Easter Term
[2024] UKPC 9
Privy Council Appeal No 0073 and 0074 of 2022

JUDGMENT

Mauritius Telecom Ltd and 3 others (Respondents) *v* Emtel Ltd (Appellant) (Mauritius); Mauritius Telecom Ltd and 3 others (Respondents) *v* Emtel Ltd (Appellant) No 2 (Mauritius)

From the Supreme Court of Mauritius

before

Lord Reed
Lord Briggs
Lord Sales
Lady Rose
Lady Simler

JUDGMENT GIVEN ON
22 April 2024

Heard on 16 and 17 January 2024

Appellants
Mark Brealey KC
Anwar Moollan SC
Emilie de Spéville
Ali Adamjee
(Instructed by ENSafrica (Mauritius))

1st Respondent
Guy Vassall-Adams KC
Louis Eric Wilson Ribot SC
Tim James-Matthews
(Instructed by Bridgewater Solicitors)

2nd Respondent
Ravindra Chetty SC
Yashley Reesaul
Khavi Chetty
(Instructed by RWK Goodman LLP (London))

3rd Respondent
Desiree Bassett SC
Aidan Casey KC
Nandraj Patten
Jean-Gaël Basset
Heetesh Dhanjee
Prasanjeet Seenauth
(Instructed by RWK Goodman LLP (London))

4th Respondent
Alain Choo-Choy KC
Rajeshsharma Ramloll SC
(Instructed by Blake Morgan LLP (London))

LADY ROSE AND LADY SIMLER:

1. INTRODUCTION

1. During the 1980s it became clear to Governments across the world that there was about to be a technological revolution in the way that telecommunications services were provided. The sectoral model that was typical at this time was that a government department owned and operated the sole physical, land-based network of equipment connecting fixed telephones in homes and offices by copper wiring. Governments recognised that in order to ensure that the full benefits of new technologies were realised, as and when they were invented, competition between providers of different kinds of services needed to be introduced. That would encourage the sector to innovate so that the best technology would ultimately win out. It would also ensure that consumers would pay reasonable prices for their calls.

2. It was also generally recognised that a move from a monopoly public sector incumbent to a competitive market would be challenging and would need proactive, ex-ante regulation. That regulation would have two aims. It would need to prevent the existing network operator, once cut free from public sector constraint, from overcharging customers who still had little choice but to buy its services. Conversely, it would need to prevent the monopolist from hindering market entry by undercharging for its services to subscribers in sectors opened to competition so as to make it uneconomic for other providers to compete. An additional factor was that providers of competing services, at least when they were first introduced, would only be attractive to subscribers if it was possible for example, for a mobile phone user to call and be called by someone using a landline. Every competitor to the incumbent operator would therefore also need to be a customer interconnecting its own subscribers' calls with the subscribers to the monopoly incumbent's network. Regulation would have to ensure that the incumbent acted fairly in its treatment of those competing customers, even though their success would inevitably erode the incumbent's market share.

3. This process began in Mauritius with the enactment of the Telecommunication Act 1988 ("the Telecom Act 1988") and the Telecommunication (Transfer) Act 1988 ("the Transfer Act 1988"). The Transfer Act 1988 transferred the operation of the fixed line network out of the central government department which ran it into a new corporate entity called Mauritius Telecommunication Services Ltd. The Telecom Act 1988 set up the Telecommunication Authority ("the Telecom Authority") to regulate the conduct of telecoms service providers through the mechanism of conditions set in a licence granted by the Telecom Authority. Without such a licence, it was unlawful for telecoms services to be provided.

4. The appeals currently before the Board arise from a claim by the Appellant ("Emtel") that there was a serious failure of the telecoms regulatory regime in Mauritius between 1996 and 1998. Emtel had entered the market with a licence to be the exclusive provider of the first mobile phone services offered to people in Mauritius. Those mobile phone services initially had to compete only with the existing fixed line services operated by the Second Respondent ("Mauritius Telecom Ltd"), the new name for the company which had taken over the operation of the network under the Transfer Act 1988.

5. In 1996, however, Mauritius Telecom Ltd set up a wholly owned subsidiary, the Third Respondent ("Cellplus") with the aim of competing with Emtel more directly in the supply of mobile phone services. Emtel alleged that Mauritius Telecom Ltd and Cellplus had engaged in conduct on the market which used Mauritius Telecom Ltd's continuing monopoly in the market for landline calls to enable Cellplus to compete unfairly in the supply of mobile phone services. In particular, Mauritius Telecom Ltd subsidised Cellplus' business so that Cellplus could enter the market undercutting Emtel's tariffs, leading to huge losses of revenue for Emtel when it had to reduce its prices to match.

6. Furthermore, Emtel complained that the Telecom Authority had wholly failed in its important task of ensuring that Emtel was not at risk of being driven out the market by this kind of conduct.

7. In December 1996 Emtel applied for leave to bring judicial review proceedings against the Telecom Authority. Those judicial review proceedings were strongly resisted by the Telecom Authority, Mauritius Telecom Ltd, Cellplus and the Ministry of Technology, Communication and Innovation ("the Ministry"). Leave was ultimately granted to Emtel by this Board on 2 October 2000: see *Emtel (Mauritius) Ltd v Ministry of Telecommunications* [2000] UKPC 36, [2000] MR 220. The judicial review proceedings were later ended, in circumstances described below, because Emtel had also issued civil proceedings seeking damages alleging breaches of article 1382 of the Civil Code.

8. Emtel's claim for damages was successful before the trial judge, A F Chui Yew Cheong J ("the Judge"). She handed down her judgment on 9 August 2017 ([2017] SCJ 294 ("the Main Judgment")). She found that Mauritius Telecom Ltd, Cellplus and the Information Communication Technologies Authority ("the ICTA") (the successor regulator currently tasked with regulating the sector) had committed serious and intentional breaches of article 1382. She held that they were liable jointly and *in solido* to pay Emtel a total of Rs 554,139,900 in damages.

9. All three defendants brought appeals against that judgment. The Court of Civil Appeal of the Supreme Court of Mauritius (Caunhye CJ and Oh San-Bellepeau J) ("the Appeal Court") allowed those appeals in two judgments, one disposing of the appeals brought by Mauritius Telecom Ltd and Cellplus: [2021] SCJ 390 ("the *MTL/Cellplus* Judgment") and the other disposing of the appeal brought by the ICTA: [2021] SCJ 389 ("the *ICTA* Judgment").

10. The *ICTA* Judgment allowed its appeal on the grounds, broadly, that the transitional provisions enacted when the original regulator, the Telecom Authority, was replaced by subsequent regulators were not effective to fix the ICTA with liability for regulatory failures in 1996. The *MTL/Cellplus* Judgment allowed the appeals brought by Mauritius Telecom Ltd and Cellplus on the grounds that Emtel's claim had only alleged that their tortious conduct comprised breaches of two obligations imposed by conditions of the operating licence granted to Cellplus. The Appeal Court held that the claim was misconceived because those obligations were not included in Cellplus' operating licence.

11. Emtel's appeal to the Board challenges both Appeal Court judgments.

2. THE MAURITIAN TELECOMS SECTOR AND ITS REGULATION

(a) The 1988 legislation, the Telecom Authority, and the licensing of Emtel

12. Before the events with which the Board is concerned, all telephone services within Mauritius were provided over a fixed line network which was owned and administered by the Department of Telecommunication of the Government of Mauritius ("the Department"). Any regulatory functions for the sector were also exercised by the Department. On 1 April 1988 a wholly owned company was incorporated. It was named Mauritius Telecommunication Services Ltd. It changed its name in 1992 to Mauritius Telecom Ltd following the transfer to it of international telecoms services which had until then been operated by different entities. The Board will refer to the company by its current name throughout this judgment.

13. This move was brought about by the Transfer Act 1988. Section 2 of that Act defined the "Department" as "the Department of Telecommunication or, as the case may be, the Government in relation to the Department of Telecommunication". Section 3 provided that "the undertaking of the Government relating to the Department shall on the appointed day [which was 1 July 1988] vest in the licensee". The licensee was Mauritius Telecom Ltd. Section 3 described what the undertaking of the Department comprised. This included the movable and immovable assets as agreed between the Department and the licensee, and various rights and liabilities of the Department.

14. The Telecom Act 1988 provided by section 4 as follows:

> "4(1) There is established for the purposes of this Act a Telecommunication Authority which shall consist of—
>
> (a) a Chairman;
>
> (b) a representative of the Minister;
>
> (c) a person with recognised experience in telecommunication.
>
> (2) Every member of the Authority shall—
>
> (a) be appointed or designated, as the case may be, by the Minister on such terms and conditions as he thinks fit;
>
> (b) be paid such remuneration or allowances as the Minister may think fit.
>
> (3) No member of the Authority shall be deemed to hold a public office by reason only of his appointment to the Authority."

15. The functions of the Telecom Authority were set out in section 5 and included to monitor, control, and regulate telecoms services and facilities, to issue, modify and revoke licences and "to do all such things as may be requisite under this Act".

16. The Telecom Act 1988 also set up a Telecommunication Advisory Council comprising a Chair with legal experience, a representative of the Minister and representatives of consumer interests and of the telecommunications industry.

17. Section 9 of the Telecom Act 1988 conferred a power of direction on the Minister in the following terms:

> "9(1) The Minister may give to the Authority and the Council such directions as to the performance of their respective duties under this Act as appear to the Minister to be requisite in the

public interest and the Authority and the Council, as the case may be, shall comply with such directions.

(2) The Minister may, in the public interest and in the interests of security, exempt any department or unit of the Government from the necessity to comply with this Act on such terms and conditions as he thinks fit."

18. Sections 10 to 14 of the Telecom Act 1988 dealt with the grant of licences by the Telecom Authority to people operating telecommunication installations:

a. Section 10 provided that no person shall establish maintain or operate a telecommunications installation which is connected to an outside telecommunication line unless he obtains a licence from the Telecom Authority.

b. Section 11 dealt with applications for licences and the factors to which the Telecom Authority should have regard when deciding whether to grant a licence, including any directions of the Minister.

c. Section 12 dealt with the modification and revocation of licences and section 13 dealt with appeals from decisions of the Telecom Authority to the Minister.

d. Section 14 dealt with the duties of the licensee including to maintain and repair the installation and to furnish such reports, audited accounts and other information as the Telecom Authority may request.

e. Sections 15 and 16 conferred powers on a "public operator" broadly to enter premises, run their lines along streets and bridges and cut back trees and hedges as needed to install the equipment for operating their service. A public operator was defined in section 2 as a person holding a licence to operate a telecoms service for use by the public.

19. Section 17 provided that any tariffs or charges proposed by a licensee had to be approved by the Telecom Authority and would only be approved if they were reasonable.

20. In Part III dealing with miscellaneous matters, section 29 of the Telecom Act 1988 provided for an immunity for the Government:

> "29 No liability shall attach to the Government in respect of any action, claim or demand by any person in consequence of any damage arising from anything done or omitted to be done by a licensee."

21. Part IV of the Telecom Act 1988 created a number of criminal offences including at section 40:

> "40 Any person who establishes, maintains or operates a telecommunication installation to provide a telecommunication service in breach of section 10 or in breach of the terms, conditions or restrictions of any licence in respect of that installation shall commit an offence."

22. By section 42, such an offence is punishable by a fine not exceeding Rs 50,000 and imprisonment for a term not exceeding 12 months and the offender may forfeit their installation and have their licence cancelled.

23. Finally, section 43 carried forward any licence issued under the previous legislation so that it was deemed to have been issued under the Telecom Act 1988 and remained valid for a maximum period of one year after the Act came into force.

24. Emtel was incorporated on 3 July 1987 as a joint venture between the Mauritian company Currimjee Jeewanjee & Co Ltd and Swedish and American partners. At that time there was no infrastructure established in Mauritius to operate a mobile telecoms network. In May 1988, Emtel became the first operator to be granted a licence by the Telecom Authority to provide mobile phone services in Mauritius. It was initially licensed by the Department, but that licence was superseded with effect from 1 January 1989 by a licence issued by the Telecom Authority under section 10 of the Telecom Act 1988. The licence was granted to Emtel for a period of seven years on an exclusive basis. That period of exclusivity expired on 31 December 1995.

25. Under the conditions of the licence, Emtel was required to enter into an interconnection agreement with Mauritius Telecom Ltd. This was eventually achieved in July 1995. Emtel was given a three-year "grace period" ending 1 July 1992, after which it had to pay charges to the Telecom Authority calculated as a percentage of its gross proceeds from all calls made by and to mobile subscribers. The percentage started at 15% and rose to 25% of all gross proceeds in year 5 and thereafter.

26. The licence stipulated the prices for calls which Emtel was required to charge users; an initial connection fee of Rs 600, a monthly "access fee" of Rs 335 and a call

charge of Rs 5 per minute for both incoming and outgoing calls. The licence provided that all changes in fees and call charges “should receive the prior approval of the Government”. The licence also stipulated the “rental cost” for leased circuits which Emtel had to pay initially to the Department and later, once Mauritius Telecom Ltd had been established, to that company.

27. Following the issue of its licence, Emtel started providing mobile phone services in Mauritius and enlisted subscribers. At this time, Emtel relied on analogue technology. According to a paper it submitted to the Ministry in 1996, Emtel invested about US$12 million in Mauritius following the grant of the licence. On 14 April 1993, Emtel sought a renewal of its exclusivity period for another seven years, but this was rejected by the Telecom Authority on 17 March 1994.

28. By 1996 when the events which gave rise to the claim took place, Emtel had about 15,000 subscribers to its mobile phone network.

(b) The licensing of Cellplus and the establishment of the MTA and the ICTA

29. The lead up to the licensing of Cellplus will be considered in more detail when considering the *MTL/Cellplus* appeal. The following is therefore a broad outline only.

30. In December 1993, Mauritius Telecom Ltd applied for a cellular mobile telecommunications licence using digital GSM technology. On 17 March 1994, the Telecom Authority approved the application of Mauritius Telecom Ltd to set up and operate a GSM cellular mobile telephone service as from 1 January 1996. It was later decided that Mauritius Telecom Ltd would establish a wholly-owned subsidiary to compete in the supply of mobile telephone services and Cellplus was incorporated in March 1996. In this judgment, Mauritius Telecom Ltd and Cellplus are referred to together as “the Operators”.

31. It is common ground that as from 15 March 1996, Cellplus started issuing portable handsets, chargers and SIM cards to certain users free of charge. It also provided all local calls free of charge for those users though charges were imposed for international calls. There was a dispute between the parties in these proceedings as to whether, as Mauritius Telecom Ltd and Cellplus contended, these were a few “friendly users” enlisted simply for the purpose of testing the network or whether, as Emtel contended, Cellplus was already seeking out and contracting with subscribers on a commercial basis before it was granted a licence by the Telecom Authority in September 1996.

32. On 5 September 1996 the Telecom Authority granted Cellplus a licence to operate a global system for mobile telecommunications. The licence stated that it was "deemed to have entered into force on 01 January 1996". This start date was then amended to 14 March 1996 by letter dated 31 March 1997. One of the issues in the *MTL/Cellplus* appeal is whether Emtel has asserted a claim to damages for loss suffered in the period between March and August 1996 (referred to as Period 1) or only for loss suffered in the period after September 1996 (referred to as Period 2) and what effect, if any, the backdating of the licence to cover Period 1 has on any such claim.

33. A further key dispute in these proceedings is the legal consequences, if any, of the contents of a press release issued by the Telecom Authority on 5 September 1996 ("the Press Release"). That Press Release announced the decision to grant Cellplus' application for a licence to operate a GSM cellular mobile telephone service. The Press Release stated that in considering Cellplus' application:

> "… the Telecommunication Authority has considered the far-reaching changes that have occurred in the field of telecommunications and is alive to Government's strong commitment to the liberalisation of this sector. The Authority is also conscious of the declared policy of Government to give its full support to the modernisation of the telecommunication sector. It is only through the establishment of a full-fledged information based economy that Mauritius will be able to become a business hub in the region".

34. The Press Release noted the steps taken by the Government to review the legal, regulatory and institutional framework in the sector and to encourage "fair and healthy competition among all operators in that sector".

35. It stated further that the Telecom Authority had decided to grant Cellplus a licence after giving due consideration to the fact that Emtel had stated that it did not intend to operate a GSM cellular telephone service "in the very near future".

36. The Press Release continued:

> "7 The Authority has further decided that the following conditions be met:
>
> (a) the interconnection agreement between Mauritius Telecom and Cellplus should be on the same terms as those offered to

> Emtel Ltd without, however, any grace period as was previously granted to Emtel Ltd;
>
> (b) the Authority would appoint an independent auditor to certify that Cellplus Mobile Communications Ltd is keeping separate accounts from Mauritius Telecom and that it is not benefiting from any cross subsidisation."

37. The Board refers to these paragraphs of the Press Release as "para 7(a) and (b)" and as setting out "the interconnection requirement" and the "cross-subsidy prohibition". An important issue in the *MTL/Cellplus* appeal is whether these apparent obligations set out in para 7(a) and (b) and in other contemporaneous documents were incorporated as conditions of Cellplus' licence, and if so whether they also bound Mauritius Telecom Ltd.

38. In due course, the Telecom Authority was replaced as regulator. The Telecommunications Act 1998 ("the Telecoms Act 1998") established the Mauritius Telecommunications Authority ("the MTA") as the successor regulator replacing the Telecom Authority. Section 4 of that Act provided that the MTA was established for the purposes of the Act and that it "shall be a body corporate". A Board was established with a chairman and members and the statute also provided for the appointment of an Executive Director to be the Chief Executive Officer of the MTA.

39. Section 6 of the Telecoms Act 1998 set out the functions of the MTA, including at section 6(1)(d) to "ensure that this Act is implemented with due regard to the public interest and so as to prevent any unfair or anti-competitive practices by licensees such as cross-subsidising."

40. Section 8 of the Telecoms Act 1998 replaced the licensing regime with a new procedure for applications for, and the grant of, licences. For the purposes of the present appeals the following provisions of the Telecoms Act 1998 are important. Section 22 provided the extent of liability of the MTA:

> "22(1) No liability, civil or criminal, shall attach to the Authority or to any member or officer, in respect of any loss or damage arising from the exercise in good faith by the Authority, or by a member or officer, of its or his functions under this Act."

