

IN THE COURT OF APPEAL

OF

TRINIDAD AND TOBAGO

CIV. APP. NO. P-126/2020

**TELECOMMUNICATIONS SERVICES OF TRINIDAD AND TOBAGO**  
**APPELLANT**

**V**

**TELECOMMUNICATIONS AUTHORITY OF TRINIDAD AND TOBAGO**  
**FIRST RESPONDENT**

**COLUMBUS COMMUNICATIONS TRINIDAD LIMITED**  
**SECOND RESPONDENT**

PROCEDURAL APPEAL

WEST COURT, PORT OF SPAIN

ON MONDAY, 10<sup>TH</sup> AUGUST 2020

PANEL:

JUSTICE OF APPEAL GREGORY SMITH

JUSTICE OF APPEAL MARK MOHAMMED

**APPEARANCES:**

MR. M. DALY SC and MR. C. SIEUCHAND instructed by  
MS S. INDARSINGH and MS L. THEODORE  
on behalf of the APPELLANT

MR. D. MENDES SC instructed by MS G. GELLINEAU  
on behalf of the FIRST RESPONDENT

MR. S. SINGH instructed by MS A. ADIMOOLAH  
on behalf of the SECOND RESPONDENT

TRANSCRIBED BY:  
VIDYA SIEWDATH

(PROCEEDINGS COMMENCED AT 10:04:00 A.M.)

JUSTICE SMITH: ...Columbus Communications. Can we get the appearances, please?

MR. SIEUCHAND: Good morning, My Lords. Should it please you, I am Christopher Sieuchand. Mr. Martin Daly leads me for the Appellant in this matter. We are instructed by MG Daly and Partners represented by Sashi Indarsingh and Ms Lisa Theodore.

MS GELLINEAU: Good morning, My Lords. Should it please you, Douglas Mendes leads me, Ms Gabrielle Gellineau, on behalf of the First Respondent, TATT (Telecommunications Authority of Trinidad and Tobago). There is a representative from the Telecommunications Authority at this Virtual Hearing, please, My Lords.

MR. SINGH: Good morning, My Lords, should it please you, my name is Stephen Singh and I appear on behalf of the Second Respondent, Columbus Communications Trinidad Limited and I am instructed by Amanda Adimoolah. I do apologize, My Lords, there is no representative of the Second Respondent this morning.

JUSTICE SMITH: Yes. And we have read the submissions in these matters and...

MR. SIEUCHAND: My Lord, I did omit to indicate that a representative of TSTT is also before you, Mr. Charles Carter.

JUSTICE SMITH: Yes. Very well. Yes. We read the submissions and we understand the purport of what is there. So unless, if there is anything you want to highlight or respond to, now is the opportunity, I guess.

Mr. Daly?

MR. DALY SC: Thank you, My Lords. Much obliged. I would like to respond and elucidate a number of things, particularly because there has been little or no response from -- may I use the names of the parties so it can be clear. In the little or no response from TATT and the authorities we raised, I think it's quite important to put those in further perspective to Your Lordships, if you would be good enough to give me some time.

JUSTICE SMITH: Yes, Mr. Daly. Yes.

MR. DALY SC: My Lord, how long would you like me to...I am fairly --

JUSTICE SMITH: How long you think you would be, Mr. Daly?

MR. DALY SC: I think possibly half an hour.

JUSTICE SMITH: Yes. I would be very loath to cut down on the learning that we could get from you. You proceed.

1 MR. DALY SC: Thank you, My Lord.

2 MR. MENDES SC: My Lord, if I may  
3 interrupt, I am not seeing anyone. Is that deliberate or  
4 is there something wrong on my end?

5 JUSTICE SMITH: I think there must be  
6 something wrong at your end, because myself and Justice  
7 Mohammed, we're seeing ourselves in one of the --

8 MR. MENDES SC: Yes.

9 JUSTICE SMITH: But maybe you've turned  
10 off your video. Check and see if your video is on.

11 MR. MENDES SC: No, well, I am seeing  
12 myself as well, but I am not seeing anyone.

13 JUSTICE SMITH: You know there's a thing  
14 you can check to see if your video is on, Mr. Mendes?

15 MR. MENDES SC: My Lord, let me not  
16 disturb the proceedings.

17 **(OFF THE RECORD)**

18 Well, My Lord, we'll see what happens as we go along,  
19 but let me not delay Mr. Daly any further.

20 JUSTICE SMITH: I can see if I can get my  
21 technical people to see if they could help. Very well?

22 Okay. Let's proceed.

23 Mr. Daly, yes.

24 MR. DALY SC: Much obliged, My Lords.

25 My Lords, this is an appeal, as you know, from an  
26 order of Mr. Justice Seepersad in which he joined TSTT as  
27 party to proceedings between CCTL and TATT, the Regulator.

28 Now, this is an unusual appeal and that's why I asked  
29 if I might have a few minutes in addition to the  
30 submissions. It would not have escaped Your Lordships, on  
31 a careful reading of these papers, that one of the odd  
32 things about the context of this order of joinder is that  
33 on the pleadings, on the evidence, there was no live issue.  
34 It was simply a live issue between CCTL and TATT, and it  
35 would not have escaped you that that is so. CCTL said,  
36 speaking colloquially, "We want you to take enforcement  
37 proceedings against TSTT." And TATT had said --

38 JUSTICE SMITH: Sorry. You said there  
39 was no live issue between CCTL and TATT or CCTL and TSTT  
40 you meant?

41 MR. DALY SC: No live issue between CCTL  
42 and TATT, who were the parties to the litigation.

43 JUSTICE SMITH: Yes.

44 MR. DALY SC: So you're being asked to  
45 bring someone into litigation in which there is no live  
46 issue. The litigation is dead, and I say that for the  
47 simple reason that CCTL is saying as against TATT, the  
48 Regulator, "I want you to bring enforcement proceedings  
49 against TSTT," and TATT have said in the affidavit in  
50 support of the application to join, "We have made a

1 decision to do that. We have, in fact, started those  
2 proceedings, and where we are at the moment is we are  
3 awaiting a certain communication from the Attorney  
4 General."

5 By any fair reading of TATT's request to the Court,  
6 it's already game, set and match for TATT. They're  
7 entitled, on the record, to everything they are seeking  
8 from TATT. And so it's odd -- I put it no higher than,  
9 "odd" -- and we say that you'll have to consider whether  
10 the order for joinder can operate at all in such a  
11 situation or whether it was intended for that. And I ask,  
12 rhetorically, how on earth it could be desirable to bring  
13 someone into litigation in which, on the evidence before  
14 the Court, it's already over. It's game, set and match.  
15 In fact, it was over before it began.

16 Secondly, in my respectful submission, it was an error  
17 of law on the part of the Learned Judge. Respectfully, it  
18 was an error of law not to appreciate it was not the  
19 business of the Court to make itself part of TATT's  
20 machinery for enforcement.

21 Effectively, we submit, that is a fair reading of the  
22 factual situation and we have cited to you the case that is  
23 very well known to the Court, of **Brown-Antoine v Sharma** in  
24 which the Privy Council made it very plain that, "The line  
25 between the prosecutorial authority or, we submit, a  
26 *fortiori*, or the same thing in relation to the regulatory  
27 authority taking enforcement proceedings. The Court does  
28 not have any business ..."

29 "It was an error of law to say it would be desired or  
30 effectively make the Court part of the enforcement  
31 machinery."

32 In fact you will be struck when you read **Brown-Antoine**  
33 by the fact that the Court says extreme caution must be  
34 used to avoid a situation where the Court, in any way, gets  
35 involved in a prosecution or, as we say, an enforcement.  
36 By contrast, on any fair reading of the judgment in the  
37 case, the Learned Judge didn't exercise extreme caution.  
38 In fact, he rushed to join TSTT as a party to this  
39 litigation and, I think, it is fair to say he never even  
40 considered our points in relation to the order for joinder.

41 He simply said, "Having regard to the form of the  
42 order or the learning of the order, they are not relevant  
43 and are void of merit, when properly considered or at all."  
44 In fact, it had not been responded to directly, at any  
45 rate, by My Learned Friends.

46 Now, I think it's very important, My Lords, to  
47 compare, bearing in mind the extreme caution approach that  
48 is required because there are ongoing enforcement  
49 proceedings in which the Attorney General's Office is also  
50 involved. The Court has stepped in, and it's supposed to

1 step in in the way that it did.

2 If I can just remind you, it's common ground in this  
3 case that whatever reading you make of Ruling 19.2, it is  
4 accepted -- whatever limb you're making a joinder on, it  
5 must be desirable that the party being joined be before the  
6 Court. And, of course, Your Lordships, who [Indiscernible  
7 10:14:26] this experience would keep in mind the  
8 overarching requirement of desirability. It's in all of  
9 the submissions before you and it's in the Learned Trial  
10 Judge's judgment at paragraph 9.

11 But having quoted the word "desirable", let's see how  
12 he proceeded. At paragraph 9 of his judgment he says, and  
13 I will read it very quickly, "In adopting a methodological  
14 approach to the resolution of the issues before it ..."  
15 that's the joinder, "... the Court should identify the main  
16 issues in dispute."

17 But what is the main issue in dispute in the case? A  
18 proper identification of the main issues in dispute would  
19 have revealed that there weren't any, that CCTL was  
20 entitled to everything it was asking TATT for and TATT  
21 understood that and were taking steps to do what CCTL  
22 wanted. So there was no main issue in dispute. And then,  
23 consider whether the joinder could assist it in the  
24 proportionate determination of the matter in dispute.

25 Now, I absolutely do not want to take a semantic  
26 approach, but I urge caution with this concept of assisting  
27 in proportionate determination. I am not aware that that  
28 is even, properly speaking, a test.

29 Then, My Lords, if you then go to another portion of  
30 the judgment, the Judge then -- immediately below paragraph  
31 9, at paragraph 10 -- he then embarks on a kind of essay, a  
32 mini essay, about the Telecommunication's competition. He  
33 talks about the FNP Facility and he says, the second  
34 sentence, "This facility serves to deepen competition among  
35 service providers which facilitates how cost-effective  
36 services for consumers, as well as an improved quality of  
37 service..." May I pause there?

38 That is, in essence, the business of TATT but, in any  
39 event, why I ask rhetorically: was the Learned Judge  
40 imposing his views about the role of FNP in the  
41 Telecommunications environment, with the greatest respect.

42 Then if you go next -- he talks about how wonderful  
43 the mobile operators have been in the pandemic. That's  
44 fine. I don't know why that influenced his judgment.

45 Then he says that (in 12 and 13) they ought reasonably  
46 to make a determination of whether TSTT is, in law, obliged  
47 to implement FNP, fairness will require. Then he talks  
48 about multiplicity of proceedings. We've had a difficulty  
49 identifying what is this spectre of multiplicity of  
50 proceedings if he allows the enforcement action to take

1 place. Then he says, "In this Court's view, the resolution  
2 of the issue as to whether or not TSTT is legally obliged  
3 to implement FNP is now critical."

4 But that is CCTL's case. It is now critical that this  
5 be implemented, you have a recalcitrant provided, "Please  
6 take enforcement action."

7 And you say, "Yes," and you've actually begun  
8 enforcement procedure.

9 So there was no business, so to speak, there was no  
10 room at the table for the Court to be a guest in these  
11 proceedings.

12 Then, he says at 21, we finally find reference to the  
13 word 'desirable' in the third sentence. "Ultimately, this  
14 Court is resolute in its view that it is desirable to add  
15 TSTT as a party. There is an evident issue which involves  
16 TSTT which must be addressed in the court as to resolve the  
17 matters in dispute."

