd\* \(1998\) 55 W.I.R. 362](#), per de la Bastide, C.J.

See also *East Coast Drilling and Workover Services Ltd v Petroleum Co of Trinidad and Tobago Ltd* (2000) 58 W.I.R., per de la Bastide, C.J.

(1) Whether triable issue

Digicel has founded its case on several planks

- (a) breach of implied contract.
- (b) breach of section 4 of the Protection Agreement Unfair Competition Act, 1996 as amended.
- (e) Anti-competitive conduct within section A21 of TSTT's concession issued to it on 31st December, 2005.
- (d) breach of sections 24(1)1, 25(2)(d)(k) and 1 and 26(1), (2) of Telecommunications Act, 2001.
- (e) a breach of sections 5(1) of the Telecommunications (Interconnection) Regulations, 2006.

#### **(a) Breach of contract**

' (28) Digicel in its notice of application seeks what are effectively four mandatory injunctions at reliefs 2 to 5 of the application. For this reason the strength of the Digicel's case is important to the grant of any relief. As to whether there is an implied contract between the parties, having read the evidence in this case and having examined the Act, I entertain some considerable doubt that Digicel can, on the facts of this case, sufficiently establish that it has a cause of action in implied contract, or even if it could, that that cause of action is likely to succeed.

Section 25(1) of the Act requires that any concession granted should require the concessions to provide for:

- (a) direct interconnection with the public telecom network or service of another concessionaires.
- (b) indirect interconnection with such network or service through the public telecom network of other concessionaires
- (c) the transmission and routing of the services of the concessionaires at any technically feasible point in the concessionaires network.

1 (29) By section 25(2) TATT shall require a concessionaire to do a number of things among them:

- (e) promptly negotiate, upon request of the other concessionaires of a public telecom network or service an agreement with respect to prices and the technical and other terms and conditions from the elements of interconnection.
- (h) submit to the authority for prompt resolution, in accordance with such procedures as the Authority may adopt, any disputes which may arise between concessionaires with respect to any aspect of interconnection including the failure to conclude an agreement per paragraph (2) or dispute as to price and any technical or other terms and condition for any element of inter connection.

The provisions of interconnection under section 25 set out requirements as between the Authority and concessionaires and as between concessionaires themselves. Breaches of the concession and of the provisions of the section 25 appear at first blush therefore to be matters for the Authority (which issues the concessions) to address and may not by themselves raise a cause of action.

1 (30) I agree with Mr. Daly that in the absence of an express interconnection agreement under section 25(2) TSTT was under no obligation to interconnect with Digicel for Digicel to establish an implied agreement or contract having regard to the nature of this case. It must show agreement on the substantial aspects of interconnection. Such as to suggest that even without the express written agreement the parties are so ad idem that their business relationship is governed by legal regime by which they can function without constraint. I cannot conceive of an enforceable contract between the parties in the absence of an agreement at least as to the rates charged by the parties for use of each other's network by its customers. That must at a minimum be one of the basic requirements of a contract having regard to the nature of interconnection. Additionally, Digicel although it relies on the payment of monies as evidence of consideration for the existence of a contract, now disputes the necessity to have paid them. I am appalled that it can seek to dispute the payment and yet seek to rely on it as creating an implied contract. The statement of claim at paragraph 22 does not contain particulars of the facts or matters relied on to draw from the inference of the implied contract. I therefore consider that even if Digicel is able to establish a cause of action in the contract it will have a difficult burden to discharge and in those circumstances it would be unwise to grant any injunctive relief on the basis of an implied contract. I am mindful of the dictum of de la Bastide, C.J. in *East Coast Drilling & Workover*

*Services Ltd v Petroleum Co. of Trinidad & Tobago Ltd* that proof of the likelihood of success in the substantive action was not always essential where the consequences of refusing the interlocutory injunction were likely to be disastrous to the applicant while the consequences to the respondent of granting it could be mitigated to a tolerable level (as a matter of balancing justice) but I am sufficiently persuaded of the weakness of Digicel's argument as to find its application unnecessary in this instance.