41. Section 29 dealt with transitional provision:

> "29(1) Every act done by, or in relation to, the Telecommunication Authority established under section 4 of the Telecommunication Act 1988 shall be deemed to have been done, or commenced, as the case may be, by or in relation to the Authority."

42. In 2001 the institutions for regulating the sector were reviewed again. Section 4 of the Information and Communication Technologies Act 2001 ("the ICT Act 2001") established the ICTA and provided that it shall be a body corporate. Like the MTA, it had a Board and an Executive Director. Its objects, set out at section 16, included at section 16(b) "to create a level playing field for all operators in the interest of consumers in general" and at section 16(f) "to promote the efficiency and international competitiveness of Mauritius in the information and communication sector". The functions imposed by section 18(1) included an obligation on the ICTA to:

> "18(1) …
>
> (c) promote and maintain effective competition, fair and efficient market conduct between entities engaged in the information and communication industry in Mauritius and to ensure that this Act is implemented with due regard to the public interest and so as to prevent any unfair or anti-competitive practices by licensees; …
>
> (i) ensure the fulfilment by public operators of their obligations under any enactment."

43. The licensing regime was set out in sections 24 onwards. Section 45, headed "Protection of members and officers", provided:

> "45. No liability, civil or criminal, shall attach to any member or officer of the Authority, or to the Authority, in respect of any loss arising from the exercise in good faith by a member or an officer or the Authority of his or its functions under this Act."

44. The ICT Act 2001 repealed the Telecoms Act 1998 by section 49 and provided in section 51:

> "Every act done by, or in relation to, the Mauritius Telecommunication Authority established under section 4 of the Telecommunications Act 1998 shall be deemed to have been done, or commenced, as the case may be, by or in relation to the Authority."

3. PROCEEDINGS BROUGHT BY EMTEL

(a) The judicial review proceedings

45. As described earlier, Emtel enjoyed a period of exclusivity under its licence until 31 December 1995. Emtel wrote to the Telecom Authority on 8 September 1995 expressing its concern at the operation by Mauritius Telecom Ltd and Cellplus of GSM services within Emtel's exclusivity period.

46. On 16 October 1995 Emtel wrote asking the Telecom Authority to "look into the following matters to ensure fair competition". These matters included that the new GSM company should be separate from Mauritius Telecom Ltd; that there needed to be transparency in costs allocations for facilities shared between Mauritius Telecom Ltd and Cellplus such as space rental, power and air-conditioning costs; that the GSM company must pay the same interconnect charges as Emtel to Mauritius Telecom Ltd and have the same terms and conditions; and that cross-subsidisation must be prevented. On the same day, Emtel wrote to the Telecom Authority reiterating the complaint made on 8 September, adding that:

> "For your information, dealers are now openly demonstrating GSM phones operations, and subscribers are using GSM phones. As you know, anyone using GSM phones must have a mobile cellular licence. Therefore we feel that firstly these subscribers are being encouraged to use GSM cellular phone illegally and secondly MT is operating its cellular services within our exclusivity period.
>
> We regret to note that Telecommunication Authority does not seem to be doing anything about this."

47. On 18 October 1995 the Telecom Authority responded that it had concluded that Mauritius Telecom Ltd had not infringed Emtel's exclusive rights.

48. In August 1996 Emtel submitted a paper to the Ministerial Committee on Telecommunications. It stated that further development of its business was "being hampered by the weak regulatory environment and the predatory attitude of Mauritius Telecom to exploit their monopoly position". The paper went on:

> "Under cover of the present Telecommunications Act 1988, Mauritius Telecom is now competing unfairly with Emtel through its GSM subsidiary, Cellplus. The conditions under which this GSM subsidiary is operating are acutely contrasting with the strict terms and conditions of License Emtel has to respect.
>
> On top of that, the proposed plans of Mauritius Telecom to implement substantially lower tariffs for the GSM operations would put into question the very existence of Emtel. We cannot see how these tariffs can be practiced if interconnect charges are similar to what Emtel has to pay and if there has to be any return on investment."

49. On 28 November 1996 Emtel sent a formal Notice to the Telecom Authority asking it, amongst other things, to appoint an independent auditor to verify and monitor on an ongoing basis and certify that Cellplus was keeping separate accounts from Mauritius Telecom Ltd and not benefiting from any cross subsidisation. The notice recited Emtel's licence terms and said:

> "Whereas even prior to 31 December 1995, Mauritius Telecom Ltd and Cellplus set up the infrastructure for providing mobile cellular telephone services by portable GSM telephones and made wide and aggressive advertisements to the effect that it would provide such telephone services as from 1 January 1996.
>
> Whereas Mauritius Telecom Ltd and Cellplus caused to be imported a substantial number of portable handsets compatible with and required for the use of the mobile cellular telephone services contemplated to be provided by Cellplus, and caused them to be sold to the public at large by means of a wide and aggressive advertisement. The owners of those handsets were provided with and did use commercially as from 15 March 1996 the mobile cellular telephone services set up by Mauritius Telecom Ltd and Cellplus, although Cellplus was not licensed so to do until 5 September 1996."

50. The Notice asserted further that Cellplus' licence was subject to the condition that there should be no cross-subsidy between Mauritius Telecom Ltd and Cellplus directly or indirectly and referred to the Telecom Authority's decision to appoint an independent auditor to examine their accounts and to report to the Telecom Authority "to ensure that there is no such cross-subsidy". It went on:

> "Whereas on or about 8 September 1996, by way of a deliberate and aggressive publicity campaign, Cellplus published its tariff which was substantially lower than the one provided by Emtel Ltd. Such a tariff is not commercially sustainable unless interconnect charges are not paid at the prescribed level or there is cross subsidy between Mauritius Telecom Ltd and Cellplus.
>
> Whereas in order to maintain its subscribers, Emtel Ltd has had to reduce its tariffs to the level of those published by Cellplus, thereby running substantial financial risks."

51. The Board has not seen any response from the Telecom Authority to that Notice.

52. On 19 December 1996, Emtel issued an application for leave to apply for an order of mandamus against the Telecom Authority directing it to appoint an independent auditor to verify the Cellplus and Mauritius Telecom Ltd accounts, to provide Emtel with a copy of the interconnection agreement between Cellplus and Mauritius Telecom Ltd and to ensure that any interconnection fees supposedly being charged were in fact being paid by Cellplus.

53. The application was supported by an affirmation of the General Manager of Emtel who stated that Cellplus had operated its mobile telephone service from 15 March 1996, although not licensed to do so until 5 September 1996; that Cellplus had published a tariff which was substantially lower than that of Emtel and which was not commercially sustainable if interconnection charges were being paid at the prescribed level, that there was evidence of cross-subsidy, and that on the prevailing tariffs offered by Cellplus, Emtel was bound to sustain a crippling loss from its operations.

54. Although relief was initially sought against the Telecom Authority alone, notice was given to Mauritius Telecom Ltd, the Ministry and Cellplus, all of whom exercised their right to appear and be heard. In a judgment given on 2 July 1997 the application for leave was dismissed: 1997 SCJ 216. The Mauritian Supreme Court held that the Telecom Authority owed no public law duty to Emtel to appoint an auditor or to enforce the contractual obligations between Mauritius Telecom Ltd and Cellplus. The judgment stated that to grant the relief being sought by Emtel would be tantamount to ordering the

Telecom Authority to act beyond its powers under the Act and to violate the constitutional right to privacy of Mauritius Telecom Ltd and Cellplus. The judgment noted that the licence issued by the Telecom Authority to Cellplus "is subject to the condition that there should be no cross subsidy" between Cellplus and Mauritius Telecom Ltd but there was nothing to suggest that the Telecom Authority was "shirking its duty" in ensuring that this condition was complied with. The judgment held that it would be ultra vires for the Telecom Authority to appoint an auditor to investigate the accounts of Mauritius Telecom Ltd and Cellplus.

55. The Board allowed Emtel's appeal against that refusal. Lord Bingham of Cornhill referred to the Telecom Authority's decision that Cellplus' licence "should be subject to the conditions specified in the press release": para 36. The Board held that the Telecom Authority did have power under section 5 of the Telecom Act 1988 to impose those conditions:

> "37 … In deciding what terms or conditions to impose on the grant of a licence the Authority enjoyed a wide discretion, provided it had regard to the public interest and any directions of the Minister. It had power to modify licences. Nowhere in the Act is there any indication that the Authority lacked power to license competing operators of mobile telephone services if it judged it to be in the public interest to do so or if it was directed by the Minister to do so. If it had power to license such competitors, it plainly had power to impose what it considered to be appropriate conditions to regulate competition between licensees. It cannot be thought that the Authority had power to license such competitors but not to control the terms on which they were to compete."

56. Further the Board held that Emtel had a sufficient interest to seek appropriate relief if, as it claimed, Cellplus was permitted to enter the mobile telephone market on terms which the Telecom Authority had power to enforce but had failed to enforce. At para 40 the Board held:

> "Those conditions were of obvious significance to Emtel, which may have made commercial decisions in the expectation that the conditions would be imposed and enforced and was in any event liable to suffer loss if they were not. If it be true that the conditions were not imposed or not enforced, it is at least arguable that Emtel's expectation, legitimately entertained, was unfairly defeated."

57. The Telecom Authority's powers included, the Board therefore held, power to appoint an independent auditor.

58. The Board noted that section 43(8) of the Telecom Act 1988 provided that the predecessors of Mauritius Telecom Ltd were deemed to be validly licensed under the Act and recorded its understanding "that no licence has ever been granted to Mauritius Telecom". But the Board held at para 42 that the statutory regime must be interpreted as permitting the Telecom Authority to enforce the requirements imposed in Cellplus' licence on Mauritius Telecom Ltd as well as on Cellplus.

59. The Board therefore granted Emtel leave to apply for judicial review.

60. Emtel pursued that application before the Supreme Court of Mauritius. It amended its claim to include a declaration that the Telecom Authority had power under the Telecom Act 1988 Act to impose conditions in Cellplus' licence to ensure that there was no cross-subsidisation of Cellplus' business by its parent Mauritius Telecom Ltd.

61. By this time, there had been two important developments. First, the Telecom Authority had been replaced by the MTA under the Telecoms Act 1998. Secondly, Emtel had lodged a civil claim for breach of article 1382 of the Civil Code.

62. The MTA, which had taken over the proceedings from the Telecom Authority, raised a preliminary objection in the judicial review proceedings. It argued that Emtel should elect between its civil claim and its application for judicial review. By a judgment delivered on 11 June 2002 (2002 SCJ 130) the Supreme Court set aside Emtel's judicial review application on the grounds, in part at least, that the issues raised by the application would be better determined in the civil claim. That aspect of the history of the claim forms part of the basis for Emtel's assertion that it was an abuse of the court's process for the ICTA to assert before the Judge, before the Appeal Court and now before the Board, that the civil claim cannot proceed because of lack of legal personality on the part of the Telecom Authority.

(b) The early stages of Emtel's civil claim

63. Emtel launched its civil claim on 2 June 2000. The defendants to the claim were initially Mauritius Telecom Ltd, Cellplus, the Ministry and the MTA but the ICTA was put into the cause instead of the MTA on 23 March 2006, once the Telecoms Act 1998 had been repealed.

64. The detail of what is pleaded in the statement of claim is considered below in relation to the issue about the scope of Emtel's claim in relation to Period 1, that is the period between March and September 1996. Here it is enough to point out that Emtel averred:

a. that the conditions set out in para 7(a) and (b) of the Press Release of 5 September 1996 were imposed in compliance with directions given by the Minister for the purpose of preventing unfair competition by Cellplus against Emtel.

b. That there had been cross-subsidisation between Mauritius Telecom Ltd and Cellplus. The Telecom Authority has failed and neglected to exercise its statutory powers to ensure that the licence conditions set out in the Press Release were complied with and had failed and neglected in its duty to protect Emtel from unfair competition by Mauritius Telecom Ltd and Cellplus.

c. That "bias" on the part of the Telecom Authority towards Mauritius Telecom Ltd and the tolerance shown by the Telecom Authority of the tortious act of Mauritius Telecom Ltd and Cellplus "amount to "faute", a dereliction of duty and/or tortious bias".

d. Further, the actions of Mauritius Telecom Ltd, its concerted actions with Cellplus and the abuse of the dominant position of Mauritius Telecom Ltd constituted "faute" and were tortious.

e. Emtel has suffered considerable loss from those tortious acts, in particular from the Telecom Authority's failure to ensures that the conditions of Cellplus' licence were duly complied with. The loss was quantified at Rs 1,100 million.

f. The Ministry had failed to ensure that its direction to the Telecom Authority be complied with and so had tolerated the conduct of the other defendants.

65. It is common ground that the reference to "faute" in Emtel's statement of claim is to article 1382 of the Civil Code. This provides:

> "1382 Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer."

> Any action of a person which causes harm to another, requires that the person by whose “faute” the damage was caused, to make it good.
>
> …
>
> “1384 On est responsable non seulement du dommage que l’on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l’on a sous sa garde.”
>
> One is liable not only for the harm which one causes by one’s own action, but also for the harm caused by the action of persons for whom one is responsible, or of things which one has in one’s keeping.

66. The ICTA, Mauritius Telecom Ltd and the Ministry all applied to be removed as parties from the civil claim on the grounds that they could not be held liable in law in respect of the facts pleaded in the statement of claim. The interlocutory application was heard by the Judge.

67. The ICTA’s contention at that stage was that the transitional provisions in the Telecoms Act 1998 Act and the ICT Act 2001 carried forward only positive acts of the former regulators and not omissions. Given that Emtel’s allegations were that the Telecom Authority had failed to act rather than that it had acted in a particular way, there could be no liability on the part of the successor regulators.

68. In a judgment handed down on 25 July 2011 (2011 SCJ 270) (“the 2011 Interlocutory judgment”), the Judge had no difficulty in rejecting that restrictive interpretation of the transitional provisions. She held that the transitional provisions were enacted to ensure continuity of action of the successive regulatory bodies created by the three statutes. The defendants’ construction would run contrary to the “raison d’être” of the provisions. She also rejected a point raised by Mauritius Telecom Ltd that Emtel had agreed to submit any disputes to the arbitration of the regulatory body.

69. She considered two points made by the Ministry. First, that, having regard to section 2(1)(a) of the State Proceedings Act, the Ministry could only be liable under article 1384 of the Civil Code and not article 1382 and secondly that Emtel had failed to comply with section 4(2) of the Public Officers’ Protection Act (“POPA”). That subsection provides:

> “(2) (a) No civil action, suit or proceeding shall be instituted, unless one month’s previous written notice of the action, suit, proceeding and of the subject matter of the complaint, has been given to the defendant.
>
> (b) No evidence shall be produced at the trial except of the cause of action as specified in the notice.”

70. The Judge held that these points were valid but that the Ministry was barred from relying on them because it had waived the two defences which might have been available to it. In light of its conduct in joining in the application to set aside the judicial review proceedings in 2002 on the basis of the civil claim and by not invoking then any intention to take up defences under the State Proceedings Act and POPA, “it would be reasonable and fair that [the Ministry] has waived its right to rely on these defences”.

71. The ICTA’s and the Ministry’s appeals against the 2011 Interlocutory judgment were dismissed by the Court of Civil Appeal in the judgment of 30 December 2013 (Matadeen SPJ and Chan Kan Cheong J): 2013 SCJ 500.

72. Again, Emtel relies on these proceedings in support of its argument that the ICTA should not have been permitted to raise further *in limine* objections as precluding a proper assessment of the merits of Emtel’s complaint about the Operators’ conduct and the failure of the Telecom Authority to prevent Emtel’s business from being seriously damaged by that conduct.

73. The trial of the civil claim was listed to take place in May 2016 over six weeks. At a case management hearing on 28 April 2016, counsel for the ICTA sought to raise four preliminary points. Three of these points related to the alleged failures to comply with section 4 of POPA. The Judge said she had already ruled upon those in the 2011 Interlocutory judgment and her ruling had been confirmed on appeal. The fourth preliminary point was a complaint about delay making it impossible to have a fair trial. The Judge rejected that as premature.

74. Shortly before the trial, the ICTA again tried to raise the alleged failure of Emtel to comply with section 4 of POPA. This was also rejected firmly by the Judge on the basis that, like the Ministry, the ICTA must be regarded as having waived any non-compliance:

> “… there is a compelling reason why objections taken under the POPA cannot be taken at this late stage. I note that in a ‘*plea in limine litis*’ taken as far back as 16 January 2007, [the

> ICTA] moved that it be put out of cause as it cannot be held liable in law in respect of facts disclosed in the second amended statement of claim. No objection under section 4 of POPA was taken. In my view, as rightly submitted by Mr A Moollan for the plaintiff company, [the ICTA] must be deemed to have waived its right to raise an objection under the said section."

75. The trial took place before the Judge in May and June 2016 over a period of seven weeks.

(c) The Main Judgment

76. In the Main Judgment, which was detailed and thorough, the Judge noted at the outset, at para 2, that there had been extensive correspondence exchanged among the parties over the claim period from 1996 to 2002. This enabled the court "to have a good and complete view and understanding of the facts and circumstances leading to and surrounding the present claim despite the significant lapse of time between the events which gave rise to the claim and the actual hearing of it."

77. After setting out the history of the sector, the Judge turned to Emtel's contention that Cellplus started commercial operations before it obtained its licence. She considered the evidence in support of that and concluded at para 72 that it had started its commercial operations and acquired a substantial number of subscribers by the end of September 1996.

78. She then considered the witness evidence at the trial concerning the exchanges between Emtel and the Telecom Authority, and between the Telecom Authority and Mauritius Telecom Ltd during the course of 1995 and 1996. She described the licence granted to Cellplus on 5 September 1996 and the Press Release that day, setting out the terms of para 7(a) and (b). She recorded at para 98 that, as at 18 January 1997, no interconnection agreement had been concluded between Mauritius Telecom Ltd and Cellplus and no interconnect charges were being paid by Cellplus. The first interconnection agreement between them was signed on 31 March 1997 to take effect as from 1 October 1996. The charges and terms for payment, save for volume discounted rates were the same as those found in the 1995 agreement between Mauritius Telecom Ltd and Emtel: para 99. In October 1997, Cellplus was also entitled to benefit from volume discounted rates.