18 Well, I don't quite know what he means about 'an  
19 evident issue', but to be fair, if he meant there was an  
20 issue connected with the proceedings, at the risk of  
21 repetition, the proceedings were dead, so nothing to  
22 connect to, nothing live to connect to. But he needs to be  
23 very careful with the nuances of the language when you slip  
24 from "connected" to "involved" and when we bear in mind --  
25 and I don't say this in any way disrespectfully -- when we  
26 bear in mind that this Judge was of the view from the start  
27 that TSTT should be joined -- yes, of course, he gave us a  
28 hearing, but the output of that hearing is a judgment in  
29 which he takes into account his use of the  
30 telecommunications environment.

31 He uses some language that is not really reflective of  
32 what is in order, he simply dismisses any suggestion that  
33 the proceedings between CCTL and TATT are academic and,  
34 well, he says little or nothing about the point about being  
35 involved, getting the Court involved in the enforcement  
36 proceedings.

37 And he is resolute in his view, we submit, for all the  
38 wrong reasons, some of which we have identified in our  
39 submissions and the flavour of which I am seeking to give  
40 you this morning in light of the fact that those on the  
41 other side are simply defending the judgment on the basis  
42 that he's applied all the right tests, although I assure  
43 you that they put a lot more emphasis on desirability than  
44 the Learned Judge did.

45 So I'd just like to draw those things to your  
46 attention and invite you, therefore, to say that a very  
47 serious consideration on our appeal against judgment is:  
48 Why is it desirable to bring TSTT into an issue which is  
49 going to be resolved by the enforcement proceedings? What  
50 is the role there? Presumably, as the enforcement

1 proceedings unfold, whatever position TSTT takes will be  
2 disposed of by a court of competent jurisdiction. If it is  
3 prosecuted, it is open to them to take any points before  
4 the Court, with no disrespect intended. The fact that it's  
5 not the High Court, it is not a court of competent  
6 jurisdiction, capable of analysing anything that TSTT puts  
7 forward by way of defence, including the interpretation of  
8 a statute.

9 Courts, as you know, and a court of this experience --  
10 and if I may on this particular occasion refer to some of  
11 the competent jurisdiction of a member of this court -- the  
12 courts have to look at statutes all of the time. Lower  
13 courts have to look at statutes all of the time to decide  
14 whether an offence is made good. So why do we have to take  
15 the position, well, the High Court really has to guide on  
16 this or give some kind of antecedent blessing to  
17 proceedings that are going to take place? And we have used  
18 the words 'constitutionally impermissible' because we don't  
19 think you can go to the High Court on some guise and get an  
20 antecedent blessing for a prosecution or an enforcement  
21 proceeding that you are taking.

22 And in the submissions that My Learned Friends for  
23 CCTL, which, knowing Mr. Singh as I do, are somewhat mild  
24 in support of the Learned Judge, they make something about  
25 the fact that a statute has to be interpreted. And it's  
26 for that reason, I specifically spent a few minutes on the  
27 point about the interpreting of a statute. It has nothing  
28 to do with taking enforcement proceedings or involving  
29 yourselves in enforcement proceedings in a court below.

30 So that, in essence, we say that this Court, with  
31 respect, must examine carefully what we say about -- it's  
32 described in our submissions in rather politer language in  
33 some paragraphs by My Learned Juniors as 'an academic  
34 issue'. It's more than that. It's a dead issue. And the  
35 Learned Judge, if you look at his judgment, he simply  
36 didn't consider any points. He just said, "Having regard  
37 to the wording of the order, these things are devoid of any  
38 merit." They are not devoid of merit because they must  
39 weigh in the balance when the Court is considering whether  
40 to apply the test of desirability which applies to both  
41 limbs of the rule.

42 So that is a key complaint in this case, the failure,  
43 and it's an error of law to consider those things, even if  
44 you're applying the test of desirability.

45 Now, the other reason I have spent some time on this,  
46 although it may well have struck Your Lordships already, is  
47 that in the conclusion of the submissions filed by the  
48 First Respondent, they conclude, they go right through all  
49 of the discretion cases -- no new cases, that's fine. No  
50 new cases come up, they go right through all of the

1 discretion cases, the ways in which you can add or join a  
2 party. **Shetty** is a particularly interesting case and I  
3 would like to at least highlight certain paragraphs for  
4 you; it's a long case. And then they say: "The decision as  
5 to whether or not to join a party to proceedings is within  
6 the discretion of the Trial Judge. To succeed in this  
7 appeal, the Appellant must show that the Learned Judge  
8 committed some error of principle or was plainly wrong."  
9 The Appellant has fallen short on both counts.

10 Now, the one thing I am respectfully asking you to do,  
11 My Lords, is not to simply say, "Oh, this is another appeal  
12 against the exercise the Judge's discretion in reference to  
13 a rule in the CPR." For the reasons that I have tried to  
14 highlight this morning, it's anything but. We don't have  
15 any duty to disabuse some presumption towards joinder which  
16 the Judge clearly had. I don't complain because he gave us  
17 a hearing, but, in the end, he said he was affirming his  
18 decision. We don't have to fight any presumptive trend or  
19 the possible presumption that we ought to be joined just  
20 because we are in the telecommunications field and we have  
21 a point of view about something.

22 So I am specifically requesting, in the light of  
23 paragraph 51 of My Learned Friend's submissions, not to go  
24 down the discretion route and consider whether we have  
25 indeed not raised a number of matters of principle that  
26 affect the constitutional propriety of the Court getting  
27 involved in this case or, alternatively, make it  
28 undesirable, plainly undesirable to join TSTT to these  
29 proceedings.

30 I'd just like, in the brief time available, to refer  
31 to **Shetty's** case, simply because I think it's important and  
32 it will underscore something else that you will observe.  
33 The 'something else you will observe' is that not only does  
34 TSTT have no defence to CCTL's claim and, therefore, there  
35 is no need to bring in TSTT -- they don't really not have a  
36 defence, but they never thought, in the course of the  
37 enforcement proceedings that they were taking, they never  
38 thought that TSTT's absence or presence at the stage of  
39 preparation for reinforcement was a problem for them.

40 And on any fair reading of these papers, Your  
41 Lordships would have observed that this defence or  
42 [Indiscernible] -- I am tempted to say to *plea ad*  
43 *misericordiam* -- but this [Indiscernible], "Oh, no, no, we  
44 can't do anything without TSTT," only appear when they were  
45 served with CCTL's proceedings.

46 If you look at Ms Reddock's affidavit, paragraphs 37  
47 to 47, she gives a long account of all that they were  
48 doing. And she never says, well, everything we were doing  
49 was professional and, you know, getting some order against  
50 TSTT or bringing TSTT into some other proceedings, or



1 starting some other proceedings or joining them in some  
2 other proceedings. They were gung-ho on proceedings with  
3 their duty to proceed against TSTT.

4 When you look at **Shetty**, that's so completely  
5 different. That was the fraud case, a complex fraud case  
6 involving a multiplicity of parties and when, after the  
7 defence was served -- it's very important to note that --  
8 after the defences were served, the party stood back and  
9 looked at the defences and said, well, look here, they are  
10 raising something about two individuals, not domiciled in  
11 the United Kingdom, we need to join that.

12 They are raising something about another company who  
13 was part of the group whose management conduct was being  
14 impugned, we need to bring them in so, in my words, there  
15 was no kind of escape on a technicality because all of  
16 these parties were not before the court.

17 That is so very different from the unique factual  
18 situation that is, with respect, presented by the case.  
19 Specifically, My Lord, I am not going to read it but I want  
20 to say that even when we make our submissions on joinder,  
21 as an application of the rule -- we have spent some time  
22 showing you that joinder didn't arise in this case at all,  
23 and even if it did, the desirability component could not be  
24 met. We go further and say that the Learned Judge, despite  
25 him mentioning 'desirable' once in his judgment, may have  
26 took it wrongly -- too restrictive a view.

27 We all accept that the joinder order is very right.  
28 Why? But he took too restrictive a view of what are the  
29 matters to be considered in a joinder application. And we  
30 make that point in paragraphs -- the specific paragraphs of  
31 our submission where we make the point -- 30 and 34.

32 Sorry. We bring it up first at paragraph 10 and then  
33 we make that point in paragraphs 30 to 34 of TSTT's  
34 submissions on appeal.

35 So very much in fear of repetition, this is a unique  
36 case, no live issue, enforcement proceedings (had) begun  
37 and *en route*, letters being written to the Attorney  
38 General, no suggestion at that time when the matter was hot  
39 that somehow TSTT was required. Confronted with  
40 proceedings to which they have absolutely no defence, they  
41 then said, "Wait, no, no, we have to get TSTT in this in  
42 some way. It involves them in some way."

43 And, of course, you have all written submissions that  
44 TATT has a wide and exclusive jurisdiction to deal with a  
45 number of matters under the **Telecommunications Act** and a  
46 point that is frequently, with respect, it won't be  
47 forgotten by a Court of this experience -- is a porting,  
48 the use of porting procedures, whether for mobile or fixed,  
49 are part of the whole interconnection regime and there are  
50 specific provisions about interconnection disputes and

1       there are specific provisions about enforcement provisions  
2       under which TATT is acting. You can't in some way take  
3       porting out of the whole interconnection regime.

4       TATT, I can't say whether they're doing a good job or  
5       a bad job. TATT is doing its job. And why is a High Court  
6       going there now to somehow stir the pot when everything is  
7       in place? Whatever has to be sorted out with relation to  
8       TSTT can be sorted out in due course, and it is properly to  
9       be sorted out in the course of the enforcement proceedings.

10       And so that is not an ordinary joinder application,  
11       and not a case in which you should simply say, oh, the  
12       Judge exercised his discretion, it's all okay. It's simply  
13       not that. This Judge has gone into making some economic  
14       pronouncement about the telecommunications environment, the  
15       main resolute in his original view, and simply dismissed  
16       the points that we are making to you now. And therefore,  
17       they require more than the usual, careful consideration of  
18       this Court.

19       My Lords, unless there is anything else, those are the  
20       supplements that I would like to make to our written  
21       submissions. Thank you very much. Of course, I am  
22       available to assist you in any other thing you may need.

23       JUSTICE SMITH:       Well, let's hear from Mr.  
24       Mendes and Mr. Singh first, and if we still have questions,  
25       we'll come back to you.

26       MR. MENDES SC:       Much obliged to you, My  
27       Lord. I still can't see you.

28       JUSTICE SMITH:       Just bear with me a  
29       minute.

30       MR. MENDES SC:       Sorry.

31       JUSTICE SMITH:       Do you need to see us?

32       MR. MENDES SC:       Well, it's always  
33       preferable, My Lord.

34       JUSTICE SMITH:       All right.

35       MR. MENDES SC:       But I don't think it's  
36       absolutely necessary.

37       JUSTICE SMITH:       No, here is what could  
38       happen. We could have our technical people call you and  
39       walk you through your set up to see if we could get you on.

40       **(OFF THE RECORD)**

41       MR. MENDES SC:       I think I am back in,  
42       My Lord.

43       JUSTICE SMITH:       Yes, Mr. Mendes, we see  
44       you. Do you see us?

45       MR. MENDES SC:       No, I don't see you as  
46       yet, My Lord. This screen is now just blank, but I will  
47       proceed, My Lord.

