[i]THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P-165 of 2022

Claim No. CV2021-02135

BETWEEN

TELECOMMUNICATIONS SERVICES OF TRINIDAD AND TOBAGO

Appellant/Claimant

AND

TELECOMMUNICATIONS AUTHORITY OF TRINIDAD AND TOBAGO

Respondent/Defendant

PANEL:

P.A. Rajkumar JA

G. Henderson JA

R. Rahim JA

APPEARANCES:

Mr. J. Mootoo S.C, Ms. T. Toolsie, Ms. S. Indarsingh for the Appellant

Ms. D. Peake S.C, Mr. R. Heffes-Doon, Ms. S. Sookraj-Beharry for the Respondent

DATE OF HEARING: 22 APRIL 2026

DATE OF JUDGMENT: 5 JUNE 2026

I have read the judgment of Rajkumar JA. I agree with it and I have nothing to add.

…………………………………………………………………..

Geoffrey Henderson

Justice of Appeal

I have read the judgment of Rajkumar JA. I also agree with it and I have nothing to add.

………………………………………………………………….

Ricky Rahim

Justice of Appeal

JUDGMENT

Delivered by P. Rajkumar JA

[1] The appellant, Telecommunications Services of Trinidad and Tobago Limited (TSTT) is a provider of telecommunication services. The respondent, Telecommunication Authority of Trinidad and Tobago (TATT) established under the Telecommunications Act Chapter 47:21 (the Act), is the regulator of such services.

[2] This appeal arises as a result of a Determination by TATT which was published on the 16th of March 2021 as Determination 2021/01 (the Determination)[1]. At the same time as the Determination TATT published a 2021 benchmarking study referred to as "the results of an Interconnection Benchmarking Study in the Telecommunications Sector of Trinidad and Tobago 2021[2]", (The 2021 IBS). The price caps were therefore set by reference to International Benchmarks identified in the 2021 IBS.

[3] The Determination mandated that from the period 2021 to 2024 all concessionaires (including TSTT) shall offer international termination rates for fixed and mobile interconnection services to othe**r** operators in Trinidad and Tobago by reference to Maxima International Wholesale Fixed and Mobile Termination Rates as set by TATT, (the proposed interconnection rates)[3]. These had been set by reference to benchmarks based on the recommendations of the international benchmarking study (IBS) 2021. TATT therefore issued **price caps** (price maxima) on the proposed rates set by reference to benchmarks.

[4] The proposed interconnection rates were produced on the basis of the 2021 IBS as well as the results of previous interconnection benchmarking studies in the telecommunications sector of Trinidad and Tobago in 2017 – (the 2017 benchmarking study)[4], and 2019 (the 2019 benchmarking study)[5].

[1] Page 769 record of appeal
[2] Page 100 record of appeal
[3] Page 103 record of appeal
[4] Page 363 record of appeal
[5] Page 449 record of appeal

[5] TATT purported to base its determination upon Regulation 15 of the Interconnection Regulations. It claimed that that regulation permitted it to determine costing benchmarks that concessionaires could refer to when setting interconnection rates. The Determination provided maximum rates based upon those costing benchmarks. TATT claimed the jurisdiction to set maxima rates (price caps) and capped the rates for wholesale interconnection termination for the period April 2021 to March 2024 based upon section 29 (3) of the Act.

[6] TSTT challenged, inter alia, the legality of TATT's regulating rates by reference to price maxima or price caps, and the authority of TATT to utilize benchmarks without taking into account TSTT's costs.

[7] TSTT also contended that i] it had not been consulted on the 2021 International Benchmarking Study (IBS) and that ii] the Determination had also occurred without consultation, in breach of TSTT's right to be heard and in breach of TATT's established practices and procedures in relation to consultation.

[8] TSTT contended, inter alia, that because those rates did not pay regard to its own costs, it was required to be heard in relation to any aspect of rates that were set as the maximum rates that it could charge. TSTT also contended that, while TATT attempted to justify its decision thereafter under section 29(3) of the Act by characterizing the Determination as a pricing rule or principle, it had not sought to do so initially.

[9] The grounds of TSTT's challenge to the Determination therefore included the following:

i] That the Determination was irrational, illegal, unlawful and/or ultra vires TATT's powers under the Act;

ii] That the Determination undermined the policy of the Act, (alleging that rates were to be set by open market competition);

iii] That TATT's failure to publish the 2021 IBS or a draft of the Determination for consultation prior to its issue breached TSTT's legitimate expectation to be so consulted;

iv] That the failure to consult on the 2021 IBS or the draft Determination denied TSTT the opportunity to be heard.;

v] TSTT also claimed initially that TATT unlawfully intervened in the negotiations between concessionaires on their interconnection rates and sought a declaration that TATT acted in bad faith in failing to publish the 2021 IBS or the draft of the Determination for consultation, and by impermissibly intervening in negotiations between concessionaires on the issue of rates. This ground was withdrawn on appeal.

[10] Accordingly, TSTT sought:

a] an order of certiorari quashing the Determination;

b] an order of mandamus compelling TATT to publish the 2021 IBS and a draft of the Determination for consultation in accordance with TATTs published consultation procedures;

c] an injunction to restrain TATT from doing any act or taking any step which had the effect of intervening in negotiations between concessionaires in relation to interconnection rates;

d] an injunction restraining TATT from taking any enforcement action against TSTT for any alleged failure to comply with the Determination and an order of prohibition for this purpose.

[11] The issues identified by the Trial Judge included the following:

i] Whether TATT acted illegally, ultra vires the Act and/or the regulations, unfairly and/or irrationally, and whether in those circumstances the Determination ought to be quashed.

ii] Whether TATT's failure to publish the 2021 IBS and the draft Determination for prior consultation was in breach of TSTT's legitimate expectation to be consulted.

iii] Whether TATT acted in bad faith by copying other concessionaires in its correspondence to TSTT.

Issues

[12] The issues which arise on this appeal include the following:

i] Whether TATT acted illegally or ultra-vires the Act in publishing the Determination, and in particular whether TATT had any authority or jurisdiction to set **maxima rates** for Telecommunications Interconnection Services a] under section 29 (3) of the

Telecommunications Act (the Act) and b] to regulate prices by reference to International Benchmarks under Regulation 15 (2) of the regulations.

ii] Whether TATT acted irrationally in setting maxima rates for interconnection.

iii] Whether there was a duty upon TATT to consult with TSTT before imposing rate maxima for interconnection.

iv] Whether TSTT's failure to publish the 2021 International Benchmarking Study (IBS) and a draft of the Determination to engage consultation thereon by concessionaires, breached TSTT's legitimate expectation to be consulted before the finalization of the Determination.

v] Whether the Determination undermined the policy of the Act.

Conclusion

[13]

i. a] TATT did have jurisdiction under the Act to set maxima rates for telecommunication interconnection services. **Price caps** and benchmarks fell squarely within the category of **pricing rules and principles** and b] TATT was authorised by section 29 (3) of the Act to regulate prices for public telecommunication services and international incoming and outgoing settlement tariffs. There was therefore nothing illegal, unlawful or ultra vires about the use of a price cap or price maxima in relation to interconnection rates.

ii. Further, TATT was authorised under Regulation 15 (2) to utilize international costing **benchmarks** for inter alia, price regulation and interconnection.

iii. There was nothing irrational, unreasonable or unfair in the use of international costing benchmarks. That is because the Act and regulations clearly provided for their use as a proxy for costs, where costing methodologies, models or formulae were unavailable. This was especially so when the reason for the unavailability of the costing information from TSTT was that it never supplied it.

iv. Consultation was required in relation to the 2021 IBS, and the proposed Determination based thereon, because it referred to rates and periods which had never been communicated to TSTT or other concessionaires previously. TSTT (and other concessionaires) were accordingly deprived of the opportunity to make representations in the course of a consultation as to, inter alia, any potential considerations which may have arisen with respect to its ability to cover its costs of providing the relevant service.

v. TATT is the regulator of the telecommunications sector. As set out in the preamble to the Act, its role and purpose include acting as an intermediator between the established virtual monopoly and new entrants to guide the transformation of the telecommunications sector from a virtual monopoly to a competitive environment. It did not act unlawfully in setting price maxima. Having concluded that additional consultations, further to the 2017 and 2019 consultations, were not necessary, it omitted to consult on the potentially new matters introduced by the 2021 Determination. Despite this however, there is no basis on the evidence for contending that TATT acted in any way inconsistent with its mandate in its role as regulator. The role of the regulator continues to be an important and statutorily mandated function, not to be hampered by technical, restrictive and abstruse purported constructions of its price regulating powers.

vi. There is no basis whatsoever for contending that the Determination undermined the policy of the Act. It was in fact entirely consistent with TATT's performance of its role as regulator, and its statutorily mandated function under the Act to guide the transformation of the telecommunications sector from virtual monopoly to a competitive environment, and provide the conditions for an open market, and the facilitation of the orderly development of the sector.