79. The Judge then turned to the complaints of cross-subsidisation. The complaint could be summarised by saying that Cellplus had a share capital of only Rs 500,000 and few fixed assets. It was financed mainly by intercompany payables from its parent of

over Rs 316 million. Other instances or evidence of cross-subsidisation alleged were: (para 102)

a. Cellplus customers were given free calls for over six months.

b. Customers were able to pay their bills at Mauritius Telecom Ltd's service centres with cheques payable to Mauritius Telecom Ltd.

c. Cellplus' public relations and marketing were operated with Mauritius Telecom Ltd's units and resources.

d. Cellplus made use of Mauritius Telecom Ltd's infrastructure such as buildings, showrooms, power equipment etc.

e. Cellplus and Mauritius Telecom Ltd carry out joint advertising.

80. The Judge described the expert evidence provided by the parties on the key issue of whether Cellplus was cross subsidised by Mauritius Telecom Ltd. The expert on behalf of the defendants was a chartered accountant, Mr Halpin. The evidence given for Emtel was from Mr Nicholas Forrest of PricewaterhouseCoopers. Finally, she described further evidence from a past Director of Competition and Regulatory Finance at Ofcom, the UK communications regulator and competition authority who also gave evidence for Mauritius Telecom Ltd and Cellplus. She discussed the evidence of these experts on a number of issues including the point which she described as central to Emtel's claim, namely whether the low tariffs offered by Cellplus "were commercially unsustainable were it not for the fact that Cellplus was cross subsidised by [Mauritius Telecom Ltd]": para 161. Finally, she set out Mr Forrest's evidence about the quantification of loss suffered by Emtel.

81. Turning to the legal basis for the claim, the Judge stated that:

> "234 Civil liability for unfair competition '*concurrence déloyale*' – which is Emtel's case against MT and Cellplus – is governed by article 1382 of the Code Civil which replicates the French provision for liability in tort."

82. To succeed in such a claim for damages, the claimant must prove an act giving rise to the liability for damages, the damages and the causal link between the act and the damages. She considered a complaint by the defendants that Emtel's case had moved

during the course of the trial from one of predatory pricing to one of breach of licence conditions. The Judge rejected this, holding at para 243 that breach of licence conditions was alleged in the statement of claim and was "at least one of the alleged tortious acts".

83. The Judge considered whether para 7(a) and (b) of the Press Release were conditions of Cellplus' licence and held that they were: paras 244 to 254. The Board considers this aspect of the judgment in more detail in the context of Ground 1 of the *MTL/Cellplus* appeal. Here it is enough to state that the Judge concluded, at para 246, that there was no room for doubt that para 7(a) and (b) set out conditions of Cellplus' licence "albeit they are not found in the licence proper."

84. She then examined the evidence about how the operation of the interconnection agreement between Mauritius Telecom Ltd and Emtel differed from that between Mauritius Telecom Ltd and Cellplus. Her conclusion, broadly, was that although Mauritius Telecom Ltd did purport to charge Cellplus for interconnection and for shared infrastructure, the fees were treated as an intercompany debt in their respective accounts. As such, Cellplus' fees were payable only at some indefinite time in the future whereas Emtel had to pay its interconnection fees to Mauritius Telecom Ltd in cash within 60 days of being invoiced.

85. Her conclusion on cross-subsidisation was as follows: (referring to Mauritius Telecom Ltd as "MT")

> "269 … I therefore accept Mr Forrest's calculations and conclusions which show that the intercompany accounts or intercompany payables allowed Cellplus to benefit from a longer time to settle bills and from additional financing costs of Rs 148 million until the debt was converted into shareholders loan in April 2000 and December 2002 and that the 10 year lease arrangements allowed Cellplus to benefit from financing costs of about Rs 581 million. The cross-subsidisation of Cellplus by MT has therefore been proved."

This, she held at para 273 exemplified the type of conduct that condition 7(b) expressly prohibited and was a clear breach of the condition against cross-subsidisation. She held that these breaches were so obvious that "they can only be described as intentional breaches."

86. She went on to hold that both Mauritius Telecom Ltd and Cellplus were liable for "faute" under article 1382:

> "277 For the reasons stated above, I find that MT and Cellplus breached the condition against cross-subsidisation which they implicitly agreed to comply with and which was stated by the Telecom Authority as '*conditions to be met*' when Cellplus was granted the GSM licence. Both MT and Cellplus have intentionally made use of unfair means leading to a '*rupture d'égalité dans les moyens de la concurrence….*' and have committed an '*acte fautif*'.

87. Turning to the liability of the Telecom Authority, the Judge dealt first with preliminary points raised by the ICTA. The first was the point which forms one of the grounds of appeal before the Board, namely that the ICTA could not be held liable for the *faute* of the Telecom Authority under the Telecom Act 1988 because the Telecom Authority was not established as a body corporate but was a department of the Government. She rejected this as having been determined against the ICTA in the 2011 Interlocutory judgment: para 280.

88. The ICTA raised again the alleged failure to comply with section 4(1) of POPA. The Judge held that this point "cannot be seriously made as all parties had ample notice of Emtel's complaint of unfair competition": para 282. Finally, she rejected a complaint of delay, holding that the hearing had been fair. She held further that Emtel had adequately pleaded an allegation of bad faith against the Telecom Authority and that that claim was made out.

89. Finally, the Judge dismissed Emtel's claim against the Ministry on the ground that there was no evidence that any direction had been issued by the Ministry pursuant to section 9 of the Telecom Act 1988: para 299.

90. Turning to causation and the quantum of damages, the Judge addressed first the question whether the tariffs set by Cellplus at its launch were unreasonable. If the lower tariffs were commercially sustainable then Emtel had not suffered a "*trouble commercial*" entitling it to compensation. She described the calculations put forward by Mr Forrest on the basis that the tariffs should cover the full economic costs incurred by Cellplus.

91. She concluded first that Emtel's tariffs in October 1996 were reasonable (para 317). As to Cellplus' tariffs, she accepted the evidence of Mr Forrest as thorough and held that they justified his conclusion that the fully allocated costs per minute incurred by Cellplus were well above the tariff it charged and that the tariffs were unreasonable: para 318. She said that although Cellplus' witnesses had insisted that the tariffs were cost based, in fact "no attempt has been made by Cellplus to show that the tariffs of Cellplus were in fact cost based": para 321. It was accepted that Emtel had had to

reduce its tariffs to match those of Cellplus. The loss of income for Emtel therefore had a direct link to the breach of the cross-subsidy prohibition.

92. The Judge referred further to Mr Forrest's evidence for the calculation of the loss suffered by Emtel. She concluded that the evidence showed on a balance of probabilities that the tariffs had become reasonable by the end of 1998, so that that marked the end of the claim period: para 344. She considered the assessment of the quantum of loss made by Mr Forrest in the counterfactual model for the full period of loss. She was satisfied that he had been conservative in his approach and that she could rely on his calculations for the loss of tariff income suffered by Emtel in the counterfactual case for the years 1996 to 1998: para 350. She concluded at para 351 that an award of damages for market share loss for the period March 1996 to August 1996 was reasonable and just.

93. In considering whether interest should be charged on the damages, the Judge referred to article 1153 of the Civil Code. This provides that interest generally runs from the date of the award but there are exceptions arising from the nature of the loss and "*au comportement du débiteur*". As to the former, she accepted evidence from Mr Currimjee that Emtel had had to seek loan and overdraft facilities and sell assets because of the reduction in its revenue in 1997 and 1998. Emtel had therefore proved "*un préjudice indépendant de ce retard".* As to the conduct of Mauritius Telecom Ltd and Cellplus she referred to the "chequered history" of the claim:

> "356 … After the decision of the Judicial Committee of the Privy Council in the year 2000, it would at least be expected that the Authority, MT and Cellplus would have taken heed of the observations therein and proceeded at least to a narrowing down of the issues but it did not happen. I therefore find that '*mauvaise foi*' has also been proved and that compensatory damages with interest pursuant to article 1153 alinéa 4 are warranted and that the interest should run as from the date of the tortious act."

94. She therefore awarded damages totalling RS 554,139,900 (including interest up to 1 June 2016) as follows: (para 358)

(i) March 1996 to August 1996 – Rs 11,360,637

(ii) September 1996 to December 1996 – Rs 59,545,150

(iii) January 1997 to December 1997 – Rs 254,762,004

(iv) January 1998 to December 1998 – Rs 228,472,109

(d) The appeals against the Main Judgment

95. There was no appeal by Emtel against the dismissal of its claim against the Ministry. The ICTA, Mauritius Telecom Ltd and Cellplus all appealed against the Main Judgment to the Appeal Court.

96. Cellplus' notice of appeal contained 18 grounds of appeal, challenging many of the Judge's factual and legal conclusions on both liability and quantum. Mauritius Telecom Ltd also raised as grounds many of the issues decided against them by the Judge, including the point that their liability should have been assessed under article 1384 of the Civil Code rather than article 1382.

97. The grounds which are relevant to the present appeals to the Board were:

a. Ground 1 of Cellplus' appeal and Ground 2 of Mauritius Telecom Ltd's appeal: that the Judge had erred in concluding that para 7(a) and (b) of the Press Release were conditions of Cellplus' licence.

b. Ground 6 of Cellplus' appeal and Ground 3 of Mauritius Telecom Ltd's appeal: that the Judge was wrong to find liability established for Period 1, that is March 1996 to September 1996 "as she failed to take into account that Cellplus' licence was in force in March 1996".

c. Grounds 7 and 14 of Cellplus' appeal and Ground 11 of Mauritius Telecom Ltd's appeal: that the Judge was "manifestly wrong" to have found that Cellplus started commercial activities in March 1996 prior to obtaining its licence in September 1996.

98. The ICTA's notice of appeal contained 28 grounds of appeal. It sought to revive almost every argument dismissed by the Judge and to challenge almost every finding of fact. It raised again the allegation that delay had deprived it of a fair hearing, that there had been breaches of section 4 of POPA and asserted that the finding of *faute lourde* against the Telecom Authority had no factual basis.

99. The grounds which were dealt with by the Appeal Court in the *ICTA* Judgment were the following:

a. Ground 4: that the Judge failed to address the issue of lack of legal personality of the Telecom Authority at the material time and to adjudicate on that issue.

b. Grounds 5 and 6: that the Judge erred in her interpretation of the transitional provisions in the Telecoms Act 1998 and the ICT Act 2001 because any *acte fautif* of the Telecom Authority under the Telecom Act 1988 could only have been a *"faute"* of the Government of Mauritius and not a *"faute"* of the Telecom Authority as the latter did not have legal personality.

100. The Appeal Court handed down the two judgments to which the Board has already referred.

101. The *MTL/Cellplus* Judgment allowed the Operators' appeal on the following grounds. First, the Appeal Court considered whether the interconnection requirement and the cross-subsidy prohibition in para 7(a) and (b) of the Press Release were conditions of Cellplus' licence. They considered and rejected the reasons the Judge gave for holding that they were. They criticised the Judge for failing to take into account the procedures set out in section 11 of the Telecom Act 1988 that must be followed by the regulator before imposing conditions on a licensee. She had also failed to address her mind to the procedure for modifying licences under section 12. The Appeal Court accepted that the Telecom Authority had been empowered to impose such conditions; that had been decided in the Board's ruling in the judicial review proceedings in 2000. But the Telecom Authority could only impose such conditions in accordance with the Telecom Act 1988. The procedures in sections 11 and 12 were couched in mandatory terms and there were strong indications that the legislature's intention was that the requirements in sections 11 and 12 were to be strictly adhered to by the Telecom Authority. They held that the Judge had erred in holding Mauritius Telecom Ltd and Cellplus liable in tort for unfair competition arising from breach of licence conditions as embodied in the Press Release: p. 24.

102. Further, the Judge had failed to take account of the fact that there was only one licensee, Cellplus, which was a different legal entity from Mauritius Telecom Ltd. The latter company had never held a licence for mobile telecommunication services and so could not be liable for a breach of licence conditions.

103. Secondly, the Appeal Court dealt with the finding of liability for Period 1 on the ground that Cellplus was operating without a licence during that period. The first point was the effect of the backdating of Cellplus' licence. The Appeal Court noted the changes to the start date of the licence to 14 March 1996 (see para 32., above). The Appeal Court stated that the Judge had failed to examine the consequences of the

backdating to cover Period 1. The Telecom Authority had been empowered to make the licence "lawfully effective" as from 14 March 1996:

> "…. In any event, it has not been shown how Cellplus or MT can be found tortiously liable for carrying out commercial services during that period in the teeth of a valid and lawful amendment of Cellplus' licence which on the face of it endorsed the legitimate exercise of commercial services from March 1996 to September 1996." (p 30)

104. Further, the Appeal Court held that Emtel's statement of claim did not allege unlawful market entry or unlicensed activity between March and September 1996. Although the Judge had stated that Cellplus had started its commercial operations before it obtained a licence, she "never made any finding of '*faute*' pursuant to article 1382" (p 28) in that regard. The claim was limited to the alleged breach of licence conditions after 5 September 1996. They held therefore that the Judge had erred in awarding damages in respect of Period 1.

105. The Appeal Court therefore allowed the appeal and quashed the whole of the damages award. In light of the other matters pleaded by Emtel in the statement of claim, the Appeal Court ordered a non-suit rather than dismissing the claim. Ultimately, however, Emtel asked that the order made by the Appeal Court formally dismiss the claims against Mauritius Telecom Ltd and Cellplus. Emtel explained at the hearing before the Board that it was not possible for Emtel to restart the case - they stood or fell on the evidence that they had adduced at trial.

106. The *ICTA* Judgment allowed the ICTA's appeal against the Main Judgment. The Appeal Court dealt only with the effect of the transitional provisions in the Telecoms Act 1998 and the ICT Act 2001. It recorded that at trial, counsel for the ICTA "had elaborately invoked as a defence" the Telecom Authority's lack of legal personality during the material time of the alleged acts or omissions. The ICTA had submitted that since the Telecom Authority could not be sued on its own in respect of Emtel's claim, that in turn meant that neither the MTA (between 1998 and 2001) nor the ICTA could subsequently be held responsible or liable for any of the acts or omissions of the Telecom Authority.

107. The Appeal Court held that the Judge had been wrong to reject this argument as having been decided in the 2011 Interlocutory judgment. That had concerned only the question of whether the transitional provisions covered the omissions of the Telecom Authority as well as the actions of the Telecom Authority.

108. The Appeal Court considered that the transitional provisions were "savings" provisions which were not intended to confer any rights which did not exist already. If there was no liability which could accrue to the Telecom Authority by reason of its lack of personality, this remained unaffected by the repeal of the Telecom Act 1988.

109. The Appeal Court then considered at length whether the Telecom Authority had the attributes of a "*personnalité juridique*" which is fully entitled to exercise all of its civil rights (page 15 onwards). They concluded that it was not the intention of the legislature to create the Telecom Authority as a body corporate or to confer on it the attributes associated with the operation of a statutory body with a distinct and independent personality of its own (*personnalité juridique*) in respect of civil proceedings in tort.

110. The Appeal Court went on to reject Emtel's submissions on waiver and abuse of process. Emtel complained that at no time prior to April 2016 had either the Telecom Authority or the MTA or the ICTA raised the point about the Telecom Authority's lack of legal personality. The Court held that there had been no voluntary or unequivocal election on the part of the ICTA as required by *Millar v Dickson* [2002] 1 WLR 1615, 1624. In any event, waiver or abuse of process could not cure the defect in respect of the legal incapacity of the ICTA to be sued as a defendant because the proceedings had been vitiated from the outset.

(e) The issues before the Board

111. The issues raised by the appeal to the Board can be summarised as follows.

112. The *MTL/Cellplus* appeal raises the following issues:

a. Was Emtel's claim for breach of article 1382 of the Civil Code limited to an allegation that during Period 2 (that is after 5 September 1996) Mauritius Telecom Ltd and Cellplus were in breach of licence conditions imposed by the regulator or did it encompass a claim that Emtel had suffered loss in Period 1, that is from March 1996 to 5 September 1996, because Cellplus had unlawfully entered the market before it was licensed?

b. If Emtel can pursue a claim in respect of Period 1, can Mauritius Telecom Ltd and Cellplus rely on the backdating of the licence granted to Cellplus to cure any unlawfulness during Period 1?

c. Were the interconnection requirement and the cross-subsidy prohibition on which Emtel rely to establish tortious conduct on the part of Mauritius Telecom Ltd and Cellplus incorporated into Cellplus' licence as conditions?

d. If they were so incorporated, did those conditions bind Mauritius Telecom Ltd as well as Cellplus?

e. If they were not so incorporated, is it an abuse of process for Mauritius Telecom Ltd and Cellplus now to dispute that they were bound by them? Are they therefore precluded from arguing that conduct contrary to the interconnection requirement or the cross-subsidy prohibition amounted to *acte fautif* within article 1382 for which they can both be held liable?

113. In the *ICTA* appeal the principal issues can be summarised as follows:

a. Do the transitional provisions enacted in legislation replacing the original telecoms regulator, the Telecom Authority, with later statutory bodies make the current regulator, the ICTA, potentially liable for the failings of the Telecom Authority?

b. If the answer to that question turns on whether the Telecom Authority under the Telecom Act 1988 had separate legal personality or was only a branch of Government, what was the status of the Telecom Authority?

c. In light of the history of the judicial review proceedings and the earlier stages of the proceedings in the civil claim, is it an abuse of process for the ICTA now to assert that it is not liable for the conduct of the Telecom Authority?

114. At the hearing before the Board, Mr Mark Brealey KC made submissions for Emtel in relation to the *MTL/Cellplus* appeal with Mr Aidan Casey KC responding on behalf of Cellplus and Mr Chetty on behalf of Mauritius Telecom Ltd. In the *ICTA* appeal, Mr Anwar Moollan SC made submissions for Emtel and Mr Guy Vassall-Adams KC responded on behalf of the ICTA. Mr Alain Choo-Choy KC made brief submissions on behalf of the Ministry.

4. THE *MTL/CELLPLUS* APPEAL

(a) Introduction

115. As indicated above, this appeal to the Board concerns the *MTL/Cellplus* Judgment which overturned the Main Judgment holding the Operators liable to Emtel for damages (assessed at Rs 554,139,900 with interest and costs) in tort for anti-competitive behaviour under article 1382 of the Civil Code.

116. The Board has summarised both judgments at paras 95 to 110 above, together with, at para 112 above, the issues that arise on the *MTL/Cellplus* appeal.