(c)(d)(e) — Anti-competitive Conduct/Breach of the Act/Breach of the Regulations

(31) I am of the same view with respect to the alleged breaches of section A21 of TSTT's concession, breaches of section 26(1) & (2) of the Act and regulation 5(l) of the Telecommunications (Interconnection) Regulations. In my judgment breach of these provisions are matters for the Authority and raise no causes of action of their own. Moreover, a breach of reg. 5(1) of the Telecommunications (interconnection) Regulations can be met with criminal sanctions brought by the Authority.

**(b) unfair competition**

(32) I come then to the breach of section 4 of the Protection Against Unfair Competition Act, 1996 (as amended). Section 4 of the Protection Against Unfair Competition Act, No. 27 of 1996 provides:

(1) ... 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. 4(2) Any person damaged or likely to be damaged by an act of unfair competition shall be entitled to the remedies obtainable under the civil law of Trinidad and Tobago."

Section 6 thereafter provides:

(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 and act of unfair competition, regardless of whether such act or practice causes confusion. 6. (2) Damaging another's goodwill or reputation may, in particular, result from the dilution of the goodwill or reputation attached to any of the following:

(e) the presentation of products or services;

(33) This area is very much uncharted territory in Trinidad and Tobago and there is no local authority on the subject. Resort must be had to other jurisdictions. In this regard I refer to the text. "Intellectual Property in Europe" by Guy Tritton, (cited by Mr. Fitzpatrick), which states that competition laws have two objectives:

"First, they are to protect the consumer against confusion in the market place; secondly, they are to protect the trader against other traders' business practices that

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are intent on, or have the effect of damaging the trader's business other than those founded on free-market economies.”

Section 4 of our Act is widely drafted. It refers to “any act or practice”. That definition came by way of amendment to the original act signaling a clear intention by the legislature to widen its ambit.

In *Cel-Tech Communications v. Los Angeles Cellular Telephone Company* 20 Cal 163 the Supreme Court of California was required to adjudicate on the defendant's telephone company's marketing strategy of selling telephones below cost, the issue being whether that strategy was a breach of California's Unfair Practices Act and its unfair competition law. In comparing the scope of the two laws, Chin, J., stated at page 14:

“In contrast to its limited remedies, the unfair competition law's scope is broad. Unlike the Unfair Practices Act, it does not proscribe specific practices. Rather, as relevant here, it defines “unfair competition” to include “any unlawful, unfair or fraudulent business act or practice.”

At page 16 he added:

“As discussed above, the Unfair Practices Act condemns specific conduct. The unfair competition law is less specific, because the Legislature cannot anticipate all possible forms in which unfairness might occur.”

It is apparent therefore that the term “act or practice” is subject to broad interpretation. Section 4 gives the aggrieved person access to all the civil law remedies available in Trinidad and Tobago. It thus establishes a whole new cause of action separate and apart from contract. The cause of action arises from the statute and from the fact of competition between the parties. There can be no dispute that such a competition exists between the parties here. It has been a fierce and at times bitter rivalry and that it is a matter of great public notoriety.

- (34) In my judgment even if TSTT is correct that the business relationship between parties may not be governed by a contract it does not mean that as between them their relationship is a “loose and legally uncertain working arrangement which TSTT was willing to attempt in the public interest” as submitted by Mr. Daly and as deposed by Ms Agard. It is arguable that while TSTT may have been under no legal obligation to provide physical interconnection in the absence of a binding legal agreement, once it decided to provide physical interconnection it was required by the Protection Against Unfair Competition Act, No. 27 of 1996, in the provision of such interconnection to treat fairly with Digicel and to engage fair practices in the course of competing with Digicel. The basis of that business relationship is governed not by the existence of a contract but by statute and under statute TSTT is under a duty to compete unfairly. This would include affording to Digicel the same treatment it affords its own mobile network in relation to its landlines and vice versa.
- (35) Digicel has alleged TSTT is in breach of the Act by blocking calls from its network to TSTT's in a number of ways:

(1) By providing limited circuits or trunks to Digicel's network,

(2) By outrightly blocking its calls including international calls to its network,

(3) By routing calls from Digicel's network through limited circuitry, allowing for choking.