Orders

[14] i] An order of certiorari is granted quashing the Determination.

ii] An order of mandamus is granted compelling TATT to publish the 2021 IBS and a draft of the Determination for consultation in accordance with TATTs published consultation procedures with reasonable timelines for conducting and concluding the consultation process.

Costs

[15] It is of some significance that TSTT ignored i] the Determination by failing to comply with it and ii] the conclusion of the trial judge that the Determination was valid. TSTT did not seek, far less obtain, a stay of the trial judge's order. TSTT 's submissions regarding i] the vires of the Determination and the statutory basis therefor, ii] the rationality of the Determination and iii] its assertion that the Determination undermined the policy of the Act, which challenged the very basis of price regulation by TATT as regulator, have all been

found to be without foundation. In the circumstances the parties are invited to file and serve written submissions on costs within 7 days and replies within 7 days thereafter if necessary.

Analysis

Statutory Framework

[16] The purpose of the Act appears from its preamble as set out hereunder:

> *Whereas, the Government believes that in order to promote the country as the regional centre for the new information economy, it is necessary to establish a comprehensive and modern legal framework for an open telecommunications sector by permitting* ***new providers of telecommunications services to enter the market and compete fairly****:*
>
> *And whereas it is appropriate that an Authority be established with transparent* ***regulatory processes to guide*** *the sector's* ***transformation from virtual monopoly****, in which Telecommunications Services of Trinidad and Tobago is the principal provider of telecommunications services,* ***to a competitive environment****, to monitor and regulate the sector so transformed and, in particular, to prevent anti-competitive practices:*
>
> *And whereas, in order to achieve these stated goals, it is necessary to repeal the existing, outdated legislation and enact new legislation, as hereunder proposed:*
>
> *And whereas existing legislation in the related field of broadcasting is also outdated:* (Emphasis added)

[17] The Act therefore recognizes that regulation was required to guide the telecommunications sector from a virtual monopoly by TSTT to a competitive environment. It does not dictate immediate competition. TSTT's submissions to this effect are based upon a misunderstanding of the language and structure of the Act. Rather, it recognizes the role of TATT in regulating the sector and guiding it towards a competitive environment.

[18] Section 3 of the Act is as follows:

> *3. The objects of the Act are to establish conditions for—*
> *(a) an open market for telecommunications services, including conditions for fair competition, at the national and international levels;*
> *(b) the facilitation of the orderly development of a telecommunications system….*
> *(c) promoting and protecting the interests of the public by—*
> *(i)promoting access to telecommunications services;*

(ii) ensuring that services are provided to persons able to meet the financial and technical obligations in relation to those services;
(iii) providing for the protection of customers;
*(iv) promoting the **interests of customers**, purchasers and other users in respect of the quality and variety of **telecommunications services** and equipment supplied; ….*
(f) promoting the telecommunications industry in Trinidad and Tobago by encouraging investment in, and the use of, infrastructure to provide telecommunications services; and to (g) regulate broadcasting services consistently with the existing constitutional rights and freedoms contained in sections 4 and 5 of the Constitution.

[19] The objects of the Act therefore include **establishing conditions** for an open market and for fair competition and to facilitate the orderly development of a telecommunication system and to promote and protect the interests of the public and customers. Regulation therefore is not solely for the benefit of the telecommunications providers/concessionaires, but rather is intended to also take into account the interests of the public and customers.

Interests of Consumers

[20] Section 18 (3) of the Act provides that "*in the performance of its functions, the Authority should have regard to the interests of consumers and ...to the quality and reliability of the service provided at the lowest possible cost*".

[21] Section 29 of the Telecommunication Act, Chap. 47:31 establishes the basis upon which TATT can regulate prices for telecommunications services as follows:

*29. (1) Prices for telecommunications services, **except those regulated by the Authority** in accordance with this section, shall be determined by providers in accordance with the principles of supply and demand in the market.*

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

(a) there is only one concessionaire operating a public telecommunications network or providing a public telecommunications service, or

(b)where one concessionaire has a dominant position in the relevant market; a concessionaire operating a public telecommunications network or providing a public telecommunications service cross subsidises another telecommunications service provided by such concessionaire; or

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

(3) ***The Authority shall regulate prices for public telecommunications services and international incoming and outgoing settlement tariffs by publishing pricing rules and principles.***

(4) Such rules and principles, made pursuant to subsection (3), shall require rates to be fair and reasonable and shall prohibit unreasonable discrimination among similarly situated persons, including the concessionaire.

(5) …

(6) For any ***public telecommunications service provided on a non-exclusive basis****, the Authority may introduce a* ***method for regulating the prices of a dominant provider*** *of such telecommunications service by* ***establishing caps and floors*** *on such prices, or by such other methods as it may deem appropriate.*

(7) …

(8) For the purposes of this Part and wherever the issue of dominance otherwise arises in the Act, the Authority may determine that an operator or provider is dominant where, individually or jointly with others, it enjoys a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers and, for such determination, the Authority shall take into account the following factors: (a) the relevant market; (b) technology and market trends; (c) the market share of the provider; (d) the power of the provider to set prices; (e) the degree of differentiation among services in the market; (f) any other matters that the Authority deems relevant.

(9) Where a concessionaire, deemed dominant by the Authority pursuant to subsection (8), considers that it has lost its dominance, it may apply to the Authority to be classified as non-dominant and should the Authority so classify, the relevant concession shall be amended to reflect such classification.

(All emphasis added)

TSTT's Complaint

[22] TSTT's complaint is set out at paragraph 64 of the judgment as follows:

64. TSTT after careful consideration of the Determination published on the 16 March 2021 wrote to TATT three days later on the 19 March 2021,15 setting out its concerns: a. TSTT was alarmed by TATT's publication of the finalized 2021 IBS containing new data without consultation in breach of its procedures; b. The publication of the Determination without any prior public consultation as required by section 18(4) of the Act and TATT's Consultation Procedures; c. That the Determination setting rates was unlawful and ultra vires to the Act and Regulations; and d. The potential impact of the Determination on negotiations among concessionaires.

Illegality - Whether TATT had any authority or jurisdiction under the Telecommunications Act (the Act) to set maxima rates for Telecommunications Interconnection Services

[23] Section 29(2) of the Act permits TATT to establish price regulation regimes which can include setting prices in specific circumstances. These include: a] where there is only one concessionaire or where one concessionaire has a dominant position in the relevant market, b] a concessionaire cross-subsidises another telecommunications service which it also provides, or c] the Authority detects anti-competitive pricing or acts of unfair competition. TSTT contended that TATT had no power to **set prices** because the conditions for doing so set out in section 29 (2) did not apply. TATT contends that in setting price maxima it has not set prices because concessionaires are left free to negotiate rates up to and including the price maxima.

[24] Section 29(3) is in far more general terms. It permits TATT to regulate prices by publishing pricing rules and principles. TATT contends that publishing price maxima is one such pricing rule or principle.

[25] Section 29 (6) of the Act recognizes that pricing rules and principles for regulating the prices of a dominant provider can include establishing caps and floors on prices.

[26] TSTT contended that caps (and floors) could only be used in the specific situation contemplated under section 29(6), i.e. in the case of a dominant provider deemed dominant under section 29 (8). However, it is not disputed that TSTT has never been declared to be a dominant provider.

[27] However, the word **only** does not appear in section 29 (6). There is no justification for its incorporation or implication into that section. While section 29 (6) provides a specific example of a situation when price caps can be used, it is not a legitimate construction of that section, based upon its plain literal and grammatical meaning, that price caps could **only** be implemented in the case of a dominant provider or could not be used in other situations if appropriate. Any alternative interpretation would require a construction that section 29(6) provides the **only** situation in which a price cap is authorized under the legislation. This notwithstanding that section 29 (6) does not utilize the word 'only' and does not exclude the mechanism of a price cap in other circumstances. The words "only

or exclusively" do not qualify the circumstances in which price caps can be used. Nothing in the language in section 29(3) or in the Act precludes a price cap from being one of the pricing rules and principles contemplated under it, or prevents the use of price caps or floors in circumstances other than in relation to a dominant provider of telecommunication services under section 29 (6).