117. The Judge awarded Emtel damages for two acts of unfair competition by the Operators. The first, alleged to have occurred during Period 1, concerned unlicensed market entry and operation at a zero-tariff. The Judge held that Cellplus entered the market on about 15 March 1996, when it had no licence to do so, offering customers unlicensed mobile telephone services at unlicensed tariffs of zero. Her findings of fact about Period 1 concluded (at para 72):

> "… the clearest proof that Cellplus started its commercial services within the meaning of the 1988 Act before it obtained its licence is the fact that at the end of August 1996, it already had about 4000 subscribers and by the end of September 1996, it had 4791 subscribers."

118. This reflected the acquisition by Cellplus of a market share of about 30% gained at the expense of Emtel, the exclusive mobile phone operator at that time.

119. The second act of unfair competition concerned the alleged breach by the Operators of conditions of the Cellplus GSM licence during Period 2, that is from 5 September 1996 onwards. The Judge held that the interconnection requirement and the cross-subsidy prohibition were conditions of the Cellplus GSM licence. As she explained:

> "246. … The evidence on the circumstances leading to the issue of the [press release] and of the inclusion of paragraph 7(a) and (b), on the events after its issue and on the intention of the parties leaves no room for doubt that paragraph 7(a) and (b) sets out conditions of the GSM licence granted to Cellplus albeit they are not found in the licence proper."

120. She concluded that those conditions were breached:

> "273. … Cellplus as a subsidiary of MT was paying for finance at uncommercial rates, which constitutes a clear breach of the condition against cross-subsidisation. The effect was that MT was bankrolling Cellplus in its operations when the conditions at paragraph 7 were designed expressly to put a stop to this bankroll. The breaches were so obvious that they can only be described as intentional breaches."

121. The bankrolling (or cross-subsidy) allowed Cellplus to charge zero tariffs to its customers in the initial (unlicensed) period and unreasonably low tariffs when it started licenced operations in September 1996. The low tariffs charged once licensed caused Emtel to reduce its own tariffs and thereby to suffer loss of income.

122. The Appeal Court overturned both findings of unfair competition, holding that the Judge had erred in both respects. The Board will consider below the reasons for those conclusions, addressing first the Period 1 issues and then those relating to Period 2.

(b) Emtel's appeal in relation to Period 1

(i) Is it open to Emtel before the Board to challenge the Appeal Court decision in relation to Period 1?

123. In its written case to the Board, Cellplus contended that Emtel had limited its appeal to the Board in relation to Period 1 to a challenge to questions concerning the effect of the retrospective backdating of the GSM licence for this period. Further, since all aspects of the Appeal Court's reasoning form part of the ratio of its judgment, unless Emtel is permitted to amend its grounds of appeal to the Board to challenge the other reasons, the retrospectivity ground is academic, because even if accepted, it would not result in the overturning of the relevant part of the Appeal Court's judgment (and consequent order).

124. This point was (correctly) not pursued orally by Mr Casey KC (on behalf of Cellplus). It has no merit. It is well established that appeals lie against orders not reasons: see *Lake v Lake* [1955] P 336, [1955] 3 WLR 145. The order made by the Appeal Court reversing the finding of liability and the award of damages by the Judge for Period 1 is properly the subject of Emtel's appeal. It was not necessary for Emtel to appeal separately against each reason relied on by the Appeal Court for the order made in relation to Period 1. No amendment is accordingly necessary, and Emtel is entitled to pursue the challenge to that order in relation to Period 1 on all bases advanced in its written case.

(ii) Was the Period 1 claim pleaded?

125. It is worth noting, before considering Emtel's pleaded case, that Mauritius Telecom Ltd does not seek to support this reason for the Appeal Court's conclusion that the Judge's finding of unlawful competition in Period 1 should be set aside. Indeed, consistently with Emtel's case, in its written case for the Board, Mauritius Telecom Ltd submitted:

> "38. The torts complained of [Mauritius Telecom Ltd] were set out at paragraphs 11.1, 12.3, 17 and 18 of Emtel's third amended statement of claim. Such torts were:
>
> (a) from 15 March to 05 September 1996, [Mauritius Telecom Ltd] and Cellplus set up cellular telephone mobile services for commercial use when Cellplus had no licence to offer such services and during this period Cellplus customers were given free calls;
>
> (b) abuse of [Mauritius Telecom Ltd's] dominant position to destroy and/or cause harm to Emtel; and
>
> (c) breach of the conditions of Paragraphs 7 (a) and (b)."

126. That is not a promising start for the argument pursued by Cellplus that Emtel advanced no separately pleaded case of unfair competition in Period 1.

127. Emtel's third amended statement of claim set out the powers of the Telecom Authority under the Telecom Act 1988. Emtel referred to section 5 which sets out the functions of the Telecom Authority, section 11 which provided that the Telecom Authority must licence operators subject to any terms and conditions as the Telecom Authority thought fit; and section 17 which stated that all tariffs must be approved before licensed service could commence. Emtel pleaded the grant of the GSM licence to Cellplus by the Telecom Authority (for cellular telephones using GSM technology) with effect from 5 September 1996, and its case as to the conditions of that licence was pleaded at paragraphs 8 and 9.

128. Emtel then pleaded its case as to the period before the Cellplus GSM licence was granted. At paragraph 11 Emtel said:

> "11. Even prior to December 31, 1995, that is, before the expiration of the period of exclusivity granted to Emtel, Mauritius Telecom and Cellplus set up the infrastructure for providing mobile cellular telephone services by portable GSM telephones and made wide and aggressive advertisement to the effect that Cellplus would provide such telephone services as from January 1, 1996.
>
> 11.1 Mauritius Telecom and Cellplus caused to be imported a substantial number of portable handsets compatible with, and required for the use of, the mobile telephone cellular services contemplated to be provided by Cellplus, and caused them to be sold to the public at large by means of a wide and aggressive advertisement. *The owners of those handsets were provided with, and did use commercially as from March 15, 1996, the mobile cellular telephone services set up by Mauritius Telecom and Cellplus, (and allowed free calls for over six months) although Cellplus was not licensed so to do until September 5, 1996.*" (Emphasis added)

129. Paragraph 12 made further allegations. At paragraph 12.1 Emtel referred to the *faute* of publishing tariffs that were unsustainable, and which could only have been possible with cross-subsidy by Mauritius Telecom Ltd, albeit this allegation was made expressly by reference to the period from 8 September 1996, in other words in Period 2. However, at paragraph 12.3, Emtel alleged as part of its case on cross-subsidy, that Cellplus customers were given free calls for over six months (in other words in Period 1).

130. At paragraph 17 Emtel averred that "the concerted actions of Mauritius Telecom and Cellplus and the abuse of the dominant position of Mauritius Telecom to destroy and/or harm Emtel constitute 'faute' and are tortious."

131. Mauritius Telecom Ltd responded to those allegations in its defence. It denied that portable handsets were sold to the public before 5 September 1996 and instead advanced the case pursued at trial that:

> "during the period 15 March 1996 to 30 September 1996, … for pre commissioning testing purposes [Cellplus] issued to selected persons portable handsets; inasmuch as the purpose was to test the network of [Cellplus], the latter could not charge the users but had to allow them, at the pre commissioning stage, to test the network free of charge; the

> pre-launching of the service by [Cellplus], by way of a test before the start of commercial operations proper was essential to ensure the technical viability of the service; in any event, the friendly users having the free service did not exceed 300 in number during the trial period" (paragraph 19 of its defence).

132. Mauritius Telecom Ltd denied that it cross-subsidised Cellplus as alleged at paragraph 12 and simply denied paragraphs 17 and 17.1 of Emtel's pleaded case.

133. Cellplus' response to Emtel's allegations was to similar effect. It too denied selling handsets to the public before 5 September 1996 and alleged that the period 15 March to 30 September 1996 involved essential pre-launch testing of Cellplus' network to ensure the technical viability of its service, with selected (friendly) users and that Cellplus "could not commercially charge the users but allowed them to test the network free of charge" (paragraph 18 of its defence). As for paragraph 12.3 of Emtel's pleaded case, Cellplus denied this paragraph, stating that the free trials/testing in Period 1 could "in no way be construed as forming part of commercial operations and were necessary to test the network before full commercial operations could start …". Paragraphs 17 and 17.1 were simply denied and Emtel was put to proof of these allegations.

134. The Operators also sought further particulars from Emtel of the allegations made against them. By reference to paragraph 11.1 of Emtel's pleading, they asked whether Emtel took any legal action against the "unlicensed activities" alleged. By reference to paragraph 12, they asked about the customers and the precise dates during which Emtel alleged that free calls were offered by Cellplus to customers. The answers given by Emtel were consistent with a case based on unlicensed activities in Period 1 and Emtel provided a damages calculation for "Period 1 – Mar 96 to Aug 96" setting out the number of lost subscribers, the consequent loss of revenue, and its net loss of income for this period.

135. This was the pleaded basis on which the Period 1 case proceeded to trial.

136. The evidence given at trial included the expert economic evidence provided by the parties. Emtel's expert, Mr Nicholas Forrest, produced a report dated 22 April 2016, and gave oral evidence. He set out the basis of Emtel's claim in section 4 of his report. First, he explained that Emtel alleged that Mauritius Telecom Ltd had cross-subsidised Cellplus in a way that contravened the conditions of Cellplus' licence and that cross-subsidy had enabled Cellplus to launch and maintain unreasonably low tariffs. Secondly, he said:

> "4.2 Emtel also alleges that Cellplus had been operating commercially without a licence between March 1996 and August 1996. Whether or not this allegation is true depends upon the factual evidence. As an economics expert I offer no view on whether Cellplus did indeed operate commercially between March 1996 and August 1996, or whether such operation was lawful. I therefore consider this additional basis of claim in a separate analysis in Section 10."

137. Section 10 set out Mr Forrest's methodology and calculation of loss based on and for this period. In table 10.1 Mr Forrest summarised the difference between what was happening in fact (because of the alleged actions of the Operators) and the counterfactual case (in other words, what should have been happening) in each of the relevant periods. For the period concerning "Cellplus market activity prior to Cellplus licence commencement date" when it was alleged that "Cellplus was operating in the mobile telecommunications market before its licence has commenced" and that "Emtel's market share started to fall from March 1996" the counterfactual case was that "Cellplus would not have been operating in the Mauritius mobile telecommunications market" and Emtel's market share should have remained at 100%. At paragraph 10.7 Mr Forrest defined that period, namely the six-month period from 1 March 1996 to 5 September 1996, as "Period 1" when Cellplus was "allegedly operating commercially in the mobile telephony market without a licence". He concluded that "in this period, the market share assumption for Emtel in the counterfactual case is 100%."

138. Period 2 by contrast, was defined by Mr Forrest as the period when Cellplus was operating with a licence but caused harm to Emtel, both because of its actions in Period 1 as well as the level of its tariffs after the GSM licence start date. The calculations made clear however that "as Cellplus had been operating without a licence between 1 March 1996 and 31 August 1996, there is a claim for loss for these six months" (see paragraph 10.18). He carried out a revised loss calculation in the market share loss case, reflecting both periods of loss. This is clearly set out in table 10.4.

139. That this was the basis on which Emtel's claim was advanced at trial is also supported by its written closing submissions. For example, in section 2 headed "Cellplus's Entry in 1996" Emtel submitted that the evidence demonstrated Cellplus' entry into the market in March 1996 when it began operating a public mobile phone service on a commercial basis, enlisting subscribers with a domestic tariff set at zero. The evidence contradicting the Operators' case of testing was summarised and Emtel submitted that Cellplus' conduct "displays a brazen disregard of the law", continuing:

> "Cellplus had no licence at this stage and no terms and conditions had been set. Although the licence granted on 5 September backdated the licence to 1 January 1996 (and by

> subsequent amendment to 14 March 1996) the effect of this cannot be to make lawful what was a statutory offence at the time contrary to section 40 of the 1988 Act."

140. Emtel contended that by the end of September 1996 Cellplus had acquired 4,791 subscribers; the "impact on Emtel caused by these unlawful activities was severe"; and Emtel's subscriber growth rate fell from 7% at the end of 1995 to 1% by October 1996.

141. There can be little doubt that Cellplus understood the evidence and the case that was being advanced by Emtel in relation to Period 1 at trial. It is sufficient to refer to the following passages from its written submissions (omitting document references):

> "181. … the licence of Cellplus was made effective from 14 March 1996 so that it was licenced for the period of claim March 1996 to September 1996. There can be no claim that Cellplus came too early on the market because this period is covered by the licence and the claim for market share loss for that period can only be premised on the fact that Cellplus was not licenced during that period. It is apposite to quote the report of Mr Forrest on this issue at section 10 of his first report from page 80 onwards:
>
> 182. In the summary at the top of page 80, Mr Forrest states that:
>
>> 'The market share loss case provides an additional quantification of loss, if Emtel's allegations that Cellplus commenced commercial operations prior to its licence start date.'
>
> 183. In table 10.1 at page 81, Mr Forrest states that:
>
>> 'Cellplus was operating in the mobile telecommunications market before its licence has commenced.'
>
> 184. At paragraph 105 at page 81, Mr Forrest states that:

> ‘10.5 In this section, I consider 1 March 1996, instead of 5 September 1996, to be the appropriate start date for the loss calculations as Cellplus is alleged to have effectively entered the mobile telecommunications market in March 1996 without a licence, and hence started to cause harm to Emtel from this date.’

> 185. Since the whole market share loss case is based squarely on the fact that Cellplus was not licenced from March 1996, that claim is bound to fail because Cellplus was licenced from incorporation, albeit retrospectively. If Emtel is of the view that this should not have been the case, it should have applied for a judicial review of that licence. Alternatively, if it is of the view that the Authority should never have backdated the licence of Cellplus (which has never been pleaded), its cause of action can only be directed against the Authority.”

142. Although a pleading point was raised at the end of paragraph 185 quoted above, Cellplus did not submit at trial that a cause of action based on Cellplus’ conduct in Period 1 had not been pleaded. Nor was this point taken by Cellplus in writing at any stage below. It was not pursued as a ground of appeal but was advanced for the first time during the appeal hearing in the Appeal Court.

143. Given the material referred to above, the Board is in no doubt that Emtel’s case of unfair competition based on unlawful, unlicensed market entry in Period 1 was properly pleaded and plainly understood by Cellplus and Mauritius Telecom Ltd. There was no factual basis for the Appeal Court’s conclusion to the contrary.

(iii) Did the Judge make adequate findings, including of acte fautif, in relation to Period 1?

144. As for the Judge’s findings in relation to Period 1, true it is that there are occasions in the Main Judgment when she described Emtel’s claim for *faute* as being based only on breach of the GSM licence conditions. However, in other parts of her judgment she made plain (correctly in view of the Board’s conclusion above) that Emtel’s claim of *acte fautif* encompassed a claim based on the alleged unlawful commercial activities of the Operators during Period 1.

145. The following references are sufficient to demonstrate this. At para 63(b) of the Main Judgment, the Judge recorded Emtel’s contention that Cellplus started commercial operations before its licence date, operated without a licence between March and August 1996, and that Emtel incurred a loss in market share as a result. The Judge considered

the evidence relating to this contention at paras 67 to 72. She rejected the defence advanced by the Operators, that this was simply a period of testing with a closed group of friendly users and involved no provision of commercial services. She concluded (at para 72) that there was clear proof that Cellplus had started providing commercial services in the market share it had succeeded in establishing at the expense of Emtel by the end of August 1996.

146. The Judge considered Mr Forrest's evidence about "the market share loss case" at paras 211 and following, recognising that the counterfactual case for the period March to September 1996 had assumed Emtel's market share to be 100% and that Mr Forrest had presented an "additional quantification of Emtel's loss" on that basis, treating it as Period 1. She referred to Mr Forrest's assumptions and calculations (which were not seriously challenged).

147. At para 232, the Judge expressly recorded the *faute* claim pleaded under article 1382 against Mauritius Telecom Ltd and Cellplus in the following terms:

> "As regards MT and Cellplus, they breached the conditions of the GSM licence and engaged in unfair competition resulting in damages to Emtel."

148. Mr Casey invited the Board to interpret this sentence in her judgment as limiting the cause of action to one based solely on breach of the GSM licence conditions, by reading in the words "thereby has" after "and". The Board declines to read in words that would alter the plain meaning of the sentence, which identifies two separate causes of action in respect of Period 2 and Period 1 respectively. To do so would ignore what the Judge said elsewhere. In the Board's view, read as a whole, the Judge's findings and conclusions relating to the Operators' conduct during Period 1 make clear that she found a separate *acte fautif* in Period 1 by virtue of Cellplus' supply of commercial mobile telephone services without a licence, and at a zero-tariff for all domestic calls.

149. The separate award of damages made by the Judge for loss in Period 1 is both consistent with this understanding and inconsistent with Mr Casey's argument. Having referred to Mr Forrest's calculations of Emtel's market share loss and table 10.4, she held:

> "351. … In the light of the evidence establishing that Cellplus started its commercial activities before it actually obtained its licence on 5 September 1996 albeit the licence was backdated to March 1996, I find that an award for damages for the period of March 1996 to August 1996 is reasonable and just and the case of the market share loss has been made out."

150. The Judge awarded damages expressly for Period 1 at para 358. The Board notes that although the Operators made further submissions after judgment had been delivered, in relation to the interest awarded, there was no challenge to the Period 1 damages award on the basis that it reflected a misconception about the case advanced by Emtel. If, as Mr Casey now submits, the Judge considered and addressed Period 1 simply as a basis for the counterfactual for the damages claim in Period 2, and this separate award reflected a failure to follow the logic of her own earlier reasoning, it is surprising that such a patent error was not drawn to her attention during these submissions. It was not because it is clear there was no such error, and the Board is satisfied, for all the reasons given above, that this argument has no merit.

151. When addressing the Judge's findings of *acte fautif* in Period 1, the Appeal Court appears to have limited its consideration to para 72 of the Main Judgment. It made no reference to the passages to which the Board has referred above. Whether or not this explains why the Appeal Court was led into error, careful consideration of the Main Judgment demonstrates that the Appeal Court erred in holding that the Judge "never made any finding of faute" in relation to Period 1.

152. It is unnecessary in these circumstances to address the Appeal Court's conclusion that arguments based on criminal conduct by the Operators in Period 1 were similarly not pleaded.

(iv) Was the backdating of the Cellplus licence effective to cure unlawful trading and/or trading at a zero-tariff?