48       JUSTICE SMITH:       Very well.

49       MR. MENDES SC:       My Lord...

50       JUSTICE SMITH:       No, Mr. Mendes, we are

1 not getting you orally either. We are seeing you, but we  
2 are not hearing you.

3 MR. MENDES SC: Well, I am not on mute  
4 anymore.

5 JUSTICE SMITH: All right. We are  
6 hearing you now.

7 MR. MENDES SC: Okay. Good. So let me  
8 proceed, My Lord. I won't be very long in any event. May  
9 I?

10 JUSTICE SMITH: Yes. Proceed.

11 MR. MENDES SC: Much obliged.

12 What is unusual about this case is that TSTT, a  
13 responsible corporate entity, has configured its system in  
14 order to facilitate a fixed number portability, but it has  
15 not allowed other competitors to access its system because  
16 it says that it is obliged in law to do so.

17 So the Regulator is saying to TSTT, "You've got to let  
18 the others in because we have made a determination, we have  
19 given you directions to do so," et cetera.

20 And TSTT is saying, "Well, you are wrong. The law  
21 does not require us to do so. So you can't compel us."  
22 That is TSTT's position.

23 So the only thing standing in its way of using the  
24 facilities that it has already configured, and allowing the  
25 other competitors in, is its view that it is not obliged in  
26 law to do so. So one would think that as a responsible  
27 corporate citizen, if it's given the opportunity to test  
28 whether it is right as [Indiscernible 10:35:55]  
29 obligations, that it would jump at that opportunity.

30 And, of course, it has been given that opportunity in  
31 these proceedings but it has taken quite extraordinary  
32 measures in order to avoid being a participant in the  
33 determination of a question which it has raised. Everybody  
34 else in the industry has accepted that you must implement a  
35 fixed number of ports except TSTT, but TSTT does not want  
36 to participate in proceedings where that legal issue can be  
37 settled. So that is what is unusual about these  
38 proceedings, in my respectful view.

39 The evidence is clear and it's undisputed. TATT has  
40 been telling everybody about implementing fixed number  
41 portability. It's written to TSTT on numerous occasions to  
42 tell it so. Columbus has gotten frustrated and says,  
43 "Well, TATT is not doing anything. Let me go to court to  
44 force TATT to do something about it."

45 TATT has written to TSTT and said, "Listen,  
46 proceedings have now been commenced in court."

47 And TSTT's response is, "Well, I guess, too bad. I am  
48 not obliged to implement fixed number portability."

49 Now, the real issue that My Learned Friends have now  
50 raised before the court, and this is the point of emphasis,

1       there's a lot of things about separation of powers and  
2       constitutional impermissibility, et cetera. But what it  
3       now boils down to is -- and this is what is said is unusual  
4       about this case -- is that there is no live issue in the  
5       proceedings at all. In other words, that the proceedings  
6       really should be dismissed, I imagine.

7       So I imagine the argument is, "Well, those proceedings  
8       are dead. We can't proceed. Relief should be rejected  
9       forthwith and therefore it is not necessary to join TSTT in  
10      the proceedings at all." But who has said that? Columbus  
11      hasn't said that, TATT hasn't said that. TATT has said  
12      that it is consenting to the orders that CCTL is seeking.  
13      As a matter of fact, we are vehemently resisting the  
14      relief.

15      We said in the affidavit that there are three options  
16      available to us. One is to cancel TSTT's concession. That  
17      is one thing that we can do. We can take criminal  
18      proceedings, or the third thing is that we can go to the  
19      Attorney General for a fiat in order to come to court for  
20      an injunction. And if we were to get that fiat, which we  
21      have not gotten, and one would have to ask the question  
22      why, one would then have to ask the question, "Who owns  
23      TSTT and why is the Attorney General dragging his feet?"  
24      But whatever the answer to that question is, the fact is  
25      that you can't come to court to seek an injunction without  
26      the fiat of the Attorney General, and he has not given it.

27      So the issue is not dead in the case at all, because  
28      Columbus is entitled to go to the court and say, "Well,  
29      TATT has said that it's gone to the Attorney General, he  
30      hasn't given the fiat."

31      "Well, we still want relief. We want you to consider  
32      compelling TATT to consider the other alternative, which is  
33      criminal proceedings or cancelling the concession."

34      So to the extent that My Learned Friend's case is  
35      based upon there being no live issue between Columbus and  
36      the Telecommunications Authority, that is plainly a false  
37      assumption because the issues are live. TATT is resisting  
38      that relief in part at the moment because we are saying,  
39      "Well, it's not that we have not been doing anything. We  
40      have been doing something."

41      But the Court may very well say, "What you have done  
42      is not enough and, therefore, I am going to consider  
43      whether I should make the other orders that Columbus is now  
44      seeking in the proceedings."

45      Now, it is at this point, of course, the question  
46      arises: "Well, what orders can the court make? What is  
47      available to the court?" Now, you have not heard My  
48      Learned Friend say, and nowhere in their submissions do  
49      they say or do they challenge the premise of the Court's  
50      judgment or the premise of our submissions, which is that

1 the Court cannot grant any of the relief that Columbus  
2 seeks if, in fact, TSTT is not obliged in law to implement  
3 FNP.

4 That proposition has not at all been challenged by the  
5 Appellant, because it is obviously so. The Court cannot  
6 order TATT to take enforcement proceedings against TSTT, if  
7 TSTT is not obliged to implement FNP. So that is an issue  
8 which must be confronted by the Court if it is going to  
9 consider granting any relief.

10 As a matter of fact, in order for Columbus to prove  
11 their case, they must first prove to the Court that TSTT is  
12 obliged to implement FNP. That is a necessary step that  
13 they must surmount, it's a necessary part, it's a necessary  
14 element of their cause of action, as it were. If they are  
15 unable to satisfy the Court that TSTT is obliged to  
16 implement FNP, they can't get any relief. And that is an  
17 issue that is not in dispute.

18 If TSTT is not joined at all, the Court would still  
19 have to go ahead and determine the question whether TSTT is  
20 obliged to implement FNP. And the Court, in the absence of  
21 TSTT will have to come to that determination.

22 If it doesn't, if it says, "Well, you know, I have  
23 looked at the law and TSTT is not obliged," well, that's  
24 the end of the matter and the case will be dismissed. But  
25 on the other hand, if it comes to the conclusion that TSTT  
26 is bound to implement FNP, then it can go on to consider  
27 whether it grants any relief.

28 So is there an issue with the case involving TSTT that  
29 has to be determined by the Court? The answer is yes. It  
30 must be determined. There is no jump high or jump low.  
31 That issue must be determined before the Court proceeds any  
32 further.

33 In those circumstances, is it not desirable to join  
34 TSTT? The fundamental principles of natural justice  
35 require that TSTT be joined or be given the opportunity to  
36 be joined. If they were given the opportunity and they  
37 refused it, well, they can't complain later on if they are  
38 then confronted with the determination by the High Court  
39 that they are bound to implement FNP. They can't.

40 So to the extent that My Learned Friend is saying,  
41 well, the issue that the Judge did not consider and the  
42 issue which this Court must now consider in determining  
43 whether it's desirable to join FNP is that there is no live  
44 issue in the High Court proceedings, that is a false  
45 presumption and, therefore, it being a false presumption,  
46 the Appellant's entire case collapses.

47 There is still a live issue; TATT has not conceded  
48 anything in the High Court. TATT is, as a matter of fact,  
49 defending the case and saying no relief should be granted,  
50 but obviously, if it is a fact that TSTT is not obliged to

1 implement FNP, then that is an issue that obviously the  
2 Court would have to determine. Everything revolves around  
3 that one issue. That issue has to be confronted, has to be  
4 determined in the Court and it is an issue that directly  
5 involves TSTT.

6 As a matter of fact, it is an issue which TSTT itself  
7 has raised. When confronted with the fact that these  
8 proceedings are extant, TSTT said, "Well, I am not obliged  
9 to implement FNP." So this is their issue. It is TSTT's  
10 issue and it can't simply be ignored.

11 Now, that, with all due respect, goes a very long way  
12 to satisfying the test under Part 19 as to whether somebody  
13 is to be joined. You find the issue involving the party  
14 that you want to join and then you ask yourself the  
15 question: Is it desirable to join that party?

16 My Learned Friend seems to be saying, "Well, both join  
17 me." He seems to be suggesting, well, let the High Court  
18 issue a grant relief if it thinks it is appropriate to do  
19 so without considering whether TSTT is obliged to implement  
20 FNP, and then if the Attorney General grants the fiat --  
21 if, there is a big "if"; we don't know if it's going to  
22 happen -- if the Attorney General grants the fiat, then  
23 take me to court and then when you come to court, then we  
24 will discuss the question whether TSTT is obliged to  
25 implement FNP.

26 Well, that is the precise multiplicity of proceedings  
27 that Part 19 is designed to avoid. Here, right now, it is  
28 quite possible very quickly to determine the question  
29 whether TSTT is obliged to implement FNP. If TSTT is  
30 right, then no further enforcement proceedings can be  
31 taken. If TSTT is wrong, on the other hand, one would  
32 presume that they would say, "Okay, the Court has so  
33 determined and therefore I will do, I will implement it. I  
34 have already configured my equipment to implement it and  
35 so, therefore, I will do what the Authority says must be  
36 done."

37 And that will be the end of it. Proceedings are not  
38 duplicated, the issue is determined finally and fairly with  
39 all relevant parties involved. So even if it could be  
40 said, first of all, I say that the issue of a lack of a  
41 live issue is not relevant. I say the issue of the fact  
42 that TATT had taken steps towards enforcement by asking for  
43 the fiat, that is not a relevant issue.

44 But even if they were relevant, even if they were  
45 relevant, I would respectfully submit, it cannot be said  
46 that overall, the Learned Judge made an error. It cannot  
47 be said that he was plainly wrong, in all of the  
48 circumstances, in joining TSTT.

49 But if you think that he didn't give enough weight to  
50 it or he didn't properly consider it, then this Court, of

1 course, would have to consider whether TSTT was properly  
2 joined and I would respectfully submit that the points that  
3 My Learned Friend has made do not outweigh the very  
4 fundamental, undisputed fact that there is an issue  
5 involved in the case, which involves TSTT, which has to be  
6 determined and it can only be the fairest thing to involve  
7 TSTT in the proceedings to ensure that that issue is  
8 determined fairly.

9 My Lords, those are my respectful submissions in  
10 reply, unless there is anything I can say to assist you.

11 JUSTICE SMITH: Not at this point.

12 Let's hear from Mr. Singh first.

13 Mr. Singh.

14 MR. SINGH: Good morning, My Lords. I  
15 will be very brief, My Lords.

16 My Lord, the genesis of our application stems from a  
17 determination made by the Authority in 2015 whereby it  
18 declared that it shall cease forthwith to exercise such  
19 forbearance or non-compliance by operators subject to this  
20 determination. It was because of the lack, My Lord, of  
21 enforcement of this particular determination that we have  
22 been forced, My Lord, to bring this particular application  
23 against the Authority.

24 The other point that I would ask My Lords,  
25 respectfully, to note is that there is a big difference --  
26 and Mr. Mendes has highlighted it -- between the request  
27 for fiat, which has not been answered, and a prosecution in  
28 terms of the **Brown-Antoine** case which My Learned Senior has  
29 referred you to. And I would like to say that certainly,  
30 My Lord, prosecution proceedings are not in tow at this  
31 point in time. And also it's for that reason that Columbus  
32 feels that it's aggrieved.