[28] In fact, the reference to pricing rules and principles in section 29 (3), and the authorization of price caps in section 29 (6), confirms and corroborates a construction which recognizes that the use of price caps (under section 29 (6)) is one of the categories of pricing rules and principles, the use of which is contemplated and authorised by section 29 (3) of the Act.

[29] Section 29(3) allowed it to apply pricing rules and principles. On a literal, grammatical or contextual construction of section 29 of the Act as a whole a price cap was expressly recognized as being one such pricing rule or principle with its application not being limited expressly or impliedly to the regulation of prices of a dominant provider.

[30] Accordingly, there is nothing in section 29 of the Act which precluded TATT from applying a price cap in exercising its mandate to regulate prices for public telecommunications services and international incoming and outgoing settlement tariffs, even in the case when a provider has not been determined to be a dominant provider of a telecommunications service.

[31] Section 78 of the Telecommunications Act Chap. 47:31 confers upon the Minister the power to make regulations as follows:

> *78. (1) The Minister, on the recommendation of the Authority, shall make such Regulations, subject to negative resolution of Parliament, as may be required for the purposes of this Act, including* ***regulations prescribing****— (a) application procedures in relation to concessions and licences; (b) fees payable to the Authority for or in relation to applications, concessions, licences or the provision of services provided by the Authority to any person; (c) procedures for the management of the spectrum; (d) approvals and certification of terminal equipment; (e)* ***price regulation****; (f)* ***interconnection***[6]*; (g) universal service; (h) numbering; (i) quality of service standards;*

[6] Interconnection means "the linking of public telecommunications networks and public telecommunications services, to allow the users of one provider of a public telecommunications service to communicate with the users of another provider of a public telecommunications service, and to access the services provided by such other provider;"

(j) procedures for investigating and resolving complaints by users with regard to public telecommunications services; and (k) procedures for investigating alleged breaches of any term or condition of a concession or licence or alleged violations of any provision of this Act or Regulations made pursuant thereto.

[32] **The Telecommunications (Interconnection) Regulations** (the Regulations) were made pursuant to section 78(1). Regulation 15 (1) and (2) of the Telecommunications Act provide as follows:

*15. (1) A concessionaire shall set interconnection rates based on costs determined in accordance with such **costing methodologies**, **models or formulae** as the Authority may, from time to time, establish.*

(2) Where the relevant data for the establishment of the costing methodologies, models or formulae are unavailable within a reasonable time, the concessionaire may set interconnection rates with reference to such costing benchmarks, as determined by the Authority, that comport with internationally accepted standards for such benchmarks.

[33] Section 78 conferred powers to make regulations prescribing inter alia, price regulation and interconnection. Those were further to or ancillary to powers provided for elsewhere in the Act, including powers established under section 29 to regulate prices.

[34] Specifically, Regulation 15(2) permits TATT to set costing benchmarks that comport with internationally accepted standards where costs data are unavailable.

Information re costs

[35] It is not disputed, (and in any event the trial judge so found),[7] that there was no costing information supplied by TSTT. In those circumstances the alternative method of arriving at interconnection rates became applicable. It could not therefore be irrational, where

[7] At paragraph 102- 103 of the judgment

102. Based on the evidence adduced by the parties, it appears to the court that TATT's approval of TSTT's cost model was provisional. While the Panel in the 2019 Decision agreed that TATT implicitly accepted TSTT's cost model for assessing cost based rates for interconnection services, including international termination services, this was subject to concessionaires providing cost data in order for TATT to adjust it appropriately. The 2019 Decision goes on to state that TSTT failed to submit cost outputs from its cost model for TATT's assessment and adjustment to ensure that they adhered to TATT's LRAIC costing methodology.

103. Therefore, the court is of the view that since TSTT failed to provide the requisite costing information to TATT, the conditions for acceptance of TSTT's cost model by TATT were not fulfilled. As such, in accordance with Regulation 15(2), due to the unavailability of relevant data for TATT's establishment of costing methodologies, models or formulae, it was constrained to determine costing benchmarks. TATT's Benchmarking Study effected the costing benchmarks.

cost information was not supplied by TSTT, for TATT to set interconnection rates with reference to costing benchmarks, and without reference to TSTT's costs as it was expressly authorised to do under Regulation 15 (2).

Alleged inconsistency between section 29 and section 78

[36] Any contention that section 29 provided the exclusive authority for regulating prices is not sustainable. That is because i] the Act does not so provide, and ii] this is incompatible with the plain and literal meaning of section 29 and section 78.

[37] In any event it has not been clearly explained how Regulation 15 (1) and (2) are supposedly incompatible with section 29. There is nothing discernibly contradictory between section 29 and regulations made under section 78 of the Act. Section 29 contemplates that price caps (s 29 (6)) may be one example of a pricing rule or principle (s 29(3)). Section 29 (6) does not limit the use of price caps to regulating the prices of a dominant provider exclusively. Rather, it recognizes that establishment of a price cap is one method for regulating prices.

[38] Regulation 15(1) could not apply because no cost information was available. Therefore regulation 15(2) became applicable and was the basis upon which TATT utilized international costing benchmarks as a proxy for the cost information which it did not have.

[39] Regulation 15 (2) contemplates that interconnection rates may be set with reference to costing benchmarks. In the instant case the price maxima authorised by section 29 (3), established by the Determination by reference to international costing benchmarks, authorised by regulation 15 (2), constituted a price cap which interconnection rates were not to exceed.

[40] The Act provides for an internally consistent system for price regulation by TATT in conducting its mandate described above. The assertions that section 29 (3) is limited in the manner suggested by TSTT, or was inconsistent with section 78 and regulation 15 made thereunder, is not borne out by the literal construction of those provisions and requires a convoluted, unconvincing and ultimately unsustainable route of reasoning to even be described. In any event a literal construction of those provisions does not support any alleged inconsistency or limitation.

[41] Therefore, TSTT has not established that there was anything that was unlawful in TATT's either:

i] Adopting a price cap method for the purpose of **regulating** interconnection rates (section 29 (3)). This was one pricing rule or principle as recognized in section 29 (6).

ii] There was nothing in the Act that restricted price caps only to situations where they were being applied to a dominant provider, so determined under section 29 (8). Section 29(6) did not provide that price caps were to be applied **only** in relation to a dominant provider. Rather section 29 (6) reflected the fact that price caps were within the category of pricing rules and principles and were an acceptable method for price regulation under section 29 (3);

iii] Costing benchmarks were available to TATT under regulation 15 (2) for the purpose of establishing a cap on prices for interconnection. The use of international costing benchmarks for regulating prices for interconnection has not been demonstrated to be incompatible with the powers of TATT under section 29 to regulate prices for public telecommunication services or to publish pricing rules and principles. The use of international costing benchmarks is one such pricing rule or principle.

[42] As to TSTT's further submission at paragraphs 52 to 61 of the Appellant's written submissions that TATT was not empowered to set the rate maxima for international carriage charges[8], this was not a basis for the application for leave[9]. In any event section 29(3) of the Act confers upon TATT the authority to regulate prices for "international incoming and outgoing settlement tariffs"[10].

[43] Even if regulation 15 (2) was made under powers established under section 78 to set benchmarks for interconnection, and even if interconnection as defined in the Act does not extend to "International incoming and outgoing settlement tariffs" as provided for in

---

[8] Appellant's submissions at paragraph 52
52. At para 18 of her judgment, the LTJ accepted that the Wholesale Incoming International Termination Rate "is effectively comprised of two (2) sub-services: international carriage and domestic termination". However, despite this, she failed to consider whether TATT was lawfully empowered to set rate maxima for international carriage charges.

[9] See page 70 and 71 volume 1 record of appeal

[10] See paragraph 35 of the respondent's submissions
35. First, this point was not pleaded as a ground in the Leave Application and accordingly does not arise for consideration at all. Second, even if it did, international carriage falls within the definition of interconnection in section 2(1) of the Act. And third, section 29 (3) gives TATT the power to regulate prices for not only public telecommunication services, but also "international incoming ... settlement tariffs".

section 29(3) of the Act, nothing in the Act precludes TATT from utilizing such benchmarks for that component of telecommunications service. The use of benchmarks, being a pricing rule or principle, authorised under section 29(3) of the Act, would be equally available to TATT for the purpose of regulating this component of telecommunications service also.