153. It is helpful to start consideration of this question by summarising the circumstances leading to the backdating of the Cellplus licence, the respective cases at trial, and the Main Judgment.

154. Article 2 of the GSM licence granted on 5 September 1996 stated that the licence was deemed to have come into force for a period of 10 years from 1 January 1996. However, by letter dated 6 September 1996 the Telecom Authority clarified that Cellplus' exclusivity period of three years would run from the date of issue of the licence (namely 5 September 1996) rather than from 1 January 1996, when the licence purported to come into effect. The Board notes that neither Cellplus nor Mauritius Telecom Ltd sought to challenge this (seen at that point as advantageous) modification to the licence terms on the basis that it was contained in a letter rather than in the document headed licence itself.

155. Cellplus did, however, seek amendments to certain conditions of the licence. By letter dated 31 March 1997, the Telecom Authority acceded to one of these requests and amended article 2 by changing the start date from 1 January 1996 to 14 March 1996

with the 10-year period beginning from the later date. The letter also made the licence fee payable from 14 March 1996. Although now uncontroversial, it is accepted that these facts were unknown to Emtel when pleading the statement of claim that the licence had commenced on 5 September 1996.

156. Emtel's pleaded claim in relation to Period 1 is set out above. The Operators defended the Period 1 claim for damages (for alleged unlicensed, unlawful provision of telecommunications services at a zero-tariff in the six-month period before the GSM licence was granted) on the basis that no commercial services were in fact supplied by Cellplus during Period 1. Rather, they contended that this was a period limited to testing of the service. However, and in any event, the backdating of the licence cured any alleged unlawful conduct and legitimised the provision of such commercial services as were supplied. For its part, Emtel contested that the Telecom Authority had the power, by backdating the licence so that it took effect at an earlier date, to make lawful what was unlawful, criminal conduct (pursuant to sections 10 and 40 of the Telecom Act 1988) in Period 1. Emtel also submitted that the backdated licence would necessarily have contained the cross-subsidy prohibition, and that the zero-tariff offered by Cellplus to domestic subscribers was never approved or authorised by the regulator in any event.

157. The Judge did not address the retrospectivity argument expressly, though nor did she overlook it, having recorded that the licence was backdated to commence in March 1996. From her finding of liability (and award of damages) based on *acte fautif* in Period 1 she must have concluded that even with a backdated licence, the Operators were in breach of the cross-subsidy prohibition by applying a zero-tariff without authority to do so. That conclusion followed logically from her other findings and is unsurprising: the application of a zero-tariff involved a cross-subsidy, and even if effectively backdated, the licence would have imposed the cross-subsidy prohibition during Period 1 given her findings in relation to Period 2. The Judge's finding of *faute* by reason of trading in breach of licence conditions that prohibited cross-subsidy applied as a matter of logic to Period 1 which involved, at least the same, or an even more egregious breach of this prohibition. This approach effectively adopted Emtel's closing submission at trial that it was unnecessary to determine whether the Telecom Authority had power to backdate the licence to cure unlawful conduct that had already occurred, because:

> "… even if the Authority does have the power (which it does not) to disapply the criminal law, the licence terms would also have retroactive effect: including for example, the obligation that Cellplus not be cross-subsidised and that Cellplus should have the same interconnection terms as Emtel" (see paragraph 75 of Emtel's closing submissions).

158. This aspect of Emtel's appeal to the Board contends, first, that while the administrative act of backdating the licence may have altered the date from which the licence period started to run, the regulator had no power to waive the commission of unlawful acts or criminal offences already committed in Period 1. Secondly, and in any event, the zero-tariff was never approved and was knowingly operated by Cellplus in breach of section 17 of the Telecom Act 1988 without approval. This distorted competition and allowed Cellplus to gain a 30% market share at Emtel's expense. The Appeal Court failed to address the effect of Cellplus' application of a zero-tariff in those circumstances.

159. For their part, the Operators' written cases contend that the validity of the backdating of the GSM licence has never been questioned by Emtel and its written case continues to accept that the Telecom Authority had such power under the Telecom Act 1988. They submit that it is beyond dispute that the Telecom Authority had the power to make the licence lawfully effective as from 14 March 1996 and the retrospective effect of the licence made it impossible to argue that there was unlawful trading, or any criminal offence committed by the Operators in Period 1. Mr Casey submitted that where a statute confers power to grant a licence with retrospective effect, that can only be to render lawful what would otherwise have been unlawful. Moreover, he submitted that any accrued cause of action that depended on establishing unlawful activity in that period, vanishes in consequence. The Operators rely on *Howell v Falmouth Boat Construction Co Ltd* [1951] AC 837 as supporting the above analysis and submit that its reasoning should apply and answers Emtel's case however it is put.

160. However, during the hearing, the Board queried whether *Howell* does support the analysis advanced by the Operators and invited written submissions following the hearing, on the question whether the Telecom Act 1988 conferred power on the regulator to grant a licence with retrospective effect. The Board is grateful for the further submissions received from the parties and turns therefore to consider the question whether the Telecom Act 1988 conferred power on the regulator to grant a licence for the provision of telecommunication services with retrospective effect. It is common ground that the proper approach to that consideration was set out in *Howell*.

161. In *Howell*, a written licence granted by the Admiralty was required to authorise the carrying out of certain repairs to ships in the United Kingdom pursuant to paragraph 1 of the Restriction of Repairs of Ships Order 1940 and regulation 55 of the Defence (General) Regulations 1939. The work in question was done by ship repairers to a former naval vessel in 1947 (to convert it into a passenger carrying vessel), with oral permission of the Admiralty licensing officer, who only signed a written licence after completion of the work. The appellant resisted paying for the repairs on the basis that the repair work was illegal when carried out, absent a written licence authorising it. Lord Normand, with whom the other members of the Committee agreed, held that whether a licence under the Order could be retrospective was a question of construction:

> "Counsel for the respondents naturally took the point that retrospective authority is a familiar conception in our law. That is true and not unimportant for this case. But it needs more than this to justify the construing of a licence to carry on an activity otherwise prohibited by statutory order as including a licence with retrospective effect. It would be a dangerous power to place in the hands of Ministers and their subordinate officials to allow them, whenever they had power to license, to grant the licence ex post facto; and a statutory power to license should not be construed as a power to authorize or ratify what has been done unless the special terms of the statutory provisions clearly warrant the construction. There are, however, in my opinion, sufficient indications that reg. 55 is a warrant for an Order making provision for licences having retrospective effect." (page 847)

162. The context for the decision in *Howell* was repair work of the "highest urgency in the crises of war" and the need to avoid "possibly disastrous delays" which might occur if emergency work could not be done urgently with a licence to be granted afterwards. This, together with the comparison between regulation 55 and the parallel, but differently worded, regulation 56A (dealing with repairs to buildings) led to the irresistible inference that the legislation contemplated that repairs of ships might be authorised by licence granted retrospectively.

163. The question is whether the same is true in relation to the licence backdated by the regulator in the altogether different context of this case. The resolution of this question depends on a proper construction of the Telecom Act 1988. *Howell* makes clear that the default position, in circumstances where the carrying on of an activity without a licence is otherwise prohibited by statute, is that retrospective back dating of a licence is not possible absent clear words authorising it.

164. On the face of it, the model adopted by the Telecom Act 1988 is an ex ante regulatory regime, designed to regulate the future conduct of telecommunication services. As well as providing an improved structure for regulating the national telecommunication network then operated by Mauritius Telecom Ltd as a state-owned monopoly, the Telecom Act 1988 clearly contemplated the licensing of new mobile telephone operators entering this field, and the regulation in the public interest of competition between such licensed operators on a prospective basis. The Telecom Authority's regulatory function in these circumstances would be undermined by the unlicensed provision of mobile telephone services to the public without first obtaining a licence setting out the conditions on which they can lawfully operate. The regulatory context is, therefore, a strong reason against construing the Telecom Authority's powers as including the grant of a licence with retrospective effect for activities otherwise prohibited by the Telecom Act 1988.

165. There are also several provisions of the Telecom Act 1988 that disclose a strong emphasis on the need for prior approval of the otherwise prohibited activities to be carried out. Further and significantly, there is no express power for the Telecom Authority to ratify or authorise breaches of the licensing regime and nor is it obvious that retrospective approval was necessary for the Telecom Authority to exercise its powers so as to "clearly warrant the construction" that the regulator had power to backdate a licence granted under it. Nonetheless, as will appear clear below, there are certain features of the legislative scheme that point in the opposite direction.

166. The scheme of the Telecom Act 1988 is as follows. Section 4 established the Telecom Authority, and its functions were provided by section 5, including as follows:

> "(a) to monitor, control, inspect and regulate … telecommunication services and facilities;
>
> (b) to ensure that no … telecommunication services or facilities are operated or provided except in accordance with this Act;
>
> (c) to issue, modify or revoke licences under this Act;
>
> (d) to sanction any tariff or charge under section 17;
>
> …
>
> (f) to do all such things as may be requisite under this Act."

167. Wide as these functions were, they did not extend to an express power to issue licences with retrospective effect.

168. By section 2, "telecommunication" and "telecommunication installation" were defined as follows:

> "'telecommunication' means any transmission, emission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, radio, optical or other electro-magnetic systems;

> ‘telecommunication installation’ or ‘installation’ means a line, or any equipment, apparatus, structure, tower, antenna, tunnel, manhole, pit or hole used, or intended for use, in connection with a telecommunication service;”.

169. Further, “telecommunication services” were defined widely as meaning:

> “(a) the services between persons and persons, things and things, or persons and things, provided in respect of radio, sounds including speech and music, telephone, telegraph, telex, telefax, actuation or control of machinery or apparatus, images, data, information and other kinds of services that may be provided by means of telecommunication; …”

170. Section 10 of the Telecom Act 1988, headed “Licence to operate telecommunication services” provided:

> “(1) No person shall establish, maintain or operate a telecommunication installation which is connected in any manner to a telecommunication line outside his business or outside premises or part of premises not exclusively occupied by him for his own business unless he obtains a licence from the Authority.
>
> (2) Every person who establishes, maintains, or operates a telecommunication installation in respect exclusively of his own business shall notify the Authority.
>
> (3) For the purpose of this section, a telecommunication service means any service which may be provided by a telecommunication installation, including any of the services or combination of the services specified in the First Schedule.”

171. The First Schedule to the Telecom Act 1988 included in the list of types of telecommunication services:

> “Telephone Services

> To establish and operate telephone services of all kinds."

172. Section 11 provided that every "application for a licence shall be made in writing and shall … give such information as may be prescribed". The Telecom Authority had power to request an applicant to furnish additional information. In determining whether to "grant, renew, modify or revoke a licence" the Telecom Authority was required by section 11(3) to have regard, among other matters, to "the public interest" and the "technical compatibility of any installation, in respect of which an application is made, with existing and licensed or exempted installations". By section 11(4) it was provided that every licence should specify "(e) any terms, conditions or restrictions which the Authority may think fit to impose." There was power to modify a licence given to the Telecom Authority by section 12 where, "… it considers the modification to be necessary in the interest of the users of telecommunication services or the purchasers of telecommunication equipment or for any other reason; …" and to revoke a licence, "where the licensee is in breach of the terms, conditions or restrictions of his licence."

173. Section 14 set out duties of a licensee, including the requirement to give access to the Telecom Authority "at all times to his installations". Sections 15 gave certain powers to public operators (defined as those holding a licence to operate a telecommunications service for use by the public) to enter private property belonging to others in order to establish a telecommunication installation; and section 16 gave such operators power to deal with obstructions or interferences with the operation of a telecommunication installation.

174. Section 17 of the Telecom Act 1988 dealt with rates, tariffs and charges as follows:

> "(1) Any rates, tariffs or charges proposed by a licensee shall be subject to the approval of the Authority.
>
> (2) The Authority shall not approve any rates, tariffs or charges unless it considers that they are reasonable.
>
> (3) The Authority may call for such information as it thinks fit in determining the reasonableness of any rates, tariffs or charges or any proposed alteration of them.
>
> (4) No licensee shall claim any rates, tariffs or charges which have not been approved by the Authority."

175. Section 40 of the Act was headed "Operating without licence" and provided:

> "Any person who establishes, maintains or operates a telecommunication installation to provide a telecommunication service in breach of section 10 or in breach of the terms, conditions or restrictions of any licence in respect of that installation shall commit an offence."

176. Penalties for offences committed under the Telecom Act 1988 were provided for by section 42.

177. Finally, section 43(8) provided:

> "Notwithstanding section 10, the telecommunication services provided by the Overseas Telecommunications Services Co Ltd and the Mauritius Telecommunication Services Ltd, shall be deemed to have been validly licensed under this Act."

178. The Operators submit that the special terms of the Telecom Act 1988 do, on a proper construction, confer the power to grant licences retrospectively. They rely on section 10(1) as demonstrating that such a power was necessary because the scheme of the Act worked by requiring a licence only for establishing "a telecommunication installation" and not a "telecommunication service". The wide definition of "telecommunication installation" (extending to any equipment used or intended for use in connection with a telecommunication service) allied with the need to ensure that installations function satisfactorily and compatibly with existing infrastructure, meant, by definition, that the relevant installation had to be established (and presumably maintained) well in advance of the grant of the licence. Accordingly, by drafting section 10(1) by reference to the establishment (etc) of installations (rather than, say, the provision, or provision on a commercial basis, of services to the public), the legislature must have intended that the Telecom Authority would have power retrospectively to grant such licences for installations that had already been established by the time of the grant of the licence.

179. They derive further support for this construction from section 11(2) which contemplated visits to or inspection of an installation that was necessarily already established before the grant of the licence in question; and section 11(3), as the Telecom Authority would not be able to determine the technical compatibility of installations for which a licence was sought with existing installations unless the former had already been established, so that compatibility could be tested and demonstrated by actual use.

180. The Board disagrees with the construction advanced by the Operators of section 10 of the Telecom Act 1988. Section 10(1) did not require a licence to be granted for establishing "a telecommunication installation" even if no "telecommunication service" was being provided.

181. Section 10(1) required a licence for equipment which was "connected in any manner to a telecommunication line outside his business or outside premises … not exclusively occupied by him for his own business". For these purposes, a telecommunication service included any telephone service of any kind (section 2, section 10 (3) and the First Schedule). In other words, it was the interconnection of the new mobile phone operator's telephone equipment to the national telecommunication network operated by Mauritius Telecom Ltd (necessary for purposes of providing mobile telephone services) that required a licence. To put it another way, an installation could not be connected for use in providing telecommunication services without first obtaining a licence. By contrast, section 10(2) required every person who established an installation for exclusively his own business, (in other words, any equipment to be used for his own business in connection with a telecommunication service) to notify the regulator (section 10(2)).

182. The Board considers that the distinction being made within section 10 is between a telecoms installation used to provide a service in subsection (1) which connects one business or person with another different business and a telecoms installation in subsection (2) which is then used in a way which is entirely internal to a particular office building or business, like an intercom system enabling people to call one another in the same workplace but which does not connect externally with the outside world. For a purely internal intercom-type system, there is no need for a licence but only to notify the Telecom Authority. A licence is only needed for a system that connects with the outside world.

183. Consistently with this, the offence created by section 40 concerns the establishment, maintenance or operation of an installation to provide a telecommunication service in breach of section 10, which proceeds on the basis that the criminal offence cannot be committed by engaging in conduct before the licensable activity starts, that is to say, before the installation has been connected to the outside world. In other words, it is the operation of the service that is the licensable activity and so constitutes the criminal offence if it is carried out without a licence. That was made clearer in the 2001 Act which, at section 24(1), provided: "No persons shall operate [a] … network or service including telecommunication network or service unless he holds a licence from the Authority". In other words, the offence was to operate the service without a licence. No defence of impossibility or impracticability was provided by the Telecom Act 1988.

184. However, the Board does accept that the Telecom Act 1988 is not clear about when precisely a licence was expected to be issued. The Board recognises the force of the argument that a telecoms company proposing to enter the market will need to exercise the powers in sections 15 and 16 during the preparatory stages of installing its equipment, some time before it is ready to connect the system up and start providing the service to the public. The powers in those sections are exercisable only by a "public operator" and that term is defined as someone who already holds a licence. Even though it appears from section 10 that the need for a licence is triggered only by the start of the service, it may have been envisaged that it would be possible in fact for a licence to be granted at the earlier stage, before the service was up and running. The same lack of clarity persisted in the 2001 Act. Certain provisions in both legislative schemes appear to have proceeded on the basis that a licence would be granted as soon as the operator was ready to set up its equipment or installation and well before the launch of its service. A difficulty then might be that once licensed, the operator might be thought entitled to operate the service even if not ready to do so, although this problem could have been addressed by the imposition of appropriate conditions that had to be satisfied before the operator could lawfully operate the service.

185. Even if the statutory regime envisages that the licence can and should be granted at the earlier stage to render lawful, for example, the conduct envisaged by section 15, that does not mean that the regulator must have the power to issue a licence retrospectively. It means only that a prospective public operator needs to hold a licence if it wishes to exercise powers under the legislation which require it already to be a holder of a licence, even though it is not yet providing a telecoms service within section 10. If the prospective operator fails to apply for such a licence and so purports to exercise powers under section 15 without being a public operator as defined, it is not clear that it is either necessary or appropriate for the Telecom Authority to be able to legitimise the exercise of those powers retrospectively, extinguishing whatever rights may have accrued to a property owner whilst the operator was unlicensed.

186. In the present case, it seems clear that Cellplus should have applied for a licence before March 1996 since, even on its own case, which was rejected on the facts by the Judge, it was providing a public telecoms service to "friendly users" and so was carrying on a licensable activity. The Board has not been provided with any contemporaneous documents explaining why Cellplus asked for the licence to be backdated or what the Telecom Authority thought it was achieving by backdating the licence.

187. These considerations lead the Board to conclude that it is not in a position to deal with whether expressly or by necessary implication, the Telecom Act 1988 provided for licences to be backdated or granted with retrospective effect.

188. But in any event, even if it were possible for the regulator to declare that a licence would start from an earlier date, Emtel's alternative argument that the zero-tariff was never retrospectively approved was not addressed by the Appeal Court.