33 My Lord, with regard to the observations made on the  
34 Learned Judge's comments with regard to the state of the  
35 telecommunications sector, My Lord, when you look at those  
36 comments, they were just merely observations and they  
37 certainly did not play any part in the reasoning of the  
38 Learned Judge. And Learned Senior has highlighted the  
39 paragraph in the judgment (which, I believe, is paragraph  
40 9) where the Judge sets out that he is adopting a  
41 methodological approach to the resolution of the issue  
42 before him.

43 When the Judge said that he went straight in --- well,  
44 having addressed his mind to the law, he then addressed  
45 himself to the facts. And as Mr. Mendes has alluded,  
46 My Lord, the question which this Court of Appeal has to ask  
47 is: Did the Judge misdirect himself or was he so clearly  
48 wrong in law?

49 If it is that My Learned Friends from TSTT cannot get  
50 over that hurdle, My Lord, then, in these circumstances,

1 the appeal must fail.

2 My Lord, those are the submissions on behalf of the  
3 Second Respondent, unless there is anything else I can  
4 address you on.

5 JUSTICE SMITH: Thank you, Mr. Singh.

6 Mr. Daly?

7 MR. DALY SC: My Lord, and may I endure  
8 what My Learned Friend said about the Attorney General  
9 dragging his feet. I am quite surprised to hear any such  
10 suggestions from the Bar table. I would merely like to  
11 invite Your Lordships, before you decide this matter, to go  
12 to the record and look at the relief sought by CCTL. The  
13 relief that is sought by CCTL is at Tab 10, I think, My  
14 Lord -- Tab 10 of the record.

15 JUSTICE SMITH: Just now. Just give us a  
16 while to pull it up on our screen.

17 MR. DALY SC: Thank you very much, My  
18 Lord, for your attention.

19 JUSTICE SMITH: What pages?

20 MR. DALY SC: I am trying to find that  
21 out, My Lord.

22 Tab 10, Record of the Appeal.

23 My Lord, I am gravely embarrassed. May I just read it  
24 to you in the meantime?

25 JUSTICE SMITH: Sorry. Is it from your  
26 Fixed Date Claim Form you're reading from?

27 MR. DALY SC: Yes, it is.

28 JUSTICE SMITH: Let's see if we could  
29 find it, yes? The reliefs, yes.

30 MR. DALY SC: Do you have that, My Lord?

31 JUSTICE SMITH: Yes, we have the reliefs.  
32 Roll up to Number 1, let's see.

33 MR. DALY SC: Page 572. I am told it's  
34 in the record at page 572, Fixed Date Claim Form. It  
35 begins: "The Claimant, Columbus Communications." Do you  
36 have that, My Lords?

37 JUSTICE SMITH: Are you referring us to  
38 the relief part of the --

39 MR. DALY SC: Yes.

40 JUSTICE SMITH: Yes, we do.

41 MR. DALY SC: Yes, most definitely. Item  
42 1...

43 JUSTICE SMITH: Yes.

44 MR. DALY SC: I am not going to read all  
45 of them.

46 JUSTICE SMITH: Just read Item 1.

47 MR. DALY SC: "A declaration: The  
48 Defendant has acted in a manner which is procedurally  
49 unfair, and failed to satisfy or observe conditions and  
50 procedures required by law ..." and I will ask you to look



1 at all of them. But I will invite you to look at A and B:  
2 "Failing and/or refusing and/or neglecting to enforce  
3 Section 25 of the Act against TSTT; failing, refusing  
4 and/or neglecting to enforce Regulation 9 of the  
5 Interconnection Regulations."

6 And then when you go to Item 6: an order of *mandamus*  
7 compelling the Defendant to enforce Determination Number  
8 2016/01 against TSTT.

9 And I am very grateful to My Learned Friend,  
10 Mr. Singh, for reminding us that the genesis of his claim  
11 is a previous determination which TATT made and what CCTL  
12 is complaining about. So when I said there is no live  
13 issue, that's precisely the point.

14 On the face of this document, unless TATT has a  
15 defence, they're entitled to an order in terms of at least  
16 some of the orders, if not all. Order in terms -- I was  
17 trying to be polite. They're entitled to an order in terms  
18 because they haven't done it.

19 And the last thing I would like to remind you of is  
20 that before the service of any proceedings, TATT was not  
21 saying it needed anything to be decided from or about TSTT.  
22 That only surfaced after they were served. You can see  
23 that sequence in Ms Reddock's affidavit. They clutched at  
24 that. And why is it that if they say they have a defence,  
25 why haven't they set out what their defence is? The only  
26 thing is, what I will repeat, is this [Indiscernible  
27 10:54:35] we need TSTT. They never thought so when they  
28 commenced the enforcement proceedings, but now Mr. Singh's  
29 client is saying, "You go ahead and enforce the  
30 determination."

31 So there is no live issue. They're entitled to an  
32 order in terms. So for those reasons, My Lord, I would ask  
33 Your Lordships to give careful consideration, as I'm sure  
34 you would, to the points we have raised as to why this is  
35 not an ordinary joinder case. They haven't even served  
36 their defence or taken the trouble to tell you what is  
37 their defence.

38 Thank you very much, My Lord.

39 MR. MENDES SC: My Lord, if I may,  
40 briefly, on the relief...

41 JUSTICE SMITH: Mr. Mendes, before you  
42 proceed...

43 MR. MENDES SC: Certainly, My Lord.

44 JUSTICE SMITH: There are some questions  
45 we wanted to ask.

46 MR. DALY SC: Certainly, My Lord.

47 JUSTICE SMITH: Now, Mr. Daly, I am  
48 asking, I understand that remedies in law are cumulative,  
49 unless they are expressly excluded by some statute or some  
50 other practice.

1 MR. DALY SC: Yes, My Lord.  
2 JUSTICE SMITH: Remedies are cumulative.  
3 MR. DALY SC: Yes, My Lord.  
4 JUSTICE SMITH: So I don't need to go,  
5 like, if you assault and beat me I could choose to go  
6 criminally, I could go civilly, I could go both ways.  
7 MR. DALY SC: Understood.  
8 JUSTICE SMITH: Similarly, the  
9 declaration is a relief that has been sought. It is a  
10 remedy in itself.  
11 MR. DALY SC: Yes, it is, My Lord.  
12 JUSTICE SMITH: Reparatory relief.  
13 MR. DALY SC: Yes.  
14 JUSTICE SMITH: So that even if there are  
15 statutory remedies, there is nothing to stop the parties  
16 from asking for another remedy, which is a declaration?  
17 MR. DALY SC: Correct.  
18 JUSTICE SMITH: So a declaration -- I was  
19 raising this because I see no problem, constitutionally, in  
20 a court entertaining an application for declaration. And  
21 it's not a [Indiscernible 10:56:17] of any function of some  
22 other body, for a court to make a declaration as a remedy,  
23 an alternative form of enforcement.  
24 MR. DALY SC: Sorry, My Lord.  
25 JUSTICE SMITH: Sorry?  
26 MR. DALY SC: My Lord, I wasn't  
27 suggesting that. I was suggesting that in the context of  
28 this case, where enforcement proceedings have begun and are  
29 ongoing, the Court ought not now to be asked to intervene  
30 in the matters that have given rise to those proceedings.  
31 JUSTICE SMITH: No. We understand that,  
32 but in the written submissions, it is raised as a question  
33 of constitutional propriety, whether a Court could get  
34 involved. I am asking, if you have an alternative remedy  
35 by way of declaration, there's nothing constitutionally  
36 improper in a Court being asked to make a declaration. If  
37 you want, I could take you to the submissions that were  
38 written; a lot of the submissions were focused on the  
39 constitutional propriety of the Court getting involved.  
40 MR. DALY SC: Well, I completely  
41 understand what Your Lordship is asking me, but my question  
42 remains, perhaps, more elegantly put, it goes to  
43 desirability -- perhaps constitutional propriety may be --  
44 JUSTICE SMITH: Maybe I can push an open  
45 door in suggesting that it's not a question of  
46 constitutionality but a question of discretion.  
47 MR. DALY SC: Yes -- well, no, My Lord.  
48 It's a question of -- well, you can say that, but, My Lord,  
49 in our respectful submission, you have to consider that in  
50 the context of desirability. And what we are saying is

1       there's an element that goes beyond the discretion and  
2       exercising your view about desirability if, in fact, you  
3       are going to cross the line in this particular case, in  
4       which the Court ought not to cross.

5       But either way, My Lord, I contend that Your Lordship  
6       --

7               JUSTICE SMITH:       Yes, we see the problem.

8               MR. DALY SC:        -- has seen our point, but  
9       it's not desirable for the Court to put its hand in this  
10      matter at this stage when they never thought in necessary  
11      before. I am very grateful for the question, My Lord.

12              JUSTICE SMITH:       Isn't desirability a  
13      question of discretion rather than jurisdiction?

14              MR. DALY SC:        In this case, My Lord,  
15      there is an element of it that is not.

16              JUSTICE SMITH:       Very well.

17              MR. DALY SC:        That is to say, it can  
18      never be desirable for the Court to get itself involved in  
19      criminal proceedings or in enforcement proceedings and  
20      that, of course, is to set them aside. But we also say,  
21      and it's in paragraphs 30-34 of our submissions, that even  
22      if it's a matter of discretion, it would be an unwise  
23      exercise of discretion, given how far TATT has gone along  
24      the road with the enforcement that CCTL is requesting, for  
25      the Court now to exercise a discretion to join TSTT in the  
26      proceedings. So I have answered Your Lordship both --

27              JUSTICE SMITH:       Yes, you have.

28              MR. DALY SC:        There is an element that  
29      doesn't involve discretion, but even if it does, I meet it  
30      head on, with respect, My Lord.

31              JUSTICE SMITH:       Secondly, I have heard  
32      everybody talking about the regulations and the  
33      regulations, but part of the argument of TSTT, part of the  
34      case is that there is an agreement, that there is a  
35      contractual obligation and they've made a determination by  
36      virtue of their documents. I have looked at them and the  
37      Reddock affidavit, that you and TSTT had come to a lot of  
38      agreements with TATT about FNP. So another thing again,  
39      it's not a question of constitutionality because doesn't a  
40      Court have a jurisdiction to decide questions of  
41      construction of the contract, in particular?

42              It may be a question of discretion whether a court  
43      will exercise -- will do it, but a court does have  
44      jurisdiction to exercise review on matters of construction  
45      of the contract, construction of wills, construction of  
46      breaches, whether you are in breach -- in fact, the  
47      question of whether someone is in breach of a contract or  
48      not, or anticipatory breach, it's a common feature of a  
49      court of record.

50              So that whether you have enforced or not, or whether

1       you plan to breach or not, isn't this a common feature --  
2       it's a question of not jurisdiction, but discretion. How  
3       do you exercise that discretion? You see, you raised it as  
4       a jurisdictional issue, but it doesn't a court  
5       traditionally do this as a matter of part of his  
6       jurisdiction unlike -- I accept it is a question of  
7       jurisdiction/discretion, especially if you say there is no  
8       live issue.

9                   MR. DALY SC:       Well, My Lord, may I answer  
10      you this way? If I may say so --

11                   JUSTICE SMITH:       Yes.

12                   MR. DALY SC:       -- it's typical of Your  
13      Lordship's difficult questions. But it's actually quite  
14      easy to answer My Lord in this way. No one in this case,  
15      particularly in this August court, should be left by the  
16      parties to anticipate what other grounds might be  
17      forthcoming if TSTT is joined or on what other grounds  
18      might they be joined, because TATT has not condescended to  
19      tell you what are all of its defences.