Irrationality

[44] TSTT's argument that the setting of price maxima was irrational because it did not take into account TSTT's profitability is not supported by the Act. TSTT did not supply its costs data. The basis for assessing its profitability therefore had not been provided by it. The Act recognized that that fact alone could not preclude TATT from setting rates and Regulation 15(2) specifically provided for that situation.

[45] Appropriate international benchmarks were recognized under the Act as an acceptable proxy for an operator's costs. There was therefore nothing irrational in using benchmarks as such a proxy, when as the Trial Judge found, TSTT's cost data had not been supplied.

[46] Further, while TATT appears to have raised section 29 (3) of the Act for the first time as justification for the Determination, that cannot detract from the fact that it provided statutory authorization for TATT to set maxima rates or price caps, and utilize international benchmarks, in determining the appropriate rates as pricing rules or principles. Nothing therefore turns upon this. It was a matter of law and a legitimate response to TSTT's assertion that the Determination was ultra vires, regardless of when it was raised.

Whether consultation occurred

[47] The consultation procedures required to be observed by the Authority are provided for under section 18 (4) of the Act as follows:

> *In the performance of its functions under subsection (1)(c), (d), (e), (m) and (p), sections 28, **78** and 79 and any other provisions of the Act as the Authority deems appropriate, the Authority shall adopt procedures by which it will—*
> *(a) afford interested parties and the public opportunities for consultation;*
> *(b) permit affected persons and the public to make appropriate submissions to the Authority.*

[48] Regulation 15 (2) was made pursuant to section 78 of the Act. The consultation process is described by the trial judge inter alia, at paragraphs 37-38, 40-41 as follows:

37. On the 28 March 2017, TATT issued a Notice entitled "Request for Comments on the Consultative Document Results of an Interconnection Benchmarking Study for the Telecommunications Sector of Trinidad and Tobago". The Notice was published in accordance with paragraph 3 of TATT's Procedures on Consultation in the Telecommunications and Broadcasting Sectors of Trinidad and Tobago, which provides that TATT ought to undergo a minimum of two rounds of consultations with respect to regulatory documents.

[49] By letter dated 12 May 2017 TSTT submitted its comments on the 2017 International Benchmarking Study (IBS).

38. By letter dated 12 May 2017, TSTT submitted its comments on the 2017 IBS. Amongst other things, TSTT expressed disagreement with: a. The use of the 2017 IBS in the absence of an industry cost model to determine termination rates; b. The use of the results of the 2017 IBS as a regulatory maxima on the ground that those benchmarked rates were not premised on a cost model; c. The arbitrary linkage of benchmarked rates to unexplored operator costs; d. TATT's fixing of rate caps without invoking section 29(6) of the Act which TSTT expressly warned could be viewed as price-setting; e. TATT's approach to setting maxima rates by comparison which did not take into account cost-relevant factors applicable to the local telecommunications sector; f. The use of certain inappropriate jurisdictions as rate comparators; and g. The use of outdated data[11]*.*

[50] Based upon the comments made by concessionaires, including TSTT, in relation to the 2017 IBS, TATT produced a revised benchmarking study which was published in May 2019.

40. Based on the comments made by concessionaires including TSTT in relation to the 2017 IBS, TATT again retained the services of the consultant to make further amendments and inclusions to a revised Benchmarking Study which was published in May 2019 ("the 2019 IBS")[12]*.*

[51] On September 13, 2019 TSTT submitted its comments on the 2019 IBS, which was then revised by the consultant pursuant to those comments.

41. On the 13 September 2019, TSTT submitted its comments on the 2019 IBS and again TATT retained the consultant to address TSTT's comments and concerns. TATT's decisions on the comments were published in a second "Decision on Recommendations" in March 2021. Pursuant to the comments of TSTT and other concessionaires, TATT retained the consultant to perform further revisions on the 2019 IBS.

[11] TSTT's Principal Affidavit at paragraph 15

[12] Page 449 record of appeal

[52] On 16 March 2021 TATT published a third Benchmarking Study (the 2021 IBS) along with the Determination. The 2021 IBS updated the data collected to the year 2020 and enabled TATT to project costing bench marks for the period April 2021 to March 2024[13]. TATT contends that it had engaged in two rounds of consultations with all concessionaires and had considered feedback and representations received[14].

[53] On the issue of consultation, the parties are in broad agreement as to the fact that two consultation exercises had been engaged in, and that with respect to each, TSTT had provided input. These were in 2017 and 2019. The results of the 2019 consultation were included in the 2021 bench mark study that was published by TATT, together with the Determination.

[54] TSTT contends that i] it was not consulted on the specific content of the 2021 benchmark study, or ii] how the feedback it provided with respect to the 2017 and 2019 **IBS** was incorporated, if at all, until the 2021 IBS was published[15]. It contends that its comments on the 2019 IBS were also published by TATT on March 16, 2021 in its "*Decisions and Recommendations*." TSTT was therefore not afforded any opportunity to comment on the 2021 IBS or any new data which it contained, or the decision on recommendations based upon parties' comments received on the 2019 IBS[16]

[55] TATT contends that the two consultations that had been held were sufficient. The Act provided for a minimum of two consultations, but repeated consultations would have made the process unworkable.

[56] The Notice of Determination itself at paragraph (F) stated that*: "In keeping with regulation 15 (2) of the Interconnection Regulations, the Authority conducted an Interconnection Benchmarking Study, 2021 (IBS) (previous studies were conducted in 2017 and 2019) that comports with internationally accepted standards for mobile and fixed domestic and*

[13] See paragraph 42 of the judgment, Page 776 record of appeal table 1
[14] See Paragraphs 38 to 45 of the judgment
[15] Page 71 record of appeal
[16] See paragraph 22, page 89 affidavit of Lisa Agard, and exhibit LA 13 thereto at page 814 -847 record of appeal.

international benchmarks. The IBS underwent two rounds of public consultation and was finalised." [17]

[57] The 2021 IBS[18] records its maintenance history as follows: *i) Date: March 28, 2017 – Consultative Study issued for first round of consultation (the initial report), ii) June 4, 2019 – Revised Report Issued for second round of consultation (the Revised Report), iii) March 16, 2021 – Final Report (updated 2021 report).* Notably it does not refer to any consultation on the final report. This corroborates that TATT considered that the final report was the product of the first and second rounds of consultation and therefore required no further consultation.

[58] By letter dated 26 April 2021 TATT accepted that the 2017 and 2019 IBS were issued for consultation, but the 2021 IBS which included additional data was not[19]. See TATT's statements that: *"The notice of determination is not a consulted document. …in this instance it is based on the consulted IBS and is the conclusion of the Authority's consultation process."* [20] At page 867, TATT confirmed that the 2017 and 2019 IBS were issued for consultation.

[59] The 2021 IBS however i] included data additional to that in the 2021 IBS, ii] excluded some jurisdictions that had previously been in the initial and revised reports, iii] included jurisdictions additional to those which had been in the initial and revised reports, iv] applied to a different three-year period from those in the initial and revised reports[21].

[60] At paragraph 65 of the judgment the trial judge recorded that:

> *65. Six days shy of one-month's elapse, TATT still did not respond to TSTT's letter. Therefore, by letter dated 13 April 2021,16 TSTT was constrained to write to TATT again reiterating and setting out further concerns:*

---

[17] At page 102 record of appeal

[18] At page 770 volume 1 record of appeal

[19] Paragraph 49 of the judgment

49. On or about the 26 April 2021, TATT purported to respond to "statements regarding the Notice of Determination 2021/01" without directly responding to TSTT's letters of the 19 March 2021 or 13 April 2021. In that letter TATT indicated: a. Acceptance that the negotiated rates for international mobile and fixed termination would remain in effect until TATT determined the "cost by benchmarks" in accordance with the Panel's Decision and Report; b. Acceptance that while the 2017 IBS and the 2019 IBS were issued for consultation, the 2021 IBS which included additional data was not; c. The various versions of the IBS analyzed "cost-based" rates (as opposed to costs) from the benchmarking sample jurisdictions; and d. TSTT's Cost Model was not approved by TATT. Page 868 record of appeal

[20] Page 866 to 868 record of appeal

[21] See for example table 2, page 783 record of appeal

a. That TATT's reliance on the decision of the Arbitration Panel established in 2018 to determine Wholesale International Termination Rates is inappropriate since its decision was binding for a finite term which expired on the 31 March 2021;
b. Since TSTT has an internal cost model approved by TATT in accordance with Regulation 15(1), the conditions for the application of Regulation 15(2) has not yet arisen;
c. That TATT's failure to complete its internal cost model was not limited by the lack of data submission by operator but was delayed by TATT's own failure to address deficiencies in the model;
d. That the rates in the Determination are below the cost of the provision of service;
e. That the Determination had been a major impediment to the free and fair negotiations among concessionaires; and
f. That the Determination and the final version of the IBS ought to be withdrawn.