Mr. Harold Akong has deposed extensively to the number of ways the call blocking can be contrived and it is supported by the report of Mr. Malcolm Tott, an expert in the field of telecommunications.

Mr. Kurleigh Prescod has maintained that call failures or low call completion rates suffered by Digicel has been materially affected by:

(a) the recent decommissioning of its TDMA network which continues to be examined for its resolution but

(b) the limitations of TSTT's core network which is being upgraded. Such upgrade will facilitate

(c) the unauthorized bringing of international calls unto TSTT's network through circuits designed only to accommodate domestic traffic.

(d) Digicel's failure to provide timely information to facilitate adequate investigation of TSTT's network so as to facilitate solutions to the problems on its network (which have been mitigated).

;(36) At this interlocutory stage, I am not called upon to determine issues of fact. But I note that as to the issue of international calls TSTT has not outrightly denied that it has blocked those calls. Rather, it disputes that there has been any agreement that international calls should be facilitated from Digicel's network an issue which Digicel disputes. Moreover Mr. Akong, in his principal affidavit, has posited that the quantity of international traffic brought onto TSTT's network is far too miniscule to cause the level of congestion encountered by Digicel.

I note as well that the complaints emanating from Digicel about call failures to TSTT are not reciprocated from TSTT to Digicel and there has been no serious complaint from TSTT about its own calls to Digicel. Further,, Mr. Prescod's explanation that TSTT's equipment is in need of upgrade is difficult to accept having regard to the fact that TSTT has had a monopoly of telephone and mobile success in this country for a more than considerable period and was well aware that interconnection was approaching and its monopoly would be at an end. It is more than a little odd that such an upgrade is not yet complete. I shall add that on the evidence in this case TSTT has displayed a clear unwillingness to proceed with expedition.

In my judgment, having examined the Protection Against Unfair Competition Act and the evidence of Mr. Akong and Mr. Gorton, Digicel has a cause of action and an arguable case that it is being the subject to acts of unfair competition. That is not a cause of action which is the subject of the alternative remedy of dispute resolution by way of arbitration.

### **Balance of injustice/justice/strength of case**



(37) The question which next arises is where does the greater risk of injustice lie in granting the injunctions sought or refusing it. Bearing in mind that these are mandatory injunctions sought I must also examine the strength of the applicant's case and the consequences of refusing the injunction.

I consider, having examined the evidence, that Digicel's case on call blockage appears to be quite substantial, I note in particular Mr. Akong's evidence that international calls, once the caller identification was removed was allowed through to Digicel's network from TSTT. Allegations which have not been denied. Mr. Prescod's explanation as to the problems on the TSTT network and network upgrade do not appear to occur from TSTT's network to Digicel.

Moreover, while TSTT has complained about international calls being put through from Digicel network onto its own network, it has enjoyed the facility of passing international calls through to Digicel's network but says that it has done so because Digicel has consented to it. Even so, it appears to me that the Act demands equal treatment that Digicel be facilitated with its own international calls through TSTT's network as a matter.

(38) I return to the question where does the greater risks of injustice lie. TSTT has the larger customer base entities boasting of both land and mobile network. It has hitherto enjoyed the effect a monopoly of land telephone and mobile telephonic services in Trinidad and Tobago. It boasts of over one million (1,000,000,000) mobile phone users unlike TSTT. Digicel contends that it has four hundred and ten thousand (410,000) customers it is engaged solely in the provision of mobile telephone services. (This figure is disputed by Mr. Prescod who suggests that the figure is far greater than that suggested by Digicel although he has not forwarded any definite figure of his own.) Digicel is a new entrant to the Trinidad and Tobago market which has invested 1.9 billion dollars in Trinidad and Tobago. With the smaller market base and no doubt higher investment costs in the short term, it has quite a lot at stake, and in my judgment, far more to lose than TSTT which is well established. Given the "sender keeps all" arrangement, the high failure rates of calls from its network to TSTT's, if true, means a greater loss of revenue to Digicel than to TSTT.