20                   So they have left Your Lordship, if I may say so, with  
21      great perspicacity, to anticipate: well, another issue in  
22      which TSTT might be involved is breach of contract, because  
23      it has signed those contracts. Where are those things in  
24      the papers before you? It's actually, My Lord, in local  
25      parlance...

26                   JUSTICE SMITH:       Mr. Daly, I can actually  
27      show you, it's in Ms Reddock's affidavits. She refers to,  
28      in her affidavits, that look here, we signed these  
29      agreements with FNP and portability -- it's in her  
30      affidavits. If you want, we could go to it, but they are  
31      in her affidavits.

32                   MR. DALY SC:       I am not disputing that  
33      it's in the affidavits, My Lord.

34                   JUSTICE SMITH:       Yes.

35                   MR. DALY SC:       What I am disputing, with  
36      the greatest respect to Ms Reddock, is the scattershot  
37      approach. Why, for example, is this question coming up now  
38      before service of a defence? Maybe the time hasn't run,  
39      therefore, why wasn't there an obligation to say, "Our  
40      intended defence is as follows, and these are the issues  
41      involving TSTT"?

42                   So, Your Lordship, with respect, is absolutely right,  
43      that contracts are mentioned and various things are  
44      mentioned, but mentioned for what purpose? They invite the  
45      Court to speculate as to what issues may be involved in  
46      this case after TSTT is joined, before anybody has taken  
47      the Court into its confidence to say what the defence is,  
48      and most importantly, at the very time that the matters in  
49      the affidavit to which you are referring were going on,  
50      there was not one word of reservation to CCTL, well, you

1 know we are doing all these things, but we are going to  
2 have to join TSTT. That's my problem with that.

3 JUSTICE SMITH: I hear you.

4 A few more things...

5 MR. DALY SC: Yes, certainly, My Lord.

6 JUSTICE SMITH: Now, I didn't understand  
7 that it was TATT who had to mount a defence as necessary --

8 MR. DALY SC: It's CCTL.

9 JUSTICE SMITH: But they haven't they  
10 said what their case is, that their issue is, "Why, we feel  
11 you are obliged"?

12 You have said you are not obliged. Let's have the  
13 Court determine this on a matter of construction of the  
14 agreements and the statutes, let's have the Court  
15 determine...

16 Isn't that a regular function? People come with their  
17 statutes...

18 Wait. Let me finish, please.

19 People come with contracts and people say, well, look,  
20 another party is threatening to break the contract.  
21 Please, Court, determine if there is going to be an  
22 anticipatory breach or not.

23 So the question of determining whether there will be  
24 obligations or breach of contract or breach of regulations  
25 is a common function of a Court.

26 MR. DALY SC: My Lord, I may have --

27 JUSTICE SMITH: And this is what they are  
28 asking you here. The main issue...

29 Sorry. Yes, proceed.

30 MR. DALY SC: Now, My Lord, I say yes, I  
31 do not dispute that. But they have commenced enforcement  
32 proceedings, in which those issues, presumably, will be  
33 determined. They have chosen. They have already made a  
34 decision that TSTT, broadly speaking, has been wronged for  
35 a variety of issues. That's as far as you can take it.  
36 And they are set out to you. Look at paragraph 47. They  
37 have set out to you what their options are.

38 And they say why they won't cancel the concession and  
39 so on, and they say what their options are. They have  
40 chosen the option of enforcement proceedings. And they  
41 were very hot and determined to have enforcement  
42 proceedings, and then suddenly enforcement proceedings are  
43 no longer an attractive option because the CCTL has  
44 commenced a lawsuit against them to which they had no  
45 defence, if you like, of their own.

46 JUSTICE SMITH: Which brings me back to  
47 the question, Mr. Daly, yes, they have done this, and you  
48 have taken the defences, but aren't remedies cumulative? I  
49 could choose. I could choose all or none. I could choose  
50 to come by a declaration as well, and you can't stop me --

1       sorry, it's not that you can't, it's a question of  
2       discretion rather than jurisdiction.

3               MR. DALY SC:       Well...

4               JUSTICE SMITH:       So it's a question of: Is  
5       the jurisdiction, is the discretion right to be exercised  
6       when, according to you, there is no live issue?

7               MR. DALY SC:       Well, My Lord, if we are  
8       going -- and this does not apply to Your Lord -- this is  
9       just my way of answering Your Lordship's question.

10              JUSTICE SMITH:       Sure. Sure.

11              MR. DALY SC:       It doesn't apply to what  
12       Your Lordship is -- as the question. Then they chose  
13       enforcement proceedings, if they have changed their minds,  
14       or if they have decided that this is another option, then  
15       where goes the argument about multiplicity of proceedings.  
16       They're going to drag my client into enforcement  
17       proceedings and drag them into this lawsuit to raise the  
18       same issues both times? Then, My Lord, the wise advice is  
19       to go back the drawing board, decide you've made a wrong  
20       move and you should pursue another option. But don't draw  
21       us into this now on the basis that we must face this and  
22       yet still have the threat of enforcement proceedings which  
23       can be activated and keep us back on both fronts.

24              If we are going to be fair and balanced, then a  
25       different set of proceedings have to be devised which take  
26       into account the matters that have so wisely fallen from  
27       Your Lordship. But they have chosen to go this route and  
28       now they say, well, you know, we can't go that route again,  
29       we need TSTT. They have said that at the time.

30              Now, they have, Your Lordship, with great respect,  
31       Your Lordship's wisdom assisting them and saying, oh, well,  
32       you know, the remedies are cumulative and so on, so we're  
33       going to have two sets of proceedings and, with respect and  
34       rhetorically, My Lord, would that be a fair resolution of  
35       this case? They have a lawsuit against CCTL to which they  
36       have no defence other than a claim, it's all TSTT's fault,  
37       which they never raised at the time they were going  
38       tremendously hard down the road of enforcement proceedings.

39              So what's to become of the enforcement proceedings?  
40       They're going to be stayed? They're going to withdraw  
41       them? What's to become of them? We shouldn't be faced  
42       with two sets of proceedings on a whim after you get a  
43       lawsuit from CCTL. That's my respectful answer, My Lord.  
44       We must decide what it is they are doing. Going hard down  
45       one road, and then when you run into difficulty at the last  
46       minute you say, well, actually, we're not going down that  
47       road again because we need a declaration against TSTT.  
48       Well, go away and get your tact in order. But don't, with  
49       respect, put my client in the invidious position of having  
50       to face two sets of proceedings.

1 JUSTICE SMITH: Just as a matter -- I  
2 just want it clear. I am not sure. When was it that you  
3 first raised the issue that "I am not obliged"?

4 MR. DALY SC: In the course of  
5 correspondence, My Lord...

6 JUSTICE SMITH: That's what I am trying  
7 to say. When specifically?

8 MR. DALY SC: Oh. Much obliged.

9 JUSTICE SMITH: The 13<sup>th</sup> June 2019,  
10 paragraph 44 of the affidavit of Reddock. So it was only  
11 on the 13<sup>th</sup> June 2019 that you raised this issue, and when  
12 was this matter commenced?

13 MR. DALY SC: Well, My Lord, this matter  
14 was commenced...

15 JUSTICE SMITH: Do you see paragraph 44  
16 of the affidavit of Reddock says --

17 MR. DALY SC: Yes, My Lord.

18 JUSTICE SMITH: You see, why I am asking  
19 this is because you say they are flipping and flopping, but  
20 according to them, this issue was only raised after. They  
21 didn't know that this was your defence until June 13<sup>th</sup>, and  
22 by that time proceedings had already commenced, hadn't  
23 they?

24 MR. DALY SC: And then, My Lord, well --

25 JUSTICE SMITH: That's what I wanted to  
26 --

27 MR. DALY SC: But, My Lord, they barreled  
28 on, getting further advice from My Learned Friend, for  
29 whose advice I have the utmost respect. They didn't pause.  
30 We raised that with them. They didn't pause, they took  
31 further steps along the enforcement road.

32 JUSTICE SMITH: Yes.

33 MR. DALY SC: So there is no -- I don't  
34 want to talk about dragging feet and so on, that's not my  
35 style these days. But they just barreled on stubbornly  
36 along the assessment route. They didn't pause at that  
37 stage. They only decided they needed TSTT when they were  
38 faced with a lawsuit from CCTL in which we say they really  
39 have no defence to the order that the enforcement  
40 proceedings must go along. They chose, they brought in  
41 this case, they chose to rely on the determination.  
42 They've not shown, Your Lordship, in fact, with respect --  
43 well, let me put it this way: When I listened to Your  
44 Lordship, really if I were TATT, I would understand you're  
45 inviting an act of contrition; when TSTT told you this, why  
46 didn't you pause what you were doing? Why did you continue  
47 to barrel along that road?

48 So it's not about what happened and what we did, it's  
49 nothing for us to do, My Lord. We are the people who are  
50 faced with an application for joinder in circumstances in

1 which we have said we do not wish to be joined in these  
2 proceedings. What is it the Americans say? Bring it on!  
3 Bring on the enforcement proceedings, or if you have now  
4 decided that there should be some alternative, then  
5 withdraw the enforcement proceedings, put a stop to them  
6 and bring the other proceedings. But don't tie us up with  
7 this.

8 Your Lordship is very wise. No doubt, if you had  
9 conduct of the matter -- if I say, you know, intending to  
10 make a bad joke -- if you had conduct of the matter when  
11 the TSTT letter came, we wouldn't be here today. But we  
12 are. We are entitled to take the position that we ought  
13 not to be joined where -- and the Court got itself involved  
14 in matters that are before TATT with which they are  
15 proceeding and for which they have a full panoply of powers  
16 to deal -- and those were in answer to Your Lordship's  
17 questions. And all of that make this not the normal  
18 discretion case. But the Judge never looked to any of  
19 these things, with respect; he said, "Devoid of merit, go  
20 away."

21 So they have some decisions to make, with respect, My  
22 Lord, and it pains me to point out in **Shetty**, it is after a  
23 Defence is served that everybody woke up and said, well, we  
24 need to have this party and we need to have that party.  
25 This is what is being said by way of defence. But we are  
26 in somewhat speculative, with respect, speculative  
27 territory, My Lord, and we don't have to justify what TATT  
28 has done or failed to do.

29 JUSTICE MOHAMMED: Mr. Daly, I wanted to  
30 ask you this: In your submissions, you argued that the  
31 joinder might have the effect of scuttling, so to speak,  
32 any defence that TSTT may wish to raise with regard to  
33 enforcement proceedings and you alluded to a number of  
34 things including potential collusion between TATT and  
35 Columbus, oppression, procedural flaws in the declaration  
36 of dominance and, if not, being consistent in terms of the  
37 time frame with international best practice and broader  
38 constitutional law issues.

39 Could you develop that a little bit for us, please?  
40 How do you say it would scuttle your defence?

41 MR. DALY SC: But, of course, insofar --  
42 well, first of all, My Lord -- sorry?

43 JUSTICE MOHAMMED: No, proceed.

44 MR. DALY SC: I am delighted you have  
45 raised that because I think, either in our submissions or  
46 maybe in my written submissions or in my oral submissions  
47 we protested -- we didn't use the word "protest" -- we  
48 protested getting some antecedent blessing from the Court  
49 that TATT is obliged to enforce FNP, when in the  
50 enforcement proceedings, whenever they take place, we would



1 be entitled to raise all of those broader issues.