[61] TSTT's complaints concerning the Determination are set out at paragraph 64 of the judgment and reflected earlier. The trial judge at 66 of the judgment indicated that on 26 April 2021, TATT issued a letter to TSTT copying four other concessionaires, indicating, inter alia,

a. …
*b. That the IBS comports with internationally accepted standards and in keeping with section 18(4) of the Act and TATT's consultation procedures, **both reports** were issued for consultation. **The final 2021 IBS remained the same as that consulted on by stakeholders**;*
*c. **The Determination is not a consulted document** and is based on the consulted IBS and TATT's conclusion of the consultation process; and*
d. …

[62] It suggested thereby i] that there had been consultation upon the 2017 IBS and the 2019 IBS, ii] the 2021 IBS was based on the 2017 and 2019 IBS upon which there had been consultation, iii] the 2021 IBS did not require further consultation because it was the product of previous consultation processes, and iv] the final 2021 IBS **remained the same** as that that consulted on. The latter is a misquote from the letter which actually[22] states that it was the benchmarking **methodology** in the 2017 report, the 2019 report and the final 2021 report which remained the same as that consulted on by stakeholders.

[63] On the 14 May 2021 TATT indicated, (see paragraph 68 of the judge's judgment) as follows:

68. On the 14 May 2021, TATT responded to TSTT indicating:
a. …

[22] At page 867 record of appeal

b. TATT has always maintained that the parties are free to negotiate and settle on rates that are cost-based and the Determination does not seek to set the rates for domestic wholesale fixed and mobile termination as these can freely be negotiated;
c. The historical context of the IBS and asserted that the 2021 IBS was the result of the consultation process;
d. That the Determination applies to international wholesale termination rates; and
e…[23].

[64] TATT's position was that i. in producing the costing benchmarks contained in the 2021 IBS, the methodology was not altered, ii. TATT had engaged in consultations for several years and did not need to further consult with respect to the 2021 IBS when the methodology for producing it had not changed, iii] the Determination was not listed as regulatory document subject to TATT's consultation procedures, not being a regulation, framework, guideline, methodology, procedure or plan[24].

[65] By that chronology, set out in the judgment at paragraphs 38-45, it appears that TSTT was consulted with respect to the 2019 IBS and had provided comments thereon[25], although feedback on those comments was not received until March 2021. TSTT was not consulted with respect to the 2021 IBS and the Determination. The methodology of utilizing costing benchmarks in the 2021 IBS had not changed and TATT asserted that there was therefore no basis for further consultation with respect to the 2021 benchmarks.

[66] However, whether or not the costing methodology had remained constant in the 2021 IBS, and whether or not TSTT had had the opportunity to comment on it in relation to the 2019 IBS, TSTT had not been consulted on the **product** of that methodology in the 2021 IBS and the Determination. The result therefore was that with respect to the **specific** costing benchmarks set out in the 2021 Determination TSTT had not had the opportunity to be consulted or to make representations.

[67] Further the product of the 2021 Determination was to extend price maxima rates up to March 2024. TSTT therefore was never consulted or provided with an opportunity to make representations inter alia, on their applicability, relevance, or as to how, if at all, rates in the Determination could affect its profitability. The fact that costing data were unavailable

[23] Footnote 19 TSTT's Principal Affidavit at exhibits "LA 20" page 821
[24] See para 44 of the judgment
[25] See paragraph 41

did not negate the requirement for an opportunity to be provided to make appropriate representations.

[68] TATT contended that TSTT had the opportunity to make representations regarding the methodology of costing benchmarks in relation to the previous 2019 IBS. However, this fails to address the fact that the 2021 IBS produced maxima rates which limited the amount that TSTT could charge for international termination both fixed and mobile. TSTT was entitled to make representations to TATT on the impact of those price caps on its ability to provide those services profitably.

[69] The Trial Judge recognized this possibility and referred to it at paragraph 139 of her judgment. If there was also a requirement for further consultation on the product resulting from each consultation the trial judge opined that the procedure "*would be forever inconclusive and without a determination*".

[70] The trial judge's analysis on the issue of consultation is as set out at inter alia paragraphs 135 to 139 of the judgment.

> *135. After the 2019 IBS was produced, TATT invited concessionaires to make further comments on the revised IBS. After considering the concessionaires feedback, TATT produced the 2021 IBS. The production of the 2021 IBS was the completion of the second round of consultation.*
>
> *136. In making a finding, the court considered that the Benchmarking Study comprised the 2017 IBS, the 2019 IBS and the 2021 IBS. The methodology remained consistent throughout and the revised versions were updated after consideration of the comments and feedback gathered during the consultation process. TATT's Procedures on Consultation mandated it to undergo a minimum of two rounds of consultations. TATT gave effect to its procedures when it consulted the concessionaires on two occasions and produced updated versions of the Benchmarking Study. 37 TSTT's Principal Affidavit exhibit "LA 23"*
>
> *137. TATT's adherence to its procedures resulted in the production of the 2021 IBS. TSTT's feedback that the Benchmarking Study required updated data to provide a longer projection of termination rates, was the reason new data was included in the 2021 IBS. In accordance with TATT's adherence to the Procedures on Consultation, TSTT was sufficiently consulted and its feedback was considered and reflected in the updated 2021 IBS. Therefore, as it relates to the 2021 IBS, the court is not of the view that TATT breached TSTT's legitimate expectation to be heard based on the Procedures on Consultation.*
>
> *138. As it relates to the Determination, TATT asserts that it was not a regulatory document subject to consultation. The court is satisfied that the Determination is the*

notification of the decision made at the conclusion of the Procedures on Consultation – it is not disjointed from the Benchmarking Study. The Benchmarking Study, which was subject to consultation, was the basis upon which TATT made its final decision. It was the Benchmarking Studies that guided TATT in its operations and oversight of the telecommunications and broadcasting sectors by producing the Determination.

139. Accordingly, the court is of the opinion that TSTT had no legitimate expectation to be heard after the publication of the Determination. There was a legitimate expectation to be heard during the Procedures on Consultation, and this was not breached. TATT conducted two rounds of consultation with respect to the regulatory documents comprising the Benchmarking Studies in fulfilling its mandate under its Procedures on Consultation. The Determination was TATT's final decision after considering the feedback of concessionaires. There is no requirement for consultation after TATT gave notification of the decision. If TSTT is correct, then TATT's Procedures on Consultation would be forever inconclusive and without a determination.

Conclusion on Consultation

[71] TSTT was consulted and did have an opportunity to respond to the methodologies proposed of benchmarks and price maxima in both the 2017 and the 2019 consultations and availed itself of these. In fact, during the 2019 consultation TSTT suggested that apart from price maxima, that price minima also be established in relation to benchmarks[26]. TSTT commented on the 2019 benchmarking study and accepted that "TATT may consider adjusting this document so that it creates minimum benchmark rates in conjunction with the propose maxima…" At that time TSTT did not have a difficulty with the setting of maxima rates. Its view that maxima rates are ultra vires the Act appears to have evolved thereafter.

[72] The difficulty with TATT's submission, and with the trial judge's conclusion on consultation, is that TSTT never had the opportunity to respond to the 2021 benchmarks before they were published and came into effect[27]. The results of that exercise, and the **specific price maxima** that TATT published in 2021 were not made available to TSTT for further consultation. Specifically, no consultation with respect to the proposed price maxima capped rates was invited.

[73] The trial judge recognized the possibility of an interminable and unworkable process carrying the risk of permitting repeated and unnecessary consultations, when sufficient

[26] Page 651 record of appeal

[27] See page 104 record of appeal

opportunities had already been provided for consultation. However, the reality of the instant situation needs to be recognized. While the proposed product of the 2019 consultation was price maxima for a period up to March 2020[28], the specific price maxima published in 2021:

a] were not made available to TSTT before they were published,

b] included benchmarks from additional jurisdictions, and

c] were for a further period from 2021 to 2024.