## Orders

(39) It seems to me that the consequences to Digicel on its evidence are likely to be severe damage to its business and reputation and such call blocking ought to be restrained. I am mindful of the difficulties involved in policing such an order. I have been much troubled that mandatory order directing the "unblocking" of calls may not be effectual or workable but I am sufficiently persuaded by Mr. Fitzpatrick that I am to proceed on the basis that TSTT will act on the basis of my order. I shall grant the order in terms sought at reliefs 2 & 3 in the application.

With respect to the mandatory order requiring the provision of additional circuits, TSTT, through Miss Agard, has alleged that it is likely to lose one million dollars (\$1,000,000.00) by the provision of circuits to Digicel. Miss Agard also alleges that it has signed interconnection agreements with two other concessionaires (the suggestion there is that it would be unfair to provide those additional circuits to Digicel in the absence of agreed rates or an agreement on their cost.) As to the issue of loss to TSTT Mr. Fitzpatrick submitted that the consequences of the

grant of such relief on TSTT are minimal, the only claim of damage made by TSTT is that it will suffer a loss as a result of inbound international calls on the existing sender 'keeps all basis' and TSTT in fact has been able to quantify such loss.

- (40) He added that on the other hand the trunks/circuits provided by TSTT to Digicel to date are grossly inadequate. Without the provision of the necessary circuits Digicel's operation will continue to experience an unacceptably high percentage of failures in terminating calls on TSTT's network. He added that it was axiomatic that consequences to Digicel's business and reputation will be catastrophic should this continue.

In any event, any possible loss suffered by TSTT for lost revenue for inbound international calls can be compensated for by damages which, as set out above, are readily quantifiable.

It seems to me that the non-provision of additional circuits or the provision of inadequate circuits has put TSTT in a position where it is able to control the growth of Digicel's market share and as such control its competitive edge. Moreover, TSTT's decision to confine physical interconnection with Digicel to domestic traffic only necessarily makes Digicel's services less attractive to consumers when TSTT's own mobile and land customers would suffer no such limitation given their access to international calls on Digicel's network. Given the breadth of section 4 of the Protection for Unfair Competition Act, it is more than arguable that such a practice is unfair. I again bear in mind as well the dictum of de la Bastide, C.J., in *East Coast Drilling v Petrotrin* to which I earlier referred. In my judgment TSTT's case however strong must in any event give way to the question of the likely greater financial damage to the Digicel.

- (41) As to the issue of fairness to other concessionaires that is not a consideration for me in this application. But in any event the facts surrounding the operations of the other concessionaires are not before me and may well be different to those of Digicel.

It seems to me that Mr. Fitzpatrick is correct that the damage to Digicel's business and reputation will be greater in not granting the order than it will be to TSTT in granting it. I am also persuaded that damages to TSTT can be quantified in the event that it succeeds in the substantive trial whereas the damage to Digicel is not likely to be.

I shall grant an order in terms of relief 5 (described as 4) in the application i.e. the final order sought in the application

- (42) Finally I come to order sought by Digicel at relief (4) of the application which is an application pursuant to part 17.1(1) of the 1998 CPR. I am of the view that Digicel is also entitled to succeed as well, however, I am concerned that in accessing such data sensitive information of TSTT shall not be compromised. I shall order that data and information sought at para 4(1) to (xi) of the notice of application be accessed by an agent of TSTT in the presence of a representative of Digicel and two representatives of the Telecommunications Authority of Trinidad and Tobago. That information is to be copied onto a CD and given to the TATT representative. The information shall be examined by the representatives of the TATT which shall determine whether there is on the data any information which comprises material not relevant to this action and or is of a sensitive nature.

TATT's recommendations as to whether the information is sensitive or not and its reasons for saying so shall be submitted to this Court and I shall determine whether all or any of the information shall be made available to Digicel.

The accessing of the information and submission of TATT's report to this Court shall be conducted and completed within twenty-eight (28) days of today's date. There shall be liberty to apply.