2 If we are brought into this case and our participation  
3 is limited in some way to some kind of defence or to  
4 provide some kind of defence for TATT because it has upset  
5 CCTL, all of those things would come into play. The  
6 parameters of this case and the way the things are likely  
7 to be drawn will deprive us of exactly those things, My  
8 Lord. And we have been bold enough, with respect, to say  
9 what are the things that are troubling us, including the  
10 possibility of collusion.

11 And that is one of the reasons I am so concerned on  
12 behalf of my client, that they never said when they went to  
13 the Attorney General, they never said when they got Mr.  
14 Mendes' advice, we have to stop on this because we have to  
15 go and bring TSTT into some proceedings. That's a most  
16 significant thing. It didn't strike them then, the  
17 competent Regulator, the way it is striking Your Lordships  
18 now, and what I am saying, with respect, My Lord, we are  
19 not to be circumscribed in any way by the narrow confines  
20 of what is put in this case in respect of all those other  
21 things we wish to raise.

22 For example, is the determination still valid at all?  
23 It may be there as a document, but do they not have market  
24 share information that shows that this determination made  
25 in 2016 is completely unreal and ought not to be treated as  
26 anything because the market has moved on and maybe other  
27 people are dominant now? All of those things we've tried  
28 to encapsulate in those words you have raised. And these  
29 are not proceedings in which we must raise those things.  
30 Proceedings in which we must raise those things are the  
31 enforcement proceedings. With respect, do not bring us  
32 into this, let them proceed with the enforcement  
33 proceedings, and we will meet them in that forum and in  
34 that jurisdiction, where we are entitled to raise those  
35 things.

36 So I am delighted that Your Lordship has observed  
37 those things that we have raised. We are simply now in a  
38 speculative place. A Regulator says, "I didn't do my job,  
39 because I now think I need to have something resolved  
40 against TSTT, that they raised in June 2019." And we are  
41 not be, with respect, my client is not to be put to the  
42 intellectual trouble to try and explain that we didn't do  
43 anything after June 2019.

44 We have to examine what TATT did and it's completely  
45 unsatisfactory now, for TATT to work out its regulatory  
46 anguish by trying to bring us into these proceedings when  
47 there's so much else at stake. We ought not to be joined  
48 in this, My Lord. We must be left out of this and TATT  
49 will have to decide what it properly ought to do given the  
50 full panoply of powers that it has.

1           Sorry to give you such a long answer, My Lord, but  
2           that is what lies behind those paragraphs.

3                   JUSTICE SMITH:       Thank you, Mr. Daly.

4           Mr. Mendes.

5                   MR. MENDES SC:       Yes, My Lord.

6           My Lord, is there a particular question or you're just  
7           inviting me to --

8                   JUSTICE SMITH:       Well, you've heard the  
9           exchanges that have taken place, and if you find something  
10          that can assist --

11                   MR. MENDES SC:       Yes, My Lord. If I can  
12          assist?

13                   JUSTICE SMITH:       Yes.

14                   MR. MENDES SC:       I think the sequence of  
15          events is important.

16                   JUSTICE SMITH:       Mr. Mendes, sorry. You  
17          hadn't raised some of things we raised.

18                   MR. MENDES SC:       Yes.

19                   JUSTICE SMITH:       So you've heard the  
20          exchanges.

21                   MR. MENDES SC:       Yes.

22                   JUSTICE SMITH:       So, in all fairness, we  
23          need to hear you as well and --

24                   MR. MENDES SC:       Certainly, My Lord.

25                   JUSTICE SMITH:       Proceed.

26                   MR. MENDES SC:       If I may just say, first  
27          of all, that having regard to what My Learned Friend has  
28          raised in characterizing what TATT has done, now wanting to  
29          seek TSTT's assistance to resolve a problem, et cetera, et  
30          cetera, the fact of the matter is that the letter to the  
31          Attorney General was written -- asking for the fiat was  
32          written in May of 2019, and you will find that at page 533,  
33          I'm told, of the record.

34                   JUSTICE SMITH:       What is at 533?

35                   MR. MENDES SC:       It is a letter to the  
36          Attorney General seeking his fiat.

37                   JUSTICE SMITH:       Is it annexed to the  
38          affidavit of Ms Reddock?

39                   MR. MENDES SC:       Yes, it is.

40                   JUSTICE SMITH:       What paragraph is it?

41                   MR. MENDES SC:       My Lord, I may have to  
42          ask Ms Gellineau to message me that and then I will let you  
43          know. We're not at the same place at the moment.

44                   JUSTICE SMITH:       All right.

45                   MR. MENDES SC:       But the letter itself is  
46          at page 533. The point is that the --

47                   JUSTICE SMITH:       Paragraph 37...

48                   MR. MENDES SC:       If you're seeing it  
49          there, yes, My Lord. It's a May 2019 letter.

50                   JUSTICE SMITH:       Yes, May 2<sup>nd</sup>. Oh, 2019,

1       sorry.

2                   MR. MENDES SC:       Yes, 2019.   Yes.

3                   JUSTICE SMITH:       Sorry.   I was looking at  
4       the wrong thing.

5               All right.

6                   MR. MENDES SC:       Yes.   So that the letter  
7       was written, the application for leave to apply for  
8       judicial review was made on April 12<sup>th</sup> 2019, the letter to  
9       the Attorney General was written at the beginning of May  
10      2019, then we wrote to TSTT at the beginning of June 2019.  
11      I think there was a letter of June 3<sup>rd</sup>, and in that letter  
12      of June 3<sup>rd</sup>, we brought to their attention the fact that  
13      Columbus had commenced the judicial review proceedings.  
14      And you then had the response of June 13<sup>th</sup> from TSTT saying  
15      that they were not obliged in law to implement.

16               Now, the record would indicate that when the  
17      application for leave, or at least from the first occasion  
18      when we came before -- I think it was Justice Harris at  
19      that point in time who was dealing with the application for  
20      leave -- that we raised the question of TSTT's  
21      participation and asked that the proceedings be served on  
22      them.   So that TSTT had been brought in fairly early.   And  
23      it is only when TSTT said, "We do not wish to be parties to  
24      the proceedings" that the application to join was then  
25      made.

26               So those were the sequence of events.   It's not a  
27      question of TATT needing or needing to change TATT, or  
28      whatever it is.   At the point in time when the decision was  
29      made to go to the Attorney General for the fiat it's  
30      because, as explained in the affidavit, TATT considered  
31      that the other two options, which is criminal proceedings  
32      or cancelling the concession, were not the preferred  
33      option; the easier option, as it were, would be to get the  
34      Attorney General's fiat.

35               But the point is that that is where we are now.   We do  
36      not have the fiat.

37               My Learned Friend has kept saying that we have  
38      commenced enforcement proceedings.   We have not commenced  
39      any enforcement proceedings.   No proceedings have been  
40      commenced at all because we can't commence any enforcement  
41      proceedings, that is to say, by way of injunctive relief in  
42      the High Court, unless we have the fiat from the Attorney  
43      General.

44               So that is not commencing enforcement proceedings.   A  
45      decision has been taken to go in that direction --

46                   JUSTICE SMITH:       Mr. Mendes.

47                   MR. MENDES SC:       I am sorry, My Lord.

48                   JUSTICE SMITH:       There's a question I  
49      wanted to ask you about that.   Does enforcement start when  
50      you actually file the proceedings or isn't this very action

1 for a declaration a form of enforcement?

2 MR. MENDES SC: By --

3 JUSTICE SMITH: Because you're seeking  
4 relief.

5 MR. MENDES SC: Well, My Lord, we didn't  
6 bring any action. Columbus has brought an action against  
7 TATT.

8 JUSTICE SMITH: I hear you. But now,  
9 this application, the joinder and seeking declaratory  
10 reliefs --

11 MR. MENDES SC: Yes.

12 JUSTICE SMITH: -- isn't that part of  
13 enforcement? Enforcement doesn't only start when you file,  
14 for instance, the complaint; an enforcement can start  
15 before.

16 MR. MENDES SC: My Lord, well, we have  
17 not commenced any, we are not seeking any declaratory  
18 reliefs. We are saying that in order for any declaration,  
19 any relief to be granted in these proceedings to CCTL, if  
20 it is the most anodyne form of declaration that My Learned  
21 Friend, Mr. Daly, was referring to, the Court must first  
22 make a determination that TSTT is obliged to implement or  
23 else they would be making a declaration in vain. They must  
24 make that determination, first of all.

25 JUSTICE SMITH: Wouldn't that be a form  
26 of enforcement? Wouldn't that, itself, be form of  
27 enforcement?

28 MR. MENDES SC: But it's not enforcement  
29 on our part. This is Columbus who has come to the Court in  
30 order to get relief from the Court to force us to commence  
31 enforcement proceedings. That is what they are seeking to  
32 do.

33 JUSTICE SMITH: Here is the question: If  
34 you join them and then ask for that, and the Court makes  
35 those findings, isn't that a form of enforcement? Joining  
36 them itself is a form of enforcement.

37 MR. MENDES SC: Well, My Lord, all it is,  
38 My Lord, very simply recognizing that an issue has arisen  
39 in the case, that issue is whether TSTT is obliged to  
40 enforce FNP. That issue has arisen in this case and that  
41 issue has to be decided --

42 JUSTICE SMITH: In other words, because  
43 you want enforce your agreement and the regulations, you  
44 want to join them. Isn't that a form of enforcement?

45 MR. MENDES SC: No, My Lord. What we  
46 want to do is to resist these proceedings. We are  
47 resisting these proceedings and, contrary to what Mr. Daly  
48 has said, we have set out our defence in the affidavit.  
49 Our defence in the affidavit is that we have choices. This  
50 is the choice that we have made. It is not that we are not

1 doing anything. This is what we have set out in the  
2 affidavit, but we also recognise, having regard to what  
3 TSTT said, we recognise that the Court cannot grant a  
4 relief in these proceedings unless it first determines that  
5 TSTT is obliged to implement FNP.

6 So the issue has arisen, and must be confronted.  
7 That's not enforcement proceedings on our part; that is  
8 recognition of the fact that proceedings are implemented --

9 JUSTICE SMITH: No, no. Well, you're  
10 making a distinction between enforcement proceedings and  
11 enforcement. I am not saying enforcement proceedings, I am  
12 saying that there's a difference between -- this is  
13 enforcement. Enforcement doesn't start alone with  
14 proceedings. You can start enforcement, even before you  
15 file an action.

16 MR. MENDES SC: Well, My Lord, I am not  
17 sure what is the significance of describing anything that  
18 we have done as enforcement proceedings. What I would  
19 accept is --

20 JUSTICE SMITH: No, no. Leave out the  
21 word "proceedings." I am using the term "enforcement."

22 MR. MENDES SC: Well...

23 JUSTICE SMITH: Reason being that you say  
24 that, oh, we haven't commenced enforcement proceedings, but  
25 you are in full effect trying to enforce your agreement.

26 MR. MENDES SC: Well, My Lord, I should  
27 put it this way: We are defending these proceedings and I  
28 would accept that if the Court determines that in these  
29 proceedings, that TSTT is obliged to implement FNP, that  
30 would remove the only obstacle that TSTT has put in the way  
31 of enforcement, that it would have that effect, no doubt.  
32 And this is why I am saying that if it does so, then it  
33 avoids multiplicity of proceedings.