[74] TATT is correct that there was no need for TSTT to be consulted again on the methodology of benchmarks or price maxima because it had already been consulted on these. While TSTT may have had the opportunity to comment on the previous consultations about the methodology of benchmarks and price maxima, it was never provided with an opportunity in consultation to comment as to how the specific rates for the specific additional periods based on benchmarks which included some different jurisdictions could have impacted it. The proposed rates in the Determination had not been proposed previously. Therefore, there was never been any opportunity for it to raise the issue if it wished, as to how those rates related to its actual costs.

[75] Notwithstanding that it produced no information as to its cost structure, nevertheless fairness required that it be provided with the opportunity to indicate inter alia, in relation to the proposed price maxima, whether if implemented they would require TSTT to set termination rates below its costs.

[76] The concretization of those proposed rates required at least an opportunity for consultation as to whether or not they would allow TSTT to cover its own costs, or to indicate whether those rates required interconnection to be provided by it with the recoverable costs of doing so below TSTT's own costs.

[77] There was no dispute that the methodology in the 2019 IBS and that in the 2021 IBS were similar. They both provided for the use of benchmarks, on which TSTT was consulted, and the use of price caps or price maxima upon which TSTT had also been consulted. The proposals in the 2021 IBS had been amended from those in the 2019 proposals. It was

[28] Page 457 Record of Appeal

not the methodology that TSTT was required to be re-consulted upon. It was the practical concrete outcome of the 2021 IBS and the Determination based thereon. TSTT's claim that it had not been consulted on the 2021 IBS or Determination therefore could not be dismissed so lightly. The fact that the methodology may have been the same is not sufficient to displace the requirement to consult on the concrete application of that methodology, especially given that it introduced additional benchmarks from other jurisdictions. Fairness required that TSTT be consulted as it had been with respect to the 2017 IBS and 2019 IBS.

[78] There is no convincing justification for TATT to have ignored the requirement for consultation with respect to the 2021 IBS and the 2021 Determination when it had recognized the need for such consultation with respect to the 2017 and the 2019 IBS. The elaborate consultation process for the 2017 and 2019 IBS could only have been sufficient if the methodology for the Determination of maxima rates in the 2019 and 2021 reports remained the same **and** no other material change was introduced in the 2021 IBS and Determination.

[79] However, there were material changes between the 2019 IBS and the 2021 IBS. The 2021 IBS was updated, (consistent with TSTT's suggestion that the benchmarks be updated). While TSTT may have made that suggestion, it did not suggest that it did not need to be consulted with respect to new benchmarks, or that it would automatically accept them no matter what they were.

[80] The trial judge performed a careful and thorough analysis distilling a significant volume of technical information in a logical and systematic manner. However, the trial judge erred in not appreciating that the opportunity to respond in a consultation on the **2019 IBS** was separate and distinct from an opportunity to respond on the material changes introduced in the **2021 IBS**.

[81] A court is not entitled to speculate as to what arguments could have been raised by TATT or TSTT in a consultation. TSTT was therefore entitled to make representations thereon even in the absence of having supplied its own cost information. It may have been that the success of those representations would have required it to supply more cost

information, but this is a matter that would properly have been addressed in the further consultation that was required.

[82] Any consultation in which TSTT were to claim that the price maxima set impacted its profitability would need to confront that fact. However, it would be inappropriate on judicial review to attempt any prediction on the outcome of a consultation process in a highly technical and specialized area. A court on a judicial review in this case is confined to investigating the fairness of the decision-making process.

[83] Correspondence was exchanged between TSTT and TATT including letters dated 26 April 2021, 30 April 2021, 7 May 2021, and 14 May 2021 culminating in a pre-action letter dated 10 June 2021[29]. These letters raised TSTT's substantive concerns regarding the 2021 Determination. While they may address some or even all of the matters that may have arisen in a consultation process on the 2021 Determination this cannot be presumed by a court. In those circumstances it will be appropriate to grant at least that aspect of the relief sought by TSTT that requires remitting the 2021 Determination for TATT to engage in a consultation process as determined by this court.

[84] **The case of R v Secretary of State for the Home Department, ex parte Doody** [1994] 1 A.C 531 provided for the possibility of representations being made after a decision with a view to procuring its modification. In fact, TSTT's correspondence set out above indicates clearly what its concerns were and telegraphed what it would have raised had it had the opportunity for a full consultation process. However, that correspondence cannot be presumed to be a substitute for that fuller consultation, or the equivalent of a consultation process held with the specific purpose of incorporating the representations received from TSTT after the Determination. The representations in its correspondence were uninvited and TATT made its position perfectly clear that the Determination was not a "consulted document" and had already been the product of sufficient consultation.

[85] Depending on the circumstances an additional duty of fairness may be implied, even if TATT had been correct in asserting that the 2021 IBS was itself the product of two rounds of consultation on each of the 2017 and 2019 IBS, and was therefore not itself a "consulted

[29] See paragraphs 49-53 of the judgment and page 866-893 record of appeal

document"[30]. Fairness required an opportunity for consultation by TSTT on the additional material contained therein. In fact, the volume of correspondence generated after publication of the 2021 IBS and Determination corroborates this view.

[86] The respondent accepts that the law is if the proposals have been amended so fundamentally as to make them fresh proposals then further consultation would be required.

[87] At paragraphs 121 and 122 of the respondent's submissions it contended as follows:

> *121. The law was explained in Supperstone, Goudie and Walker on Judicial Review at [10.49] [TAB 9] as follows:*
> *"...if the power to courts require the process will are too liberal in their use of the consultation, there is a danger that inhibit change, either because the consultor will be disinclined to make amendments to proposals because processes that of might the repeated consultation result or because the consultation process itself will drag on interminably.*
> *The solution which the courts have adopted to this conundrum is that if the proposals had been amended so fundamentally as to make them fresh proposals, then further consultation will be necessary ...*
>
> *It seems that the distinction lies between cases where the consultation demonstrates that the original proposals require major reformation, and those where they are merely amended as a result of the consultation process itself: see R v Islington London Borough Council, ex parte East."*
>
> *122. The test formulated by the authorities, according to Supperstone at [10.51] is:*
> *"...the test of fundamental difference ... adopted so as to illustrate the very high order of the significance of any difference which would warrant re consultation'. The ultimate question from these cases is one of fairness and whether something has gone 'clearly and radically wrong."*

[88] The case law addresses this by permitting consultation to come to an end unless there is a substantially different product generated as a result of the input from the previous consultation. See paragraphs 43 to 45 of **R v East Kent Hospital NHS Trust** [2002] EWHC 2640 (Admin)[31].

> ***[43]*** *A matter of crucial importance in determining whether the defendants in this case should have re-consulted on the proposals under challenge was the nature and extent of the difference between what was consulted on in the consultation paper and the proposal accepted in the March 2002 decision. Clearly, if all the fundamental aspects of the decision under challenge had not been consulted on but ought to have*

[30] This is understood to mean that according to TATT this was not a document requiring any further opportunity for consultation being the product of sufficient consultation.
[31] Tab 4 of the respondent's bundle

been, that would indicate a breach of the duty to consult, while at the other extreme, trivial changes do not require further consideration. In approaching this issue, it is necessary to bear in mind not only the strong obligation of the defendants to consult, but also the dangers and consequence of too readily requiring re-consultation, as those dangers also flow from the underlying concept of fairness, which underpins the duty to consult.

[44] *As Schiemann J, as he then was, (with whom Lloyd LJ agreed) pointed out in explaining these dangers in Shropshire Health Authority (page 223):-*

> *"A consultation procedure, if it is to be as full and fair as it ought to be, takes considerable time and meanwhile the underlying facts and projections are changing all the time. It is not just a question of an iterative process, which can speedily be run through a computer. Each consultation process if it produces any changes has the potential to give rise to an expectation in others, but they will be consulted about any changes. If the courts are to be too liberal in the use of their power of judicial review to compel consultation on any change, there is a danger that the process will prevent any change – either in the sense that the authority will be disinclined to make any change because of the repeated consultation process which this might engender, or in the sense that no decision gets taken because consultation never comes to an end. One must not forget there are those with legitimate expectations that decisions will be taken."*

[45] *So I approach the issue of whether there should have been re-consultation by the defendants in this case, on the proposals now under challenge on the basis that the defendants had a strong obligation to consult with all parts of the local community. The concept of fairness should determine whether there is a need to re-consult if the decision-maker wishes to accept a fresh proposal but the courts should not be too liberal in the use of its power of judicial review to compel further consultation on any change. In determining whether there should be further re-consultation, a proper balance has to be struck between the strong obligation to consult on the part of the health authority and the need for decisions to be taken that affect the running of the Health Service. This means that there should only be re-consultation if there is a fundamental difference between the proposals consulted on and those which the consulting party subsequently wishes to adopt.*

[89] A duty of reconsultation only arises "*if there is a fundamental difference between the proposals consulted on and those which the consulting party subsequently wishes to adopt*". The Court also considered the following matters relevant to the issue whether re-consultation was required in any particular context: i] the nature and extent of the difference between what was consulted on and the proposal accepted, ii] whether changes after consultation were trivial and therefore did not require further consideration or consultation, iii] the dangers of compelling consultation on any change which would include causing the decision maker to become disinclined to make any change because of the fear of repeated consultations being required and the possibility that no decision gets

taken because consultation never comes to an end (a possibility correctly confronted by the trial judge).