189. The Operators contend nonetheless, that the Appeal Court was correct. They argue first that in allowing domestic calls free of charge Cellplus did not "claim any rates, tariffs or charges" within the meaning of section 17(4) because, by definition, a zero-tariff meant it "claimed" nothing and applied no rate, tariff, or charge. This, they submitted, was consistent with guidance from the Telecom Authority in the letter of 31 March 1997 (which deemed the licence to have been in force since 14 March 1996) stating that:

> "Tariffs are generally approved, in principle, as maximum tariffs which an operator may charge for a given service. Any increase in such tariffs would therefore require the approval of the Telecommunication Authority and a revision downwards should be communicated to the Telecommunication Authority prior to implementation."

190. Further and in any event, the Operators argue that the Telecom Authority knew that Cellplus was allowing calls free of charge during Period 1 so that when granting the licence expressly to cover Period 1, it implicitly approved Cellplus' conduct in that regard, and there was no contravention of section 17 of the Telecom Act 1988.

191. The Board rejects these submissions. The tariffs or charges that required the approval of the Telecom Authority pursuant to section 17 of the Telecom Act 1988 are defined by section 2 as tariffs or charges "leviable in relation to the extent of use" of a mobile phone service. Section 41 made it a criminal offence to charge unauthorised tariffs. As part of its function of regulating the market for providing mobile phone services by requiring prior approval of tariffs levied and not approving tariffs unless they were considered by it to be reasonable, the Telecom Authority was entitled to be concerned about pricing structures in general. Such concern necessarily included the need to act to prevent predatory pricing that might drive a competing operator out of the market, as much as the need to control unreasonably high pricing. Sections 17 and 41 of the Telecom Act 1988 proceeded on that basis. This necessarily means that a zero-tariff was as much a "tariff" that could be levied in relation to use of a mobile phone service, charged or applied within the meaning of the Telecom Act 1988 as any other tariff. It required approval (to avoid the commission of a criminal offence) just like any other tariff.

192. Consistently with the Telecom Act 1988, article 7 of the Cellplus licence required it to "charge the subscribers appropriate fees as described in the Third

Schedule" and made clear that all changes in call charges also required "prior approval". The third schedule to the licence identified itemised fees that "will be charged by the licensee to the subscribers" according to whether they were business or individual subscribers, and whether the call was at peak or off-peak. The evidence at trial included a letter dated 17 June 1996, in which Cellplus submitted its tariff plan and structure to the Telecom Authority, indicating that this would be applicable once approved by the Telecom Authority. The tariff approved for domestic mobile phone calls was listed in the third schedule as having been approved at 4 rupees. This, like the other charges specified in the third schedule, was specified as an actual charge for this category of calls, rather than as a maximum charge. Moreover, "charges" for "incoming calls mobile to mobile" were specified as "free" and must have been approved by the Telecom Authority on that basis. Thus, both the Operators and the regulator plainly understood that a zero-tariff required approval and understood the difference between the specified charge for a category of calls and those specified as free of charge.

193. Further, although the 31 March 1997 letter relied on by the Operators made numerous amendments to the licence, including two specific amendments to the third schedule, it did not authorise any further or other "free" charges. Nor did it give retrospective approval for a zero-tariff on all domestic calls in Period 1. The guidance given in the letter in relation to article 7 of the licence about maximum tariffs was just that. It identified as a matter of generality that tariffs were, in principle, approved as maximum tariffs and any increase required prior approval. But that did not alter the statutory obligation under section 17 of the Telecom Act 1988 or clause 7 and the third schedule of the licence to obtain prior approval for fees charged. Nor can it sensibly be understood as meaning that an operator was entitled to apply any lower tariff it chose, still less operate on a zero-tariff basis for all domestic customers (business and individuals alike). The guidance made clear, in any event, that any revision downwards required prior notification to the regulator before implementation.

194. Finally, the assertion that the Telecom Authority knew and is to be taken to have approved the zero-tariff is unsupported by the evidence and no findings of fact to this effect were made. It is inconsistent with the Telecom Authority's 31 March 1997 letter which said nothing to support such knowledge or approval. Moreover, Cellplus' letter of 17 June 1996 seeking approval of its tariff structure merely said that if approval were delayed it would have "no alternative than to continue with the present trend of friendly users". Far from making clear that commercial services were and would be supplied for free to all new subscribers for domestic calls, the implication of that letter was that services for a relatively small number of friendly users would continue to be supplied. On the Judge's finding that commercial services were provided free for domestic calls to all new subscribers by Cellplus from 14 March 1996, the Operators failed to give full disclosure of their activities, and their representation to the Telecom Authority was misleading.

195. Accordingly, whatever other effect it might have had, the backdating of the licence to take effect on 14 March 1996 did not validate the zero-tariff claimed or applied by Cellplus to its new subscribers for all domestic calls in Period 1. The backdating of the licence to 14 March 1996 did not approve what the Judge described as a zero-tariff: Cellplus could not in March 1996 charge a customer a zero-tariff for a mobile to fixed call without breaching the terms of its licence. To do so would have been a criminal offence contrary to section 41 of the Telecom Act 1988.

196. Accordingly, even if the licence and the third schedule were backdated to March 1996, Cellplus remained in breach by charging all domestic calls at a zero-tariff. That tariff was never approved and was unlawful. In those circumstances, contrary to the conclusion reached by the Appeal Court, its activities in Period 1 could and did support the Judge's conclusion that an act of unfair competition was committed by the Operators within the meaning of article 1382 of the Civil Code.

197. For the avoidance of doubt, should it be suggested that the counter-factual assessment of damages in Period 1 should be revisited by virtue of the fact of backdating, the Board notes that the Operators did not advance any alternative case based on a contention that they could have (but did not) charge the tariffs in the third schedule of the licence (as backdated). As indicated above, the Judge recorded Mr Forrest's assumption that Emtel's market share was 100% in the counterfactual case. The Judge did not record any other counterfactual scenario advanced by the Operators or their expert witnesses. No other counterfactual assessments were pleaded by the Operators. This is unsurprising given their pleaded case that no commercial services were provided at all. It is now too late for them to claim to reduce the quantum of damages for Period 1 based on Cellplus lawfully entering the market in March 1996 (by virtue of its backdated licence) and charging approved tariffs from that point onwards.

(c) The appeal in relation to Period 2

(i) Introduction

198. Emtel's claim in tort against the Operators for Period 2 was particularised in the third amended statement of claim, though certain allegations were not pursued at trial. In essentials, the allegations pursued by Emtel at trial in relation to Period 2 were that the interconnection requirement and cross-subsidy prohibition were conditions of the GSM licence granted by the Telecom Authority to Cellplus on 5 September 1996 and had as their purpose the prevention of unfair competition (paragraph 9 of the amended statement of claim).

199. The Board notes that at the date of this amended pleading, Emtel was not in possession of the letter of 5 September 1996, later relied on at trial as imposing those

same conditions on Mauritius Telecom Ltd and Cellplus. Emtel further alleged that the two conditions were breached: in particular, Mauritius Telecom Ltd cross-subsidised Cellplus in numerous ways and the cross-subsidy enabled Cellplus to operate at a tariff that was not commercially sustainable and was substantially lower than the one provided by Emtel (paras 12 and 13). These were concerted acts of unfair competition (contrary to article 1382 of the Civil Code) causing Emtel loss and damage (paragraphs 17 and 18).

200. In their respective defences, neither Mauritius Telecom Ltd nor Cellplus pleaded the case later advanced at trial, that the conditions were *ultra vires* or that they were not contained in the formal licence document given to Cellplus. Rather, Mauritius Telecom Ltd denied para 9 but averred "that the purpose of the conditions imposed was to encourage fair and healthy competition amongst all operators and to ensure that [Cellplus] should not benefit from any cross-subsidisation" (paragraph 16); referred to the Telecom Authority's letter of 4 February 1997 (at paragraph 21.1) and averred that separate accounts had been kept and there had been no cross-subsidisation between Mauritius Telecom Ltd and Cellplus; and at paragraph 25 averred that:

> "(a) … the condition that 'the interconnection agreement between Mauritius Telecom and Cellplus should be on the same terms as those offered to Emtel Ltd without, however, any grace period as was previously granted to Emtel Ltd' has always been respected by both [Mauritius Telecom Ltd] and [Cellplus]; …"
>
> and that:
>
> "(b) as regards the condition that 'the Authority would appoint an independent auditor to certify that Cellplus Mobile Communications Ltd is keeping separate accounts from Mauritius Telecom and that it is not benefiting from any cross subsidisation'," separate accounts had been kept, audited and filed.

201. The Cellplus defence was to similar effect. For example, at paragraph 15 Cellplus averred that:

> "(a) according to the press release, one of the objectives of Government policy was to encourage fair and healthy competition among all operators;

> (b) the fact [Mauritius Telecom Ltd] decided to set up an independent entity to operate mobile telephony was meant to encourage fair and healthy competition;
>
> (c) one of the two conditions cited in the press release specified that as regards interconnection agreements with [Mauritius Telecom Ltd], [Cellplus] should be on the same terms as Plaintiff (without, however, [Cellplus] enjoying the same advantages which had previously been granted to the Plaintiff during the grace period); the other condition was to ensure that [Cellplus] should not benefit from any cross subsidisation;
>
> (d) [Cellplus] has never benefited from any subsidy by [Mauritius Telecom Ltd];
>
> (e) there has never been a situation of unfair competition in favour of [Cellplus]; and
>
> (f) the interconnection agreement between [Mauritius Telecom Ltd] and [Cellplus] has always been on the same terms and conditions as those between [Mauritius Telecom Ltd] and Plaintiff."

(ii) The relevant provisions of the Telecom Act 1988

202. It is common ground that questions about the Telecom Authority's power to impose licence conditions, including questions about how such a power could lawfully be exercised, turn on the correct construction of the Telecom Act 1988. As set out above, the Telecom Authority had "far-reaching" powers which included at section 5(c) the power "to issue, modify or revoke licences under this Act". Section 11 required that any application for a licence be made in writing and required the Telecom Authority to have regard to certain specified matters, including the public interest, in determining whether to grant, renew, modify or revoke a licence. Section 11(4) provided that:

> "(4) Every licence shall specify:
>
> …

(e) any terms, conditions or restrictions which the Authority may think fit to impose."

203. Section 12(1) gave the Telecom Authority power to modify a licence "if it considers the modification to be necessary in the interest of the users of telecommunication services or the purchasers of telecommunication equipment or for any other reason" and section 12(2) and (3) made provision for the process by which that power should be exercised:

> "(2) Where the Authority wishes to modify or revoke a licence it shall give notice to the licensee-
>
> (a) stating that it proposes to make the modification or revocation;
>
> (b) giving the reasons why it proposes to do so;
>
> (c) specifying the time within which representation or objections with respect to the proposed modification or revocation may be made.
>
> (3) Any representation or objection under subsection (2)(c) may be submitted, within 21 days of receipt of the notice, to the Authority for determination."

204. Section 13 provided that an applicant or licensee who was dissatisfied with a decision made by the Telecom Authority under section 12 had a right of appeal to the Minister, and provided that any such appeal had to made in writing within 21 days of the notification of the decision.

(iii) The factual context in more detail

205. As outlined above, Emtel was the first operator to be granted a licence to provide mobile phone services in Mauritius. The licence granted on 19 May 1989 by the Telecom Authority gave exclusive rights to Emtel for an initial seven-year period from 1 January 1989 to expire on 31 December 1995. To set up and operate its cellular mobile telephone network, Emtel was bound to interconnect to the national network operated as a state monopoly exclusively by Mauritius Telecom Ltd, and accordingly, Emtel was required (as a condition of its licence, see clause 8) to conclude an agreement

with the public operator operating the national network (ultimately, Mauritius Telecom Ltd), in this regard, and did so eventually by an agreement dated 24 July 1995. However, Emtel benefitted from a period of grace for three years during which it was exempt from the payment of certain fees. At the end of the grace period, Emtel was required to pay charges calculated by reference to a percentage of the gross proceeds from all calls made by and to mobile telephone subscribers. The charges were payable with effect from 1 July 1992 and the percentage for the first year was 15% and rose to 25% of gross proceeds for the years after that.

206. However, in December 1993, Mauritius Telecom Ltd expressed a wish to enter the cellular mobile telephone market using GSM technology. On 17 March 1994, the Telecom Authority gave its approval in principle, to set up and operate such a service, envisaging it would start from 1 January 1996. The Telecom Authority stated that a licence would be issued to Mauritius Telecom Ltd on submission of the detailed project for operating the cellular mobile telephone system. On 10 November 1994, Mauritius Telecom Ltd wrote to the Telecom Authority that it was planning to undertake preliminary tests on the system with a closed user group by mid-June 1995.

207. When Emtel, as the incumbent mobile phone operator in Mauritius, became aware of Mauritius Telecom Ltd's intention to launch its own mobile telephone service, it lobbied the Mauritian Government and the Telecom Authority. Clearly, Emtel feared that Mauritius Telecom Ltd could subsidise its services through the revenue generated from its existing substantial operation of the fixed line network (where there was no competition) and stifle competition in the mobile market, reducing the value of Emtel's own investment in the market and undermining its competitive position. Thus, for example, by letter dated 16 October 1995, Emtel wrote to the Telecom Authority to "ensure fair competition" between Emtel and the new provider of mobile telecommunications services (then referred to as the "New GSM company", and which became Cellplus). The letter identified actions Emtel thought necessary to achieve this end, including as follows:

> "1. The New GSM company to be a separate company from Mauritius Telecom
>
> 2. As the Infrastructure of the GSM company is co-located in MT's premises there is a need for transparency in costs allocations for: (a) Space rental (b) Tower space rental (c) Power and air-conditioning costs (d) Technical staff costs (e) Equipment usage
>
> 3. The GSM company must pay same interconnect charges as Emtel to MT and have same terms and conditions.

> 4. Directives be given to the new GSM company for prevention of x-subsidy from MT's other operations …"

208. Mauritius Telecom Ltd updated the Telecom Authority about the status of the project in a document sent under cover of a letter dated 16 November 1995. It is a fair inference from its contents that Mauritius Telecom Ltd had by then been made aware of Emtel's concerns since Mauritius Telecom Ltd acknowledged the importance of the new company (Cellplus) having separate accounts and said in terms that the present "provisions of the interconnect agreement applicable to the analogue operator [Emtel] would be applicable to Cellplus". By letter dated 24 November 1995, the Telecom Authority informed the Ministry that it had agreed that the two conditions (separate accounts and no cross-subsidy), among others, should be imposed, subject to any objection by the Ministry.

209. Cellplus was incorporated as a wholly owned subsidiary of Mauritius Telecom Ltd on 14 March 1996.

210. A further memorandum dated 24 April 1996, submitted by Mauritius Telecom Ltd to the Telecom Authority (copied to the Minister), made clear that it was:

> "fully aware that questions have been raised by interested parties relating to the needs of having separate accounts in order to avoid cross-subsidisation of services: in anticipation of the above and with a view to ensure total transparency, Mauritius Telecom will be operating its mobile cellular services under a subsidiary company known as Cellplus Mobile Communications Ltd."

211. It continued, "Mauritius Telecom will ensure that its subsidiary company pays for all services and infrastructure at commercial rates". These points were reiterated by Mauritius Telecom Ltd in a letter to the Telecom Authority of 12 July 1996, commitments designed (no doubt) to reassure the Telecom Authority that the GSM licence could and should be granted.

212. In an internal memo addressed to the Chairman of the Telecom Authority (dated 18 June 1996), the writer suggested that, in order to regulate competition between Cellplus and Emtel, the Telecom Authority might wish to be guided by the principle that the dominant operator should be non-discriminatory in the treatment offered to competitors making use of its services, and to that end, should "consider the issue of the following directives to Mauritius Telecom: i. MT should not take advantage of its market power with a view to eliminating or … damaging another licensee; … ii. MT

should not discriminate between operators who acquire or make use of a telecommunication service …". The writer continued that this implied that:

> "i. the interconnect agreement between MT and Cellplus would have to be on the same terms and conditions as those granted to Emtel, including interconnect charges.
>
> ii. MT cannot cross subsidize the operations of Cellplus."

213. Soon afterwards, by letter dated 27 June 1996, the Telecom Authority sought advice from the Solicitor-General about its "preliminary view" that Mauritius Telecom Ltd should be required to offer the same interconnection terms to Cellplus as those offered to Emtel and required not to cross-subsidise Cellplus' operations.

214. In August 1996, there was Government consultation to discuss the issue of a level playing field. Oral and written representations were made by Emtel, Mauritius Telecom Ltd and Cellplus. Emtel's paper repeated points it had made earlier regarding the requirement that there be no cross-subsidy between Mauritius Telecom Ltd and Cellplus and the need for Cellplus to have the same interconnection terms with Mauritius Telecom Ltd as Emtel was required to have, and to prepare separate accounts from Mauritius Telecom Ltd. Emtel's paper raised as a serious concern that Cellplus was not only operating without a licence, but in the absence of any licence had been "giving unlimited free calls to customers for almost 6 months". Emtel explained that Mauritius Telecom Ltd's monopoly meant other operators had to interconnect with Mauritius Telecom Ltd to operate. The interconnection charges Emtel had to pay to gain access to Mauritius Telecom Ltd's network amounted to a high percentage of its call revenue. This made it difficult to offer flexible tariffs such as off-peak rates in the evenings and at weekend. By contrast:

> "a. Cellplus is offering free trial since nearly six months to its customers (free calls etc.). How can this be possible if they had to pay same interconnect fees as Emtel to MT? Not having to pay any interconnect charges will allow Cellplus to offer cheaper calls tariffs."

215. By letter dated 4 September 1996, the Telecom Authority informed the Solicitor-General that it had approved (among other things) both requirements and the grant of three years' exclusive rights to Cellplus for the use of GSM technology to operate a cellular mobile telephone service. The Telecom Authority sought assistance from the Solicitor-General in drafting a press communiqué to explain the latter decision.

216. On 5 September 1996 the Telecom Authority sent three letters (none of which was made public) as follows:

- Letter 1: A letter addressed to Cellplus enclosing a GSM licence document headed "Cellular Mobile Radio Telephone Service Licence". The document stated (at article 1) that Cellplus was authorised to carry on the GSM telecommunication service "subject to the conditions (general and special) hereinafter contained". It set out several "general" and "special" conditions imposed by the Telecom Authority in two separate annexes. Neither the licence document nor the annexes included the interconnection requirement and cross-subsidy prohibition. Article 2 provided that the licence would be deemed to have entered into force on 1 January 1996 and would last for 10 years. Article 3(c) provided that the Authority "reserves the right without prejudice to all the powers granted by law … to impose additional restrictions/obligations governing the operation of the licence". The licence also contained four schedules setting out matters such as the description of the mobile telephony service, the sites of radio equipment and base stations, a description of tariffs and charges, and the licence fee.