34 My Learned Friend is talking about a number of other  
35 defences that he has about unfair treatment, et cetera, et  
36 cetera. Well, maybe those can be raised at the appropriate  
37 moment. But for the time being, this issue has been raised  
38 in these proceedings, they have to be determined in these  
39 proceedings, and therefore, when you look at Part 19, and  
40 you ask the question, is there an issue involving TSTT  
41 which arises in these proceedings, the answer is yes.

42 Is it desirable to join TSTT to resolve it? The  
43 answer, we respectfully say, must be yes, as well. And all  
44 of the other points that My Learned Friend is saying: Well,  
45 give me the opportunity to raise my defence, which is that  
46 I am not obliged in enforcement proceedings that you bring,  
47 which is in criminal proceedings or maybe we cancel the  
48 concession and then they run to Court and get a  
49 [Indiscernible 11:26:26] to quash that decision, to cancel  
50 their concession, on the basis that they are not obliged or

1        whatever else. We've managed to get the fiat, if the  
2        Attorney General ever grants it, and then we come to court  
3        and then you raise the point there.

4        What is the point of going through all of those hoops  
5        when there is an opportunity -- the opportunity has arisen?  
6        It is here. Here is the opportunity for TSTT to make the  
7        point that they are making all along -- well, not all along  
8        -- from June the 13<sup>th</sup>. They want to make the point that  
9        they are not obliged. Here is opportunity to make it. How  
10       could it not be desirable to join TSTT in these proceedings  
11       in order that that point can be made?

12       My Lord, if we focus on what Part 19 requires, then  
13       the question whether joining them is the commencement of  
14       enforcement proceedings or facilitates enforcement, or  
15       whatever we may call it, really does not matter. We have  
16       to focus on whether an issue in these proceedings has  
17       arisen involving TSTT and it is desirable for TSTT to be  
18       joined. That is the question that Part 19 requires the  
19       Court to ask and answer. And the answer, I respectfully  
20       submit, seems to me to be obvious.

21       JUSTICE SMITH:        Yes. Anything else,  
22       Mr. Mendes? All right.

23       MR. MENDES SC:        Not unless there is  
24       anything that I can assist you with further, My Lord.

25       MR. DALY SC:        But, My Lord, with respect,  
26       the more the questions have flowed from the bench, the more  
27       I listen...

28       MR. MENDES SC:        This is not fair. This  
29       is not fair, My Lord.

30       JUSTICE SMITH:        Well, I'll ask for  
31       Mr. Singh.

32       No, Mr. Daly, I will hear you, but let me hear  
33       Mr. Singh first.

34       Mr. Singh?

35       MR. SINGH:        My Lord, I have nothing that  
36       I can add to the discussion, My Lord.

37       JUSTICE SMITH:        Very well.

38       MR. SINGH:        Much obliged.

39       JUSTICE SMITH:        Mr. Daly?

40       MR. DALY SC:        Well, My Lord, all I  
41       respectfully pointed out to Your Lordships is that all of  
42       this speculation about what TSTT might say and taking this  
43       monochromatic view about what has arisen, the question is  
44       desirability. And, therefore, I am respectfully suggesting  
45       it will be quite extraordinary, given all that Your  
46       Lordships have heard this morning, even before TATT has  
47       served a defence, to be hustling to join TSTT on some kind  
48       of speculative basis without the issues being properly  
49       defined.

50       And I am grateful for the indulgence to say one last

1 thing -- but everybody else comes along when service of the  
2 defence or some other thing has happened and this is a  
3 really pre-emptive strike and an antecedent blessing of  
4 what TATT wants to do.

5 JUSTICE SMITH: Yes.

6 Yes? Is there anything else, Mr. Daly?

7 MR. DALY SC: I have said --

8 JUSTICE SMITH: Sorry. Mr. Daly, you  
9 were muted for a while there. We are hearing now. Yes.

10 MR. DALY SC: Oh, I am very sorry, My  
11 Lord.

12 JUSTICE SMITH: No, no.

13 MR. DALY SC: I was really thanking --

14 JUSTICE SMITH: Sorry. You're getting  
15 muted and then unmuted and so on. Sorry, Mr. Daly. You  
16 proceed, Mr. Daly.

17 MR. DALY SC: No, My Lord. I was really  
18 thanking you for allowing me the indulgence of making the  
19 last submission that I did. Thank you very much, My Lord.

20 JUSTICE SMITH: Well, we are grateful to  
21 everyone for your submissions.

22 MR. MENDES SC: My Lord, if I may just  
23 say that the letter, the Attorney General's letter, is  
24 referred to at paragraph 48 of the affidavit.

25 JUSTICE SMITH: Yes.

26 Thank you, Mr. Mendes.

27 Well, you've given us something to think about, so  
28 what we propose to do is to come back at around 12:30 with  
29 a decision. It is a procedural appeal and these things  
30 have to be given due consideration, given the importance of  
31 the matter. Let's say about 12:30.

32 MR. MENDES SC: Much obliged, My Lord.  
33 Should we come off and then log back in afterwards or just  
34 stay on the line?

35 JUSTICE SMITH: It's preferable to stay  
36 on the line in case you log off and you can't get back on.

37 MR. MENDES SC: Okay. Thank you very  
38 much, My Lord.

39 JUSTICE SMITH: So let's say 12:30  
40 roughly. If we're ready before, we'll try to make calls to  
41 let you know. If we're going to take a little longer,  
42 we'll try and make calls to let you know as well.

43 MR. DALY SC: My Lord, I don't want to  
44 forget my appointment in the voting booth, but thank you  
45 very much.

46 JUSTICE SMITH: Oh, yes.

47 MR. DALY SC: We look forward to you at  
48 12:30.

49 JUSTICE SMITH: Thank you much,  
50 everybody, for your erudite submissions and comments. It

1 has helped us along and to focus our minds tremendously as  
2 to what we have to do. Thank you.

3  
4 (PROCEEDINGS STOOD DOWN AT 11:32:01 A.M.)

5 -----  
6 (PROCEEDINGS RESUMED AT 12:32:34 P.M.)

7  
8 JUSTICE SMITH: Hello.

9 MR. DALY SC: Yes. The 'Daly' side is  
10 here. TSTT...

11 JUSTICE SMITH: Mr. Mendes?

12 I am not seeing Mr. Mendes.

13 MR. SINGH: I am here, My Lords; Stephen  
14 Singh.

15 JUSTICE SMITH: All right.

16 I am not seeing Mr. Mendes.

17 MR. MENDES SC: I am here. I am here, My  
18 Lord.

19 JUSTICE SMITH: Very well. Okay.

20 We have a unanimous decision and we are grateful to  
21 Counsel for having focused this matter so admirably.

22 The issues that were raised in this matter were  
23 defined by the Appellant and narrowed in oral submissions,  
24 and I want to refer to the Appellant's submissions at pages  
25 2-5 as to what the issues were. They were (a) to (i), and  
26 I will try to deal with them that way to be logical and  
27 sequential about the matter.

28 The first issue was (a), whether the Learned Judge  
29 fell into procedural error by pre-determining the joinder  
30 application in Chambers and without a hearing before  
31 calling upon TSTT to dissuade him from the decision which  
32 he had already made. We find no fault in the procedure  
33 adopted by the Trial Judge.

34 Under Part 11.4 2(b), the Judge could have entertained  
35 an application that was not necessarily in writing and at  
36 the Case Management Conference, this is exactly what he  
37 did. In any event, we see no difference to what was  
38 proposed and what is being asked for, namely, a full  
39 hearing on the joinder application. So that, as far as we  
40 are concerned, that point has no merit in it.

41 At paragraphs (b) and (c) of the issues, the Appellant  
42 suggests that there has been a breach of the separation of  
43 powers by the Court assuming functions of the executive  
44 through TATT. Let me say upfront that a question of  
45 construction of contracts and regulations even anticipatory  
46 to a breach or enforcement is a common feature of a Court,  
47 and is part of the normal functions of a Court.

48 In our view, there is no breach of separation of  
49 powers or assuming functions of TATT in such a construction  
50 summons. It is not a question of jurisdiction, in our



1 view, but one of discretion.

2 And with respect to grounds (d) to (i), which are  
3 raised, these all admirably address the question of  
4 discretion, as Mr. Daly has argued it today, as to whether  
5 it is desirable in all the circumstances to join TSTT as a  
6 party to this. The relevant rule as recognised is Part  
7 19.2, sub-rule (3). The bane of the suggestion as to why  
8 TSTT should not be joined has been aptly put by Mr. Daly in  
9 this way: there is no live issue between any existing  
10 parties to the proceedings since both Columbus (and I will  
11 refer to CCTL as Columbus) and TATT agree to enforcement  
12 that is necessary and to some enforcement being necessary.  
13 In those circumstances, there being no live issue, there is  
14 no reason for joinder.

15 We find that this argument is not made out for two  
16 reasons. Firstly, there is no concession by TATT on  
17 enforcement by CCTL against TSTT. They do not concede that  
18 they are obliged to enforce on the request of CCTL.

19 Secondly, and the reason for this is evidenced by the  
20 letter of the 13<sup>th</sup> June 2019, TSTT has claimed that while  
21 they are capable of providing FNP, they are not obligated  
22 to provide this FNP. This puts everything in an awkward  
23 position for the reason being that if TSTT is not obligated  
24 in law to provide FNP, then CCTL cannot have TATT enforce  
25 any obligation and the matter will fail. If, on the other  
26 hand, they are obligated, then the matter may proceed. So,  
27 as far as we see, there is a live issue between the  
28 existing parties to the proceedings in this matter.

29 Now, with respect to the exercise of the discretion,  
30 we look firstly at Parts 19.2 (3) (a) and (b). Under Part  
31 19.2 (3) (a): "The Court may add a party to proceedings if  
32 it is desirable to add the new party so that the Court can  
33 resolve all the matters in dispute in the proceedings," and  
34 (b), "There is an issue involving the new party which is  
35 connected to the matters in dispute in the proceedings and  
36 it is desirable to add the new party so that the Court can  
37 resolve that issue."

38 While these seem to be narrow confines within which a  
39 joinder is permitted, it is interesting to note, and I  
40 quote from the case of **United Film Distribution Limited v**  
41 **Chhabria**, that these are not the only factors to be  
42 considered. And I am quoting from the case, as I said,  
43 **United Film Distribution Limited v Chhabria**: "Simply giving  
44 the Court the power to order a joinder where it is  
45 'desirable' therefore did not remove from the Court's  
46 consideration of whether the proposed party is a 'necessary  
47 or proper party' or whether the joinder is 'necessary' or  
48 'just and convenient' to determine the issues in the main  
49 claim. It can hardly be argued that the Court will order  
50 the joinder of a party because it is 'desirable' even

1        though it is not necessary or just and convenient to  
2        determine the issues or matters in dispute that fall for  
3        determination between the intervening party and the other  
4        parties in the action. These are simply considerations  
5        that are to be taken into account by the Court in dealing  
6        with the case justly to give effect to the overriding  
7        objective."

8        On a literal reading of the rules, we find to join  
9        TSTT as both a necessary and proper party, or alternatively  
10       that it is just and convenient so to do. With respect to  
11       the case of it being "a necessary and proper party", when I  
12       look at paragraph 37 of the Appellant's submissions, they  
13       have actually stated - paragraph 37(f) - "That TSTT could  
14       not be substituted for TATT indicates that the reliefs are  
15       not transferable to be sought against TSTT and, in those  
16       circumstances, CCTL would be required to amend its  
17       pleadings to introduce causes of action against TSTT."  
18       They say, according to them, that CCTL would have to amend  
19       their pleadings to seek relief.