[90] See also paragraph 62.3.11 of the Judicial Review Handbook: Fordham, 7th edition[32] under the rubric **Reconsultation**: **trigger for further consultation** where the triggers identified in the case law include i] there is a fundamental change of circumstances, ii] a fundamental difference owing to a change in circumstances, iii] a new basis was introduced.

[91] Accordingly, there is no real dispute between the parties as to the law relating to re-consultation. It is the application of those principles that separates the parties.

What did fairness require

[92] **Fairness** required the opportunity for such representations to be entertained before a decision was made which had the potential to affect TSTT's profitability in relation to this segment of its services. Even if consultation had not occurred before the publication of the 2021 Determination, fairness required that TSTT be provided with the opportunity to make representations regarding the Determination with a view to procuring its modification. See **R v Secretary of State for the Home Department, ex parte Doody** [1994] 1 A.C 531 at page 560 d-g where this issue was considered as follows: -

> *"What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may*

[32] Tab 5

> *weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer".*

[93] It was in any event entitled on the grounds of fairness to an opportunity for consultation given the potential for an adverse impact upon TSTT's profitability for at least a part of the period covered by the Determination[33].

> *….Fairness is another name for natural justice, so for convenience the Board will refer to fairness or the duty to act fairly. Legislation is to be construed in the light of values recognised under the common law and which it is presumed the legislature also recognises, so that where legislation confers a discretionary power to take action against an individual there is a presumption that the power must be exercised fairly. What fairness requires depends on the context in which the power arises and the circumstances in which it falls to be exercised.*

Legitimate Expectation

[94] TSTT had a **legitimate expectation** that TATT would comply with its own procedures for consultation. It had followed those procedures with respect to consultation on the 2017 and 2019 IBS.

Costs

[95] TSTT never complied with the Determination. Nor did it comply with the orders of the trial judge. It proceeded to ignore both without obtaining a stay of the judgment of the High Court. At paragraph 145 of the respondent's submissions it contended as follows:

> *145. We close by asking the Court to note that although TATT's Determination took effect on 16 March 2021 to cover the period April 2021 to March 2024 and applied to all concessionaires authorized to provide international termination services, TSTT never implemented same although no stay or injunction was sought or obtained by TSTT. Even after the Learned Judge dismissed TSTT's Claim for judicial review on 26 May 2022, TSTT refused to implement the Decision.*
>
> *The words of TATT's CEO, Cynthia Reddock-Downes at para 70 …of her affidavit still ring true today:*
>
>> *"70. ... Although the Determination fixes maxima rates for international termination rates for fixed and mobile interconnection services for the period April 2021 to April 2024, TSTT has failed and refused to implement the Determination since April 2021 before the filing of its Application for Leave to Apply for Judicial Review and continues to be in breach of the Determination as it refuses to give effect to the Determination and is charging rates in excess of the maxima, thus earning higher revenues to the prejudice and/or detriment of the other operators who are required to pay the higher rates."*

[33] **Public Service Commission v Ceron Richards** [2022] UKPC 1 in particular paragraph 29

[96] In those circumstances TSTT in effect conferred upon itself its own remedy. It has succeeded on the issue of consultation. It has not succeeded on the issues of illegality or irrationality which formed at least an equal part of its case and its submissions in support of its challenge to the Determination.

Whether TSTT was prejudiced by any failure to consult with respect to the 2021 benchmarks and the Determination

[97] TATT contended that in fact TSTT was enabled by the maxima rates in the Determination to charge, to a large extent, even more than the rates recommended based upon the 2019 IBS, upon which it had been consulted and did have the opportunity to make representations.

[98] TATT therefore contended that even if there had been failure to consult with TSTT on the 2021 IBS no prejudice was occasioned to TSTT as a result of the Determination. That is because the recommended rates in the 2019 IBS, with respect to which TSTT had been consulted, were less than most of the price capped rates that were introduced in the 2021 IBS and the Determination.

[99] However, comparison of the table set out in the Determination[34] in conjunction with the rates that were recommended in the 2019 IBS[35], reveals that this observation does not apply in relation to maxima rates for international mobile termination for the period April 2023 to March 2024 set under the 2021 Determination.

[100] TATT provided numerous examples by reference to Table 1[36]. That Table demonstrates that for the first two years of the period April 2021-March 2022, and April 2022 to March 2023 the rates set out in the Determination for **international mobile termination** and **international fixed termination** were in excess of those that had previously been recommended in the 2019 IBS for the period April 2019 to March 2020. It was only in the

[34] Page 103 record of appeal exhibit LA1 of affidavit of Lisa Agard
[35] Page 450 and 457 Record of Appeal
[36] At page 103 of the Record of Appeal

third year of the proposed period, i.e., April 2023 to March 2024, that some of the proposed rates were less than those which had been recommended in the 2019 IBS.

[101] This point however does not address the procedural issue raised by TSTT. If the opportunity for consultation had been afforded to TSTT then that is a point could have been made by TATT rather than in submissions on appeal. In fact, it demonstrates the necessity for consultation in the first place.

Recommended Domestic Mobile Termination under the 2019 IBS

[102] For completeness however, TATT's contention in this regard are set out as follows. It provided examples in a table (E1)[37] which in summary demonstrated that the recommended costing benchmark in the 2019 International Benchmarking Study for Domestic Mobile Termination was US $.0200 dollars for the period April 2019 to March 2020.

Recommended Domestic Fixed Termination under the 2019 IBS

[103] The recommended domestic fixed termination rate was US $ .0045

Recommended Mobile International Carriage under the 2019 IBS

[104] The recommended mobile international carriage charge thereunder was US $.0150.

Recommended Fixed International Carriage under the 2019 IBS

[105] The recommended fixed international carriage rate was US $.0030.

Rates under 2021 IBS and Determination

[106] The Determination provided for rates for the period April 2021 to March 2022, April 2022 to March 2023 and April 2023 to March 2024.

Domestic Mobile Termination - 2021 IBS

[107] Under the Determination the rate established for **Domestic Mobile Termination** for April 2021 to March 2022 (the Determined Maxima Rate - the maximum rate that could be charged) was US $.0300.

[37] Page 457 record of appeal

[108] For April 2022 to March 2023 the maximum rate that could have been charged for **Domestic Mobile Termination** was US $.0200

[109] For April 2023 to March 2024 the maximum rate that could be charged for Domestic Mobile Termination was US $ .0095.

[110] Therefore, under the Determination for April 2021 to March 2022 the Domestic Mobile Termination rate of US $ .0300 was greater than the recommended rate in the 2019 IBS (US $.0200) and that rate for the period April 2022 to March 2023 ($U.S .0200) was the same as the rate recommended for that service in the 2019 International Benchmarking Study.

[111] It was only for the period April 2023 to March 2024 that the rate in the 2021 IBS and the Determination for Domestic Mobile Termination was less than the US $.0200 in the 2019 study. In the 2021 Determination for that period it was US $.0095.

Mobile International Carriage Charge – 2021 IBS

[112] The same point was made with respect to the Mobile International Carriage charge.

[113] For April 2019 to March 2020 the recommended rate for Mobile International Carriage based upon the 2019 IBS was US $.0150. However, under the Determination and based upon the 2021 IBS the rates for the period April 2021 to March 2022 were higher - that is US $.0480, and for the period April 2022 to March 2023 – US $ .0270.

[114] Again, for the period April 2023 to March 2024 the 2021 IBS and the Determination provided for a maxima rate that was less than that recommended in the 2019 IBS, that is US $.0065 (**less than** the recommended US $.0150 in the 2019 IBS).