- Letter 2: A letter addressed to Cellplus by which the Telecom Authority granted Cellplus exclusive rights to operate the GSM licence for a three-year period. These exclusive rights were not set out in the licence document or annexes, but only in this letter.

- Letter 3: A letter addressed to Mauritius Telecom Ltd (and copied to Cellplus) stating that the Telecom Authority had approved the grant of a GSM licence to Cellplus and that:

> "…[Mauritius Telecom Ltd] should offer interconnection to [Cellplus] on the same terms and conditions as those offered to Emtel Ltd without any grace period.
>
> The [Telecom Authority] will shortly appoint an auditor to determine whether Cellplus … is keeping its accounts separate from Mauritius Telecom, and that it is not benefiting from any cross-subsidisation from Mauritius Telecom."

217. Also on 5 September 1996, the Telecom Authority issued the Press Release. This was copied to Emtel by letter dated 25 September 1996 (which plainly explains why it, rather than the letter addressed to Mauritius Telecom Ltd which was not in the possession of Emtel, was pleaded as founding the interconnection requirement and cross-subsidy prohibition). The Press Release referred to recent developments in the

national telecommunication network and to the Government's strong commitment to the liberalisation of this sector as follows:

> "The Telecommunication Authority has taken note of the various steps already taken by Government in the pursuit of the above objectives: (a) the commitment to the World Trade Organisation to gradually liberalise its telecommunication sector by the year 2004; (b) the reconstitution of the Telecommunication Advisory Council so as to propose a comprehensive policy aimed at –
>
> - reviewing the legal, regulatory and institutional framework in the sector;
>
> - encouraging fair and healthy competition among all operators in that sector …"

218. It concluded, at paragraphs 6 and 7, as follows:

> "6. The Authority has given its approval to the tariffs proposed by Cellplus Mobile Communications Ltd in respect of telecommunication services to be provided to the public.
>
> 7. The Authority has further decided that the following conditions be met:
>
> (a) the interconnection agreement between Mauritius Telecom and Cellplus should be on the same terms as those offered to Emtel Ltd without, however, any grace period as was previously granted to Emtel Ltd;
>
> (b) the Authority would appoint an independent auditor to certify that Cellplus Mobile Communications Ltd is keeping separate accounts from Mauritius Telecom and that it is not benefiting from any cross subsidisation."

219. By letter dated 6 September 1996, the Telecom Authority informed Cellplus that the period of exclusivity would run from 5 September 1996 (the date of issue of the licence) instead of 1 January 1996 (the purported commencement date of the licence).

220. In response to Letter 3, Mauritius Telecom Ltd took legal advice. By letter dated 22 October 1996, it invited urgent consideration by the Telecom Authority of amendments and clarifications it proposed to Letter 3, including:

> "An amendment to the terms of your letter of 5 September 1996 in two respects, namely the omission of the words 'without any grace period' in the first paragraph and secondly, the omission of the second paragraph …"

221. The letter enclosed a legal opinion obtained by Mauritius Telecom Ltd about the "legal validity or regularity of several conditions imposed upon Cellplus, in so far as the interests of Mauritius Telecom … may be affected". Further paragraph 2.3 of the legal opinion recorded that "The licence to operate the system was issued to [Mauritius Telecom Ltd]'s subsidiary (Cellplus) under certain conditions including the necessity of an Interconnection Agreement between [Mauritius Telecom Ltd] and Cellplus to enable communication between the subscribers of Cellplus' mobile system and the subscribers of [Mauritius Telecom Ltd]'s fixed system".

222. At the time however, Emtel remained unhappy about the lack of compliance with them, and took steps, including by a notice dated 28 November 1996, to require the Telecom Authority to enforce them: see para Error: Reference source not found above.

223. By letter dated 4 February 1997, the Telecom Authority responded to Mauritius Telecom Ltd's request for amendments to the two conditions, stating that it had maintained its earlier decision:

> "b. … the interconnection offered to Cellplus Mobile Communications Ltd by Mauritius Telecom should be on the same terms and conditions as those offered to Emtel Ltd and should not be subject to any grace period regarding payment of charges relating to such interconnection" and

> "c. … Mauritius Telecom should be, and is hereby directed to, furnish to the Authority such documentary evidence as audited accounts and reports showing that Cellplus Mobile Communications Ltd is keeping its accounts separate from Mauritius Telecom and that it is not benefitting from any cross subsidisation from Mauritius Telecom. The second paragraph to our letter dated 05 September 1996 may consequently, be disregarded".

224. Mauritius Telecom Ltd strongly objected to paragraph b in a letter of 19 February 1997, describing it as setting out "conditions [which] amount to an unlawful restriction of the right of two companies to freely negotiate" mutually agreed conditions relating to use of the national network. The Telecom Authority responded by letter dated 21 March 1997, that Mauritius Telecom Ltd should "abide by the directives as per paragraphs b and c" of the letter of 4 February 1997.

225. Finally in relation to Period 2, by letter dated 31 March 1997, the Telecom Authority informed Cellplus that it had agreed to amend certain conditions of the Cellplus licence, including by amending its commencement date to 14 March 1996. No further reference was made to the interconnection requirement and cross-subsidy prohibition.

(iv) The judgments below

226. In the Main Judgment, the Judge described the correspondence that pre-dated the three letters of 5 September 1996. She referred at para 84 to Letter 3 (of 5 September 1996) which set out the interconnection requirement and the cross-subsidy prohibition; and to Letter 2 granting Cellplus exclusive rights to use the GSM technology for three years from the date of the licence (para 89). At paras 90 et seq she explained the rationale for the Press Release and set out the terms of paragraph 7. She referred to correspondence post-dating the Press Release (summarised above) and to the correspondence setting out "amendments" sought by Mauritius Telecom Ltd.

227. The Judge described how the paragraph 7(a) and (b) conditions (as amended by the letter of 4 February 1997) were communicated to both Mauritius Telecom Ltd and Cellplus, observing at para 245 that they were "at the heart of Emtel's claim" as conditions of Cellplus' GSM licence, with which Cellplus was under an obligation to comply, and which it breached with the complicity of Mauritius Telecom Ltd and the Telecom Authority causing damage to Emtel. At para 246, she held:

> "Whether paragraph 7(a) and (b) as amended sets out conditions of the GSM licence must be considered by looking closely at the Press Communiqué and the language in which it is couched and also in the light of the circumstances surrounding it. The evidence on the circumstances leading to the issue of the communiqué and of the inclusion of paragraph 7 (a) and (b), on the events after its issue and on the intention of the parties leaves no room for doubt that paragraph 7(a) and (b) sets out conditions of the GSM licence granted to Cellplus albeit they are not found in the licence proper."

228. At paras 247 to 251, the Judge referred to the liberalisation of the telephony sector, to the recognition "by all parties that the competitors should operate on a level playing field and that a new entrant should not benefit from an unfair advantage such as cross-subsidisation of a subsidiary by an incumbent from profits earned in a monopoly market", and observed that all parties understood the implications of a liberalised market and the need for fair competition. She described the commitments to respect the principle of fair competition made by Mauritius Telecom Ltd to the Telecom Authority, including that Cellplus would be an autonomous unit with interconnection on the same terms and conditions as Emtel. She held, "it is therefore not surprising that paragraph 7(a) and (b) replicate the above commitments of [Mauritius Telecom Ltd] and set them down as conditions" which the Telecom Authority made clear were "conditions to be met".

229. At para 252 she observed:

> "Much has been made in the course of the trial that the conditions are not inserted in the GSM licence granted to Cellplus. It is noted that the two 'conditions to be met' are directed towards [Mauritius Telecom Ltd] and Cellplus and not to Cellplus alone and it was therefore fit and proper for the [Telecom Authority] to impose them in the communiqué which would have brought them to the attention of all including [Mauritius Telecom Ltd]."

230. The Judge found that the Operators understood the interconnection requirement and cross-subsidy prohibition. Mauritius Telecom Ltd sought legal advice about them and invited the Telecom Authority to make amendments to them. Both understood their purpose was to prohibit Cellplus from benefitting from "an economic and financial cross-subsidisation by [Mauritius Telecom Ltd]" (para 264).

231. At paras 265 to 273 the Judge addressed the evidence as to whether the conditions had been breached, concluding:

> "Indeed in my view, the recourse by [Mauritius Telecom Ltd] to finance the operational expenses of Cellplus by the intercompany debt or payables exemplifies the type of conduct that condition 7(b) expressly prohibits. … Cellplus as a subsidiary of [Mauritius Telecom Ltd] was paying for finance at uncommercial rates, which constitutes a clear breach of the condition against cross-subsidisation. The effect was that [Mauritius Telecom Ltd] was bankrolling Cellplus in its operations when the conditions at paragraph 7 were

> designed expressly to put a stop to this bankroll. The breaches were so obvious that they can only be described as intentional breaches."

232. The Judge held that the Operators had acted in concert to breach the condition against cross-subsidisation. Each had a shared responsibility to comply with conditions described by the Telecom Authority as "conditions to be met" when Cellplus was granted the GSM licence. Both had intentionally made use of unfair means leading to a "*rupture d'égalité dans les moyens de la concurrence*…." and had committed an "*acte fautif*". (See paras 276 and 277).

233. The Appeal Court overturned the Judge's finding of unfair competition in Period 2 because, although the interconnection requirement and cross-subsidy prohibition were contained in Letter 3 (as amended) and published in the Press Release, they were not express terms found in the single document called "Licence" which granted Cellplus the right to operate the GSM mobile phone service. Nor could Mauritius Telecom Ltd be subject to any such condition as it was not the legal licence holder and the breach which was found to establish Mauritius Telecom Ltd's liability was the breach of the paragraph 7(a) and (b) conditions of the Press Release.

234. The Appeal Court's reasoning proceeded as follows. Section 11 of the Telecom Act 1988 made detailed provision for the application and granting of a licence under section 10, and "expressly stated in section 11(4)(e) … that the conditions of the licence must be specified in the licence." Section 12 empowered the Telecom Authority to modify a licence, but subject to compliance with the statutory requirements it set out. These requirements were couched in mandatory terms and there were compelling reasons showing that this framework for licensing was intended to be strictly applied. The Appeal Court set these out as follows:

> "(i) The regulatory framework would fail to operate within the statutory scheme of the Act if the licence conditions were not specified in the licence of the licensee, as required by section 11(4)(e) … because the Authority is only empowered to revoke a licence for breach of a condition pursuant to section 12(b)(iii), "*where the licensee is in breach of the terms, conditions or restrictions of his licence*" [emphasis added by the Appeal Court].
>
> (ii) Cellplus, as a licensee, cannot be denied the benefit of the statutory rights specifically prescribed under section 12, by virtue of which Cellplus is entitled to be notified by formal notice of any proposed modification to its licence and of the

> reasons thereof, so that it is in a position to make informed representations, pursuant to section 12(3), before any modification to the conditions of its licence can be imposed upon a licensee by the [Telecom Authority].
>
> (iii) Nor can Cellplus be denied, as a result of a failure to comply with sections 11 and 12 of the [Telecom Act 1988], … its statutory right of appeal to the Minister under section 13, to contest the imposition of any new licence condition by the [Telecom Authority].
>
> (iv) The need for strict compliance with the specification of conditions in the licence in accordance with section 11(4)(e) is further highlighted by the criminal sanction which is imposed for non-compliance. … Clearly, the legislator could not have intended that an offence would lie against a licensee where there is a breach of a condition which was purportedly imposed by way of a press communiqué and which should be implied to be, or in any other way understood by a licensee to be, in its licence. This again justifies the absolute necessity for conditions to be specified in the licence, in conformity with section 11(4) of the [Telecom Act 1988], or inserted by way of modification to the licence in conformity with section 12(2) of the [Telecom Act 1988]."

235. The Appeal Court held accordingly that the Telecom Act 1988 set up a holistic regulatory regime. Its mandatory provisions for licensing rebutted the idea that "free-standing", implied or tacit conditions could be validly imposed or incorporated into the GSM licence in the manner found by the Judge. None of the reasons given by the Judge supported the finding that the circumstances prior to, or after the issue of, the licence validly incorporated the two purported conditions set out in the Press Release as conditions of the licence. The Telecom Authority was bound to exercise its power to impose licence conditions only in conformity with the express provisions of sections 11 and 12 of the Telecom Act 1988 and had not done so. Moreover, the Appeal Court considered, the fact that Government and the parties were committed to liberalisation, or that Mauritius Telecom Ltd and Cellplus understood or were aware of the conditions, as may appear from their correspondence, could not constitute valid reasons for finding that the two conditions had been incorporated into the licence of Cellplus. Nor could the correspondence or representations involving Mauritius Telecom Ltd and Cellplus be construed to amount to a valid imposition of licence conditions within the meaning of the Telecom Act 1988.

(v) The single document theory

236. The Operators support the reasoning and conclusions of the Appeal Court in relation to the operation of sections 11 and 12 of the Telecom Act 1988 as mandatory and as requiring any conditions imposed on a licensee to be specified in the single licence document itself.

237. Moreover, Mr Casey emphasised the terms of articles 1 and 14 of the Cellplus licence: the licence to operate was made subject to the general and special conditions that were contained in it; and article 14 said, "The general and special conditions and the four schedules annexed to this licence shall be read together and form one document". He submitted accordingly that the Cellplus licence defined itself as the formal document itself. This language excluded the possibility that the "Licence" is, or conditions of the "Licence" are, partly to be found other than in the single document headed "Licence" itself.

238. Notwithstanding this argument, Mr Casey accepted that it is possible for a licence to contain a term providing for the incorporation by reference of a requirement set out in another document but submitted that this is of no assistance to Emtel. As a matter of fact, in this case, the Licence was a single document and made no reference to Letter 3 or the Press Release.

239. The Board does not accept the single document theory. First, it relies on a strained interpretation of the word "licence" in section 11(4) of the Telecom Act 1988, that the licence be confined to a single document. Even on a literal reading of section 11(4), it affords no support for this construction. There is no express prohibition on the Telecom Authority from granting a licence to an operator the terms and conditions of which are contained in two separate documents to be read together. The word "licence" in section 11 simply does not bear the weight of the Appeal Court's strained interpretation.

240. Secondly, as Lord Bingham made clear in the Board's earlier ruling in this litigation at para 37, in "deciding what terms or conditions to impose on the grant of a licence the Authority enjoyed a wide discretion." If the Telecom Authority enjoyed a wide discretion as to the nature of the terms to impose there is no obvious reason why it should not also have enjoyed a wide discretion as to how a specific term should be communicated to the operator concerned.

241. Thirdly, the Appeal Court's narrow interpretation elevates form over substance in a manner inconsistent with the Telecom Authority's regulatory functions. Just as Lord Bingham held, at para 42, that it would "emasculate the regulatory regime" if Mauritius Telecom Ltd were immune from a cross-subsidy prohibition, the Appeal Court's approach deprives the Telecom Authority of the flexibility necessary to achieve fair regulation of the telephony market in circumstances where, as here, the legal licence

holder was the wholly owned subsidiary of the parent operator and had been formed specifically to make the relationship between the two businesses more transparent and hence to make regulation of the overall entity easier. The need to ensure that the conditions imposed on Cellplus in its licence were binding on Mauritius Telecom Ltd even though they were not incorporated into Mauritius Telecom Ltd's own deemed licence militates against the single document theory.

242. Fourthly, the Board recognises the force of the concerns raised by the Appeal Court regarding the fact that breach of a licence condition could lead to revocation of the licence and would amount to commission of a criminal offence. This meant there had to be care and clarity about what conditions applied and to whom they applied, in accordance with sections 11 and 12 of the Telecom Act 1988. But that imperative neither leads to nor supports the one document theory. Whether the licensee had adequate notice of the proposal to impose conditions and a proper opportunity to express their views will be relevant to the assessment of whether the putative condition was in fact lawfully imposed. But section 11 does not dictate the particular form in which the licence condition must be imposed.

243. The same is true of section 12 and the safeguards it afforded to an operator faced with a proposed licence modification. As a matter of principle, there is nothing in the terms of either section that means that a licence condition (whether as originally granted or modified) could only have been validly imposed if the single licence document was worded or amended to reflect it.

244. This conclusion is supported by the approach to the three-year exclusivity period to operate the GSM licence granted to Cellplus. The three-year term was not set out in the licence document but was contained in Letter 2. It was plainly regarded as commercially important to Cellplus as giving it an obvious competitive advantage, so much so that it publicly advertised such exclusivity. The Operators cannot sensibly contend that the grant of exclusivity could lawfully be afforded to Cellplus by letter, but the no-subsidy conditions could not be imposed by the same mechanism.

245. The argument advanced by Mr Casey to overcome this difficulty does not bear scrutiny. He submitted that it was sufficient to have a clear assurance of exclusivity from the Telecom Authority that would have public law force and unnecessary for a valuable term of this kind to be a term of, or set out in, the licence. An exclusivity period is fundamental to a licence of this kind. The commercial advantage it confers requires certainty and clarity as to when and whether it has been conferred, not least because other operators might be affected. Moreover, as a term of the licence, it would attract the safeguards of sections 12 and 13 of the Telecom Act 1988 if unfavourable modifications were proposed by the regulator. To regard such a fundamental term of the licence as sufficiently protected by the doctrine of legitimate expectation so as not to require incorporation in the licence is simply unreal. Nor is there any merit in Mr

Casey's alternative submission that there is no equivalence between the exclusivity period and the no-subsidy conditions because a purely advantageous term cannot be a term "imposed" by the regulator. "Imposed" in this context simply means insisted upon. Whether the term is favourable or unfavourable to the licensee is irrelevant.

(vi) Were the interconnection requirement and cross-subsidy prohibition intended to be conditions of the Cellplus licence?

246. The Board therefore turns to consider what indicators there are that the interconnection requirement and cross-subsidy prohibition were intended to be conditions of the Cellplus GSM licence (rather than simply the expression of policy, hope or expectation of the regulator).