20       But as **Shetty v Al Rushaid Petroleum Investment**  
21       **Company** has held, and I will read again from paragraph 19  
22       of that decision: "Once a new party has been joined to be  
23       able to argue and to be bound by an issue in the claim, he  
24       becomes a defendant within the meaning of the  
25       definition..." Therefore, the joinder will have the effect  
26       of allowing CCTL to claim the reliefs against TSTT. In  
27       fact, this is what the Trial Judge decided at paragraphs 12  
28       and 14 of his decision. He found that, "They were a  
29       necessary party to the litigation."

30       Another reason to have them joined is to prevent a  
31       multiplicity of proceedings. Again, the Trial Judge found  
32       this at paragraph 13 of the judgment. TSTT argues that  
33       this act in joinder will cause a multiplicity of  
34       proceedings and maybe scuttle some of the defences they  
35       have. But that does not take an account of the history of  
36       the matter.

37       When we look at what has happened in the history of  
38       this matter, the proceedings by CCTL against TATT had  
39       commenced by leave for judicial review in April 2019. It  
40       was only after this, on 13<sup>th</sup> May 2019, that TSTT revealed  
41       their defence that, look here, we are not obligated by law  
42       to do it. At present, there is no other enforcement  
43       proceedings, so this is the first time that this issue is  
44       being raised and it is now being raised in proceedings  
45       which are before the Court. That being the case, there is  
46       no question of scuttling of any defences.

47       Further, they can choose how they want to argue this  
48       matter. They can go on the narrow issue of the obligation  
49       and the contract and the regulations and choose how, why  
50       and when they are going to mount their defences. They

1 would not be deprived of it, in any event. But the main  
2 question, being the argument, whether they are obligated or  
3 not, is one that can be decided by this Court without  
4 scuttling of any defences that have been raised.

5 The third reason, where we see "just and convenient",  
6 is that fairness, as the Trial Judge said at paragraph 19  
7 of his decision, fairness would demand that in this  
8 application to join TSTT, they should at least be heard,  
9 and they should be joined as a party to be heard for that  
10 purpose.

11 In those circumstances, we are of the view that the  
12 Trial Judge was right, or not plainly wrong, to order their  
13 joinder to these proceedings.

14 Insofar as the Trial Judge may have considered other  
15 matters in paragraphs 10 to 14 of his decision, like  
16 competition issues and pandemic and necessities of life, we  
17 don't find these are relevant. And if they were relevant  
18 and featured broadly in the Trial Judge's reasoning, we  
19 think he may have erred. And if so, we now substitute our  
20 view for his and, without recourse to those matters that we  
21 find not relevant, we find that it is both necessary or  
22 just and convenient to add TSTT as a party to these  
23 proceedings at this stage.

24 In those circumstances, we dismiss the procedural  
25 appeal.

26 Is there anything else the parties' desire?

27 MR. MENDES SC: Just the question of  
28 costs, My Lord.

29 JUSTICE SMITH: Yes. What do you have to  
30 say?

31 MR. MENDES SC: By way of quantum, My  
32 Lord, you mean?

33 JUSTICE SMITH: Yes, let's hear. Do you  
34 want costs or you're not asking for costs?

35 MR. MENDES SC: No. Yes, we are asking  
36 for costs, My Lord, yes.

37 JUSTICE SMITH: And how are we to assess  
38 those costs?

39 MR. MENDES SC: My Lord, could you just  
40 order that they be assessed in default of agreement?

41 JUSTICE SMITH: Well, normally in  
42 procedural appeals we assess costs. We give you what sort  
43 time frame -- what sort of time you think would have been  
44 reasonable for yourself and instructing and your band would  
45 be -- you have a band in here?

46 MR. MENDES SC: \$4,000, My Lord, I think  
47 it is.

48 JUSTICE SMITH: Your band is now \$4,000  
49 per hour, and your instructing attorney is -- how long?  
50 Who is your instructing attorney?

1 MR. MENDES SC: Ms Gellineau. She would  
2 indicate, My Lord.  
3 JUSTICE SMITH: How long?  
4 MS GELLINEAU: My Lords, it's \$1,950, I  
5 believe.  
6 JUSTICE SMITH: \$1,950 per hour?  
7 MS GELLINEAU: Yes, My Lord.  
8 JUSTICE SMITH: So we have for Mr.  
9 Mendes, it would be \$4,000 plus \$1,950 per hour.  
10 And how many hours you think for both yourselves?  
11 MR. MENDES SC: My Lord, I spent no more  
12 than 5 hours on finalizing the submission, probably 4. And  
13 Ms Gellineau would indicate how long she spent in preparing  
14 the draft.  
15 JUSTICE SMITH: And how much for court  
16 time?  
17 MR. MENDES SC: And there would be from  
18 10:00 this morning and it is almost 1:00, subtract an hour  
19 for lunch, that would be 2 hours, My Lord.  
20 JUSTICE SMITH: And Ms Gellineau, how  
21 much time would she have needed?  
22 MR. MENDES SC: Ms Gellineau would have  
23 to answer that, My Lord.  
24 MS GELLINEAU: Sorry, please, My Lord.  
25 The time to do first draft of the submissions, please?  
26 MR. MENDES SC: Yes.  
27 JUSTICE SMITH: Well, as instructing  
28 attorney, putting everything together.  
29 MS GELLINEAU: Oh. Yes, please. About 4  
30 or 5 hours, please.  
31 JUSTICE SMITH: Mr. Singh. On your band,  
32 Mr. Singh.  
33 MR. SINGH: If I may indicate, my band is  
34 \$2,850, and Ms Adimoolah's is \$1,950.  
35 JUSTICE SMITH: And how many hours are  
36 you asking for?  
37 MR. SINGH: Bearing in mind that I am not  
38 as bright as Mr. Mendes, may I suggest 7 hours and 5 for my  
39 instructing attorney?  
40 JUSTICE SMITH: Well, Mr. Mendes has  
41 asked for 7, you know.  
42 MR. SINGH: Oh, he has asked for 7?  
43 JUSTICE SMITH: 5 and 2.  
44 MR. SINGH: Well, I was going to ask for  
45 7.  
46 JUSTICE SMITH: 5 for preparation and 2  
47 for court time.  
48 MR. SINGH: And I will say 7 and 2.  
49 JUSTICE SMITH: For you? Oh.  
50 MR. SINGH: Yes, My Lord.

1 JUSTICE SMITH: Okay. And for Ms  
2 Adimoolah?

3 MR. SINGH: And 5 and 2.

4 JUSTICE SMITH: Yes. Mr. Daly?

5 MR. DALY SC: Well, My Lord, may I just  
6 put it this way. Sometimes they think I have become too  
7 diplomatic. I am a bit surprised at Mr. Singh's need to  
8 claim a longer time than Mr. Mendes. I assume it was a  
9 facetious statement that he is not as bright. I am very  
10 uncomfortable with that. Otherwise, it's a matter for Your  
11 Lordships.

12 JUSTICE SMITH: What sort of time -- yes?

13 MR. DALY SC: I mean the point about it  
14 is that their submissions were very thin, if I am forced to  
15 make the point. So it doesn't seem right that they get a  
16 different assessment for submissions that were markedly  
17 less thin and oral submissions that were also thin. So I  
18 am hoping that everybody be sensible and follow the lead of  
19 Mr. Mendes and Ms Gellineau.

20 JUSTICE SMITH: And what do you have to  
21 say about the 7 hours from Mr. Mendes and the 4-5 hours for  
22 Ms Gellineau?

23 MR. DALY SC: Again, I am hoping  
24 everybody would be sensible and follow the lead of Mr.  
25 Mendes and Ms Gellineau. I can't say anything more.

26 JUSTICE SMITH: Very well.

27 MR. DALY SC: I haven't put any argument  
28 to resist an order for costs. So I think that's a  
29 reasonable approach and I would recommend it for both  
30 Respondents, even the thinner one.

31 JUSTICE SMITH: All right. Just give us  
32 a minute and I will consult with...

33 Unless there is something else anybody wishes to add?

34 Mr. Mendes, Mr. Singh, Mr. Daly?

35 MR. MENDES SC: Nothing further, please,  
36 My Lord.

37 JUSTICE SMITH: All right.

38 MR. SINGH: No, please, My Lord.

39 JUSTICE SMITH: Give us a minute and  
40 we'll get back to you on the question of costs.

41  
42 **(Audio paused from 12:49:15 to 12:51:54 p.m.)**

43  
44 JUSTICE SMITH: Yes, we have done the  
45 calculations.

46 Mr. Mendes, we say we will give you 4 hours of  
47 preparation and 2 hours of court, which is 6 hours at your  
48 rate.

49 Plus, we will give Ms Gellineau 3 hours of  
50 preparation.

1           That will give you a total of \$24,000 plus \$5,850.  
2           That will give you \$29,850 for your costs, Mr. Mendes.

3           For Mr. Singh, we say 6 hours of preparation and for  
4           Ms Adimoolah, 3 hours. That should give us a total of  
5           \$22,950.

6                       MR. MENDES SC:           Much obliged to you, My  
7           Lord.

8                       MR. SINGH:           Thank you very much, My Lord.  
9           We're very grateful to you.

10                      MR. DALY SC:           Thank you, My Lords, for  
11           your kind attention. Much obliged.

12                      JUSTICE SMITH:        Very well.  
13           Thank you, everybody, for the submissions. It focused  
14           us and we knew what we had to decide. Thank you very much.

15  
16                      **(PROCEEDINGS CONCLUDED AT 12:53:00 P.M.)**

DECLARATION VERIFYING TRANSCRIPT

I, **VIDYA SIEWDATH**, of **COURT REPORTING SERVICES UNIT**,  
**JUDICIARY OF TRINIDAD AND TOBAGO**, do solemnly and sincerely declare that having  
been required to furnish a transcript relating to the trial or proceedings, namely:

Case Caption: **TELECOMMUNICATIONS SERVICES OF TRINIDAD AND TOBAGO**

**V**

**TELECOMMUNICATIONS AUTHORITY OF TRINIDAD AND TOBAGO**  
**(FIRST RESPONDENT)**  
**COLUMBUS COMMUNICATIONS TRINIDAD LIMITED**  
**(SECOND RESPONDENT)**

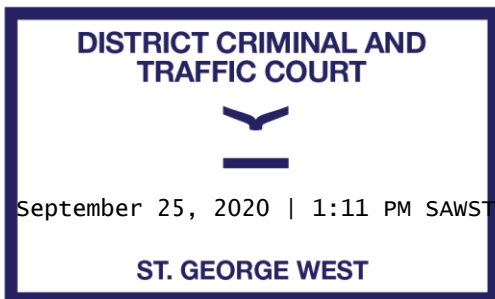
Case Number: **CIV. APP. NO. P126/2020**

Date of Proceedings: **MONDAY, 10<sup>TH</sup> AUGUST 2020**

from the audio recording made of such trial or other proceedings, I certify that the preceding  
transcript, consisting of 38 pages, is a correct and complete transcript thereof in pursuance of the  
said requirement.

And I make this declaration conscientiously believing the same to be true and according to  
the Statutory Declarations Act, and I am aware that if there is any statement in this declaration  
which is false in fact, which I know or believe to be false, I am liable to fine and imprisonment.

Dated this **25<sup>th</sup>** day of September 2020



Signed: Vidya Siewdath

Before me: Delicia Bethelmy

*Ex officio* Commissioner of Affidavits