[115] The Domestic Mobile Termination rate and the Mobile International Carriage charge together determined the International Mobile Termination rate which was the sum of those two charges.

International Fixed Termination Rate

[116] With respect to the International Fixed Termination rate this comprised the sum of the Domestic Fixed Termination rate and the Fixed International Carriage charge.

Domestic Fixed Termination Rate – 2021 IBS

[117] The same point was made by TATT in relation to the components of that charge. With respect to April 2021 to March 2022 the Determination provided that the Domestic Fixed Termination Rate would be US $.0055. This was higher than the Domestic Fixed Termination Rate under the 2019 IBS which was US $.0045.

[118] However, with respect to April 2022 to March 2023 the Domestic Fixed Termination Rate under the 2021 Determination was US$ .0040. That was **less than** the recommended 2019 rate under the 2019 IBS which was US $.0045.

[119] Similarly, with respect to the period April 2023 to March 2024 under the 2021 Determination the maxima rate for Domestic Fixed Termination was to be US $.0027. That was also less than the rate recommended in the 2019 IBS for that service which was US $.0045.

Fixed International Carriage Charge

[120] With respect to the Fixed International Carriage Charge under the 2019 IBS the recommended rate was US $.0030. The maxima rate under the 2021 Determination for the period April 2021 to March 2022 was US $.0135. The rate for the period April 2022 to March 2023 under the 2021 IBS and the Determination was US $.0095, and under the 2021 IBS and the Determination the rate for April 2023 to March 2024 was US $.0065.

[121] Accordingly, the rates for Fixed International Carriage proposed under the Determination for all three periods were higher than the rates recommended under the 2019 IBS.

[122] That analysis reveals that generally the 2021 Determination did not result in maximum rates for TSTT for the components of International Mobile Termination and International Fixed Termination that were less than those that applied under the 2019 IBS which TSTT had been consulted upon.

[123] However, there were exceptions, in which the proposed maxima rates would be lower than the rates that applied under 2019 IBS. As seen above those were:

i] The rate for the component **Domestic Mobile Termination** for the period April 2023 to March 2024;

ii] The rate for the component **Mobile International Carriage Charge** for the period April 2023 to March 2024;

iii] The rate for the component **Domestic Fixed Termination** for the period April 2022 to March 2023; and

iv] The rate for the component **Domestic Fixed Termination** for the period April 2023 to March 2024.

[124] The analysis also demonstrates that with respect to the international fixed termination rate, although for the period April 2022 to March 2023 the domestic fixed termination component was less than in the 2019 IBS, **the total of the two components**, **domestic fixed termination rate and fixed international carriage charge** resulted in a rate for that period April 2022 to March 2023 that was **overall** higher than the rate which applied based upon the 2019 IBS. The same applied with respect to the period April 2023 to March 2024.

[125] Although the component for **Domestic Fixed Termination** was less (US $.0027) than the rate in the 2019 IBS (US $.0045), the total in respect of the component for **Domestic Fixed Termination** and **Fixed International Carriage Charge** for the period April 2023 to March 2024 was US $.0092.

[126] The same applies for the period April 2022 to March 2023 where the total of the maxima rates for the components Domestic Fixed Termination and Fixed International Carriage was US $.0135. These maxima rates were both higher than the total of the recommended rates in respect of **International Fixed Termination** based upon the 2019 IBS which was US $.0075, (comprising US $.0045 for Domestic Fixed Termination and US $ .0030 for Fixed International Carriage).

[127] The result of an examination of the table[38] headed Table I. Maxima rates for **International Termination Rates** (sic) is that notwithstanding any alleged lack of consultation with TSTT with respect to the 2021 IBS and Determination, in actual fact TSTT was not disadvantaged by the maximum rates that it was permitted to charge under the 2021 Determination based upon the 2021 IBS. That is because those rates were, with the exceptions identified above, all higher than the recommended rates under the 2019 IBS **on which it was**

[38] At page 103 of the record of appeal

consulted. The lack of consultation therefore only resulted in potential disadvantage to TSTT with respect to the International Mobile Termination Rate for the period April 2023 to March 2024.

[128] The Determination would have permitted TSTT to utilize maxima rates in excess of those recommended based on the 2019 IBS, except with respect to the International Mobile Termination Rate for the period April 2023 to March 2024. Nevertheless, despite this TSTT was entitled to be consulted so as to enable it to make representations as to the effect of the maxima rates proposed for International Mobile Termination and the impact of even this limited reduction in price maxima for that service for that period. TATT is the specialized regulator specifically mandated by statute and is best placed to consider specialized technical input in the required consultation process on the 2021 IBS and Determination including the relevance or otherwise of the above.

[129] In fact, TSTT ignored the Determination altogether in its negotiations for interconnection rates that it proposed to charge other concessionaires. The following circumstances are also relevant i] TSTT had been consulted on the 2019 IBS and the recommended rates therein, (including the lower maxima rates recommended by the 2019 IBS with the exception identified), ii] the 2021 Determination on its face may even have benefitted TSTT, (save for the International Mobile Termination Rate for the period April 2023 to March 2024), iii] TSTT ignored the Determination in any event, including the exception above, iv] TSTT's arguments with respect to the legality of a] setting price maxima, b] the reference to benchmarks, c] the issue of irrationality, d] the issue of the Determination being inconsistent with the policy of the Act, were all unsuccessful. The parties would be invited to address as to the impact of these on the appropriate order for costs.

[130] Mindful of the time that has elapsed TATT would be entitled to stipulate and enforce strict but reasonable time limits for the necessary consultation, especially bearing in mind that substantial ventilation of TSTT's concerns has now occurred in pre-action correspondence and in the course of submissions before the High Court and the Court of Appeal.

Conclusion

[131]

i. a] TATT did have jurisdiction under the Act to set maxima rates for telecommunication interconnection services. **Price caps** and benchmarks fell squarely within the category of **pricing rules and principles** and b] TATT was authorised by section 29 (3) of the Act to regulate prices for public telecommunication services and international incoming and outgoing settlement tariffs. There was therefore nothing illegal, unlawful or ultra vires about the use of a price cap or price maxima in relation to interconnection rates.

ii. Further, TATT was authorised under Regulation 15 (2) to utilize international costing **benchmarks** for inter alia, price regulation and interconnection.

iii. There was nothing irrational, unreasonable or unfair in the use of international costing benchmarks. That is because the Act and regulations clearly provided for their use as a proxy for costs, where costing methodologies, models or formulae were unavailable. This was especially so when the reason for the unavailability of the costing information from TSTT was that it never supplied it.

iv. Consultation was required in relation to the 2021 IBS, and the proposed Determination based thereon, because it referred to rates and periods which had never been communicated to TSTT or other concessionaires previously. TSTT (and other concessionaires) were accordingly deprived of the opportunity to make representations in the course of a consultation as to, inter alia, any potential considerations which may have arisen with respect to its ability to cover its costs of providing the relevant service.

v. TATT is the regulator of the telecommunications sector. As set out in the preamble to the Act, its role and purpose include acting as an intermediator between the established virtual monopoly and new entrants to guide the transformation of the telecommunications sector from a virtual monopoly to a competitive environment. It did not act unlawfully in setting price maxima. Having concluded that additional consultations, further to the 2017 and 2019 consultations, were not necessary, it omitted to consult on the potentially new matters introduced by the 2021 Determination. Despite this however, there is no basis on the evidence for contending that TATT acted in any way inconsistent with its mandate in its role as regulator. The role of the regulator continues to be an important and statutorily mandated function, not to be hampered by technical, restrictive and abstruse purported constructions of its price regulating powers.

vi. There is no basis whatsoever for contending that the Determination undermined the policy of the Act. It was in fact entirely consistent with TATT's performance of its role as regulator, and its statutorily mandated function under the Act to guide the transformation of the telecommunications sector from virtual monopoly to a competitive environment, and provide the conditions for an open market, and the facilitation of the orderly development of the sector.

Orders

[132] i] An order of certiorari is granted quashing the Determination.

ii] An order of mandamus is granted compelling TATT to publish the 2021 IBS and a draft of the Determination for consultation in accordance with TATTs published consultation procedures with reasonable timelines for conducting and concluding the consultation process.

…………………………………………………………………….

Peter A. Rajkumar

Justice of Appeal

---

[i] The court would like to record its appreciation to Ms. E. Ali, Judicial Research Counsel II for her contribution to this judgment.