247. The starting point, as it seems to the Board, is to recall the Board's earlier ruling that the Telecom Authority had power to impose appropriate conditions when licensing competing operators of mobile telephone services to regulate competition between them. As Lord Bingham explained:

> "36. …The purpose of the conditions was, plainly, to ensure that Emtel and Cellplus competed on broadly equal terms; in other words, to see that Cellplus as a wholly-owned subsidiary of the monopoly fixed-line operator did not gain an unfair competitive advantage. There was no challenge to the validity of those conditions until Emtel sought to enforce them."

248. It is unsurprising, in the circumstances, that well before 5 September 1996, the correspondence between the regulator and the Operators (a summary of which appears above), recognised that Mauritius Telecom Ltd's dominant position meant Emtel needed protection to ensure fair competition with Cellplus in the public interest. That Mauritius Telecom Ltd had this understanding is plain. It is equally clear that Mauritius Telecom Ltd was prepared to offer measures that would afford Emtel protection in relation to the regulatory concerns raised and understood such measures would be necessary to obtain the GSM licence for Cellplus. Mauritius Telecom Ltd understood that those measures included, at least, equal interconnection terms for Cellplus and no cross-subsidy. Having reached that mutual understanding, there can be little doubt that the Operators were on notice that such conditions were likely to be imposed.

249. For its part, the Telecom Authority considered the regulatory position and took advice in June 1996 about what conditions to impose to achieve fair competition in this context. The Telecom Authority's letter to the Solicitor-General of 4 September 1996, (recording its decision to grant exclusive rights to Cellplus for three years to operate its service, and to require the Operators to abide by the interconnection requirement and

cross-subsidy prohibition) is clear evidence of the Telecom Authority's intention to exercise its power under section 11 of the Telecom Act 1988, to impose all three as conditions of the Cellplus licence the day before the licence was granted.

250. The terms of the three letters and the Press Release, all dated 5 September 1996, are entirely consistent with that decision. There is nothing to suggest a change of approach. The documents communicated to the recipients, both Cellplus and Mauritius Telecom Ltd, in clear and unequivocal terms, that these were additional conditions imposed as part of the GSM licence at the time of its grant. That this is how the interconnection requirement and cross-subsidy prohibition were reasonably understood is supported by a consideration of the correspondence that followed the 5 September 1996 letters and Press Release, and the Operators' response to it.

251. Letter 3 was plainly understood and treated by Mauritius Telecom Ltd as imposing conditions with legal force and requiring compliance by it and Cellplus. That legal advice was sought is consistent with that understanding. There was no objection to the method adopted by the Telecom Authority of imposing the conditions by way of Letter 3. Mauritius Telecom Ltd sought urgent amendments. An amendment would have been unnecessary if the letter was regarded as simply expressing an expectation or giving guidance.

252. Further, Mauritius Telecom Ltd's letter of 19 February 1997 referred to the requirements expressly as "the above conditions". Extensive representations were made about them. Mr Casey's written argument that nothing in the language of paragraph b of Letter 3 amounted to a condition prohibiting cross-subsidy was unrealistic in this context. Having regard to the correspondence that preceded Letter 3 (and the representations made afterwards) it is fanciful to suggest this was a mere statement of fact, informing Mauritius Telecom Ltd that the Telecom Authority would shortly appoint an auditor for certain purposes and neither required compliance, nor was there anything with which to comply. Indeed, Mr Casey was driven, during argument, to accept that the terms of the interconnection requirement and cross-subsidy prohibition were sufficiently clear and capable of being conditions had they been inserted into the document headed GSM licence. He was right to do so. They reflected express commitments made by Mauritius Telecom Ltd, as Mr Casey also accepted.

253. Furthermore, as the Judge observed, it was both sensible and practicable for these additional conditions, which had wider potential consequences, including for Emtel and other possible third parties, to be communicated in the Press Release that was published, and in Letter 3, addressed to Mauritius Telecom Ltd, who was not the legal holder of the licence to operate the mobile telephone service. There is nothing in the express language of the Cellplus licence document (articles 1, 14 or elsewhere) that excluded the possibility of additional conditions being imposed in this way. Indeed, the right to

impose other obligations was expressly reserved to the Telecom Authority by article 3(c) of the licence document.

254. Nor was the imposition of the no-subsidy conditions an unlawful modification to Cellplus' licence as the Appeal Court suggested. The conditions were imposed contemporaneously with the other licence conditions and accordingly, the requirements of section 12(2) were not engaged. In any event, as the evidence of communications before and after the 5 September 1996 shows, there is no factual foundation for the Appeal Court's conclusion that there was no notice given to Cellplus explaining the reasons for imposing the additional conditions or identifying a time limit for objecting in accordance with that provision.

255. Different judges presented with a body of evidence may make different findings of fact and reach different conclusions about what the findings show. The course charted by the Judge through the mass of evidence presented at trial in this case was one she was uniquely well-placed to navigate as the trial judge over the seven-week trial. There was ample evidence to support her conclusion that the circumstances leading to the issue of Letter 3 and the Press Release, the terms of those documents, the events after their issue and the intention of the parties, left no room for doubt that the interconnection requirement and cross-subsidy prohibition were conditions of the GSM licence granted to Cellplus, albeit not found in that document. Appellate courts are repeatedly warned not to interfere with primary findings of fact by trial judges or the evaluation of those facts and the inferences to be drawn from them. That is not least because, as highlighted by the Court of Appeal of England and Wales in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at para 114 (iv) per Lewison LJ:

> "In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping."

256. The exercise on which the Appeal Court embarked (at the invitation of the Operators) was an example of island hopping. For all the reasons given above, there is no basis on which the Appeal Court could properly have concluded that the Judge was wrong to hold in favour of Emtel on the grounds that she did.

(vii) Did the additional conditions bind Mauritius Telecom Ltd as well as Cellplus?

257. Mr Chetty did not seek to support the Appeal Court's conclusion that to impose such conditions on Mauritius Telecom Ltd would be "preposterous" because Mauritius Telecom Ltd was not the legal holder of the licence to operate the mobile service. He conceded that Mauritius Telecom Ltd was capable of being required to abide by these

conditions if the Board were to conclude that the no-subsidy conditions were validly imposed by the Cellplus licence.

258. He was right to do so. Any other conclusion would be wholly at odds with the reasoning of the Judicial Committee in 2000 when rejecting Mauritius Telecom Ltd's submission that it was immune from being regulated in respect of Cellplus' licence. Lord Bingham explained then: (para 42)

> "It would, however, emasculate the regulatory regime established by the Act if the Authority were held to have had no power to approve the rates, tariffs or charges proposed by Mauritius Telecom as the monopoly fixed-line operator, and the Authority would have had no means of enforcing the requirement that Cellplus make an inter-connection agreement with Mauritius Telecom on the same terms as that between Mauritius Telecom and Emtel unless it could, in the last resort, enforce that obligation on Mauritius Telecom as well as on Cellplus."

(d) Conclusions on the *MTL/Cellplus* appeal

259. The Board concludes that the reasoning of the Judge in relation to the interconnection requirement and cross-subsidy prohibition was unassailable. On a proper interpretation of the Telecom Act 1988 there was nothing preventing the Telecom Authority from imposing a specific condition of the licence in a separate document. The interconnection requirement and cross-subsidy prohibition were express, lawful conditions imposed at the same time as and incorporated in the licence granted to Cellplus. They were imposed on both Mauritius Telecom Ltd and Cellplus as conditions for the grant of the licence to Cellplus which Mauritius Telecom Ltd had a clear interest in, and binding on both Operators. They can properly be described as binding licence conditions. For the reasons set out in detail above, the backdating of the licence to take effect on 14 March 1996 did not validate the activity of Cellplus in applying a zero tariff in Period 1.

260. These conclusions make it unnecessary to address the arguments based on abuse.

261. Accordingly, and for all these reasons, the Board allows this appeal in relation to Periods 1 and 2.

5. THE *ICTA* APPEAL

(a) Preliminary matters

262. The main issue presented to the Board in the *ICTA* appeal was the challenge to the Appeal Court's decision that the Telecom Authority as established under the Telecom Act 1988 did not have legal personality but had merely been a branch of Government in the same way as the Department of Telecommunications before the reforms enacted in 1988. A substantial part of the written submissions provided by the parties examined different provisions of the legislation said to indicate whether the Telecom Authority was or was not a legal person. At the hearing of the appeals, the Board sought to understand why it was said that this was determinative of the appeal and why it had led the Appeal Court to conclude that Emtel's claim had been fatally flawed.

263. During the course of the hearing before the Board, the ICTA made clear that it was not advancing an argument that it is impossible for the state to be liable for *acte fautif* under article 1382 of the Civil Code merely because of the nature of government as contrasted with the nature of a person as referred to in article 1382. The ICTA accepted therefore that the state can be liable in tort both directly under article 1382 and indirectly under article 1384. It appears that the Appeal Court arrived at the same conclusion. It referred to section 2 of the State Proceedings Act 1953 which provides that "the State shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject in respect of … torts committed by its employees or agents". That was why the Appeal Court stated at the conclusion of the *ICTA* Judgment:

> "Civil proceedings instituted by Emtel claiming liability in Tort by [the Telecom Authority] in respect of alleged acts and omissions could only be brought against the State pursuant to the [State Proceedings Act]. [The Telecom Authority] was not validly amenable as a party to the claim in tort brought by Emtel."
>
> …
>
> "Any claim in tort in respect of the acts or omissions of [the Telecom Authority] at the material time could only have been entered pursuant to the State Proceedings Act, by virtue of which the State could be sued and be held tortiously liable for the 'faute', if any, of its "préposés" and/or agents."

264. The ICTA rejected, of course, the assertion that the state in the form of the Telecom Authority had done anything wrong. They also relied on the existence of the immunity conferred expressly on "the Government" by section 29 of the Telecom Act 1988. This, the ICTA said, showed that the intention of the legislature was to shield the Government from liability to pay compensation for loss arising out of the action or inaction of the Telecom Authority.

265. The argument presented by the ICTA therefore ran as follows:

a. The Telecoms Act 1998 transitional provisions only transferred to the MTA liabilities incurred by the Telecom Authority as a separate legal entity.

b. As a matter of law, the Telecom Authority was not a separate legal entity so did not incur liabilities for its actions or inactions outside the public law sphere.

c. Any liability arising out of what those working for the Telecom Authority did or failed to do was always and remains the liability of the Government, subject to the Telecom Act 1988 immunity. If the Telecom Authority had been sued by Emtel before it was abolished, it would have been able to rely on a "defence" that it had no liability itself for the conduct of those working for it. It would not have been liable.

d. That "defence" could also be relied on by the MTA and the ICTA so that therefore no liability was transferred to the MTA by the Telecoms Act 1998, and it could not have been transferred to the ICTA by the transitional provisions in the ICT Act 2001.

e. In any event, the only liabilities transferred from the MTA to the ICTA under the 2001 Act transitional provisions were liabilities arising from the conduct of the MTA when it was itself the regulator, and not liability arising from acts of the Telecom Authority which are only deemed to be the acts of MTA because of the Telecoms Act 1998 transitional provisions.

266. Emtel's argument ran as follows:

a. What the Telecoms Act 1998 transitional provisions transferred to the MTA was not the *liabilities* of the Telecom Authority but the *conduct* of those working for the Telecom Authority. That conduct was deemed by the legislature to be the conduct of the successor regulators.

b. If that conduct would have been characterised as an *acte fautif* as a matter of law if it had in fact been the conduct of the MTA or the ICTA, then if it caused loss to Emtel, the ICTA was liable directly to pay damages to compensate Emtel for those losses.

c. Whether such a claim, if commenced before 1998, would have been properly brought by naming the respondent as "the Telecom Authority" or "The Government" or some other branch of the state does not matter. The conduct of the Telecom Authority was deemed by the Telecoms Act 1998 transitional provisions to be the conduct of the MTA, whether it comprised the conduct of a separate legal entity or the conduct of government officials.

d. The MTA was undoubtedly a legal person under the Telecoms Act 1998 capable of being sued in its own right for that conduct. The same is true in relation to the ICTA under the ICT Act 2001.

e. Similarly, the ICTA took over responsibility for the Telecom Authority's conduct when it replaced the MTA as regulator under the ICT Act 2001.

f. On the facts of this case as found by the Judge, none of the immunity provisions in the 1988, 1998 or 2001 Acts shielded the Telecom Authority or the government or the MTA or the ICTA from liability to pay compensation to Emtel.

267. Finally, Emtel argues that even if it is wrong on all or most of those arguments, it is an abuse of process for the ICTA to raise a defence based on the Telecom Authority's lack of legal personality.

(b) The scope of the transitional provisions

268. Section 29 of the Telecoms Act 1998 dealt with transitional provisions as follows:

> "29(1) Every act done by, or in relation to, the Telecommunication Authority established under section 4 of the Telecommunication Act 1988 shall be deemed to have been done, or commenced, as the case may be, by or in relation to the Authority."

269. As described earlier (see para 67., above) the ICTA's initial plea *in limine* was that section 29 only covered "acts" and not omissions. That was rejected by the Judge in the 2011 Interlocutory judgment and was rightly not pursued before the Board. In this judgment, therefore, a reference to "acts" or "conduct" includes both acts and failures to act.

270. The parties put forward alternative constructions of the scope of the transitional provisions.

271. On behalf of the ICTA, Mr Vassall-Adams KC put forward what one might call a minimalist scope of the provisions. The ICTA argue that section 29 does not transfer tortious liability from the Telecom Authority to the MTA and thence the ICTA at all because the Telecom Authority could not be liable in the absence of legal personality. The purpose of the transitional provisions was only to ensure the continuation of regulatory acts performed by the Telecom Authority. Without that provision, licences granted by the Telecom Authority and other regulatory instruments made during the currency of the original regulator would fall away on the abolition of that body and would need to be reissued by the MTA and then by the ICTA.

272. Mr Brealey for Emtel construed the transitional provisions as having the effect that, as he put it, it is not the *faute* which is transferred by section 29 but rather the act or omission. The reasoning of the Court of Appeal is wrong, he submitted, because the starting point of the analysis is "to allow the act to travel freely" from the Telecom Authority to the ICTA by operation of the transitional provisions. At this stage of the analysis, whether that act was *fautif* or not is immaterial.

273. In the Board's opinion, the correct construction falls somewhere between these two extremes but is more in line with Emtel's submissions than with those of the ICTA.

274. The UK Supreme Court considered how deeming provisions in legislation should be construed in *Fowler v Revenue and Customs Commissioners* [2020] UKSC 22; [2020] 1 WLR 2227 at para 27. Lord Briggs stated that the extent of the fiction created by a deeming provision is primarily a matter of construction of the statute in which it appears. For that purpose, the court should ascertain the purposes for which and the persons between whom the statutory fiction is intended to apply and then apply it, unless it would produce effects clearly outside those purposes.

275. The ICTA's construction is at base that only the "acts" of the Telecom Authority are transferred, and the Telecom Authority did not actually perform any "acts" because it was not a separate legal personality. That would mean that the Telecoms Act 1998 transitional provisions carry forward an empty set, leaving all liability arising during the period when the Telecom Act 1988 was in force with the Government.

276. Mr Vassall-Adams tried to avoid this stark conclusion by arguing that the intention was to carry forward only regulatory matters to avoid the need for all licences to be reissued by the MTA and then by the ICTA. In the Board's view, that distinction between acts such as the grant of licences which are carried forward and other steps taken in the exercise of the Telecom Authority's statutory functions which are not, rapidly breaks down under scrutiny.

277. The grant of a licence may itself be conduct which gives rise to liability in public law, for example if the grant of the licence to one operator may have infringed the rights or legitimate expectations of a different operator. It would create unnecessary difficulties if the continuation of the licence were attributed to the new body but any liability arising from its grant remained with a different body. The Appeal Court accepted, as did the parties, that the Telecom Authority as a public body was the proper party to any proceedings for judicial review. It appears that even under the ICTA's approach, therefore some liabilities as well as some licences could be carried forward.

278. The Appeal Court said that there is a clear divide between "*droit administratif*" and "*droit civil*" with regard to the exercise and nature of any remedial action by an aggrieved party. But it would also lead to difficulties if one attempted to draw a boundary between public law remedies and private lawsuits. In its reasons for dismissing Emtel's judicial review proceedings once the Board had granted leave, the Appeal Court referred to the longstanding and consistent procedural practice of the Mauritian court not to allow parallel judicial review proceedings and a civil claim to proceed, nor to join judicial review proceedings and a civil claim. One must assume that the legislature was aware of the practice of the Mauritian courts in that regard. That would make it very unlikely that the transitional provisions were aimed at splitting the public and civil liability between two different bodies, thereby requiring such parallel proceedings to be pursued.

279. The Board accepts that part of the purpose of section 29 is to carry forward licences. That is clear from the material qualification placed on that by subsection (2). That provides that "notwithstanding subsection (1)" all existing licensees authorised under the Telecom Act 1988 must surrender their licence not later than three months after the commencement of the Telecoms Act 1998. The fact that it is not limited to that purpose is clear if one compares the wording of section 29 of the Telecoms Act 1998 with the transitional provision in the Telecom Act 1988 dealing with the move of the licensing function from the Department to the Telecom Authority. Section 43(1) of the earlier Act provided:

> "43(1) Subject to subsection (2), every licence issued under the Telephone Act, the Radiocommunication Act or the Post Office Act which has not expired prior to or on the day on which this Act comes into operation shall—

> (a) be deemed to have been issued under this Act;
>
> (b) remain valid for the maximum period of one year from the day this Act comes into operation."

280. If that was all that section 29 of the Telecoms Act 1998 was intended to achieve, the legislature could simply have reproduced that earlier wording, expanded to cover other regulatory documents as necessary.

281. The minimalist construction is also inconsistent with what the Transfer Act 1988 assumed was happening. The legislature could have decided to leave all the existing liabilities within the Government as such and set up the two new entities (to use a neutral word), Mauritius Telecom Ltd to be the operator running the network and the Telecom Authority to be the regulator, both starting with a clean slate. But the Transfer Act shows that a decision was taken that the two new entities would have to deal with legacy cases.

282. Section 3 of the Transfer Act 1988 provided:

> "3(1) Notwithstanding subsection (4) or any other enactment, the undertaking of the Government relating to the Department shall on the appointed day vest in the licensee.
>
> (2) For the purpose of this section but subject to subsection (3), the undertaking of the Department shall be deemed to consist of—
>
> (a) such assets whether movable or immovable, as may be agreed upon between the Department and the licensee; and
>
> (b) all the rights and liabilities of the Department, other than the rights and liabilities which are vested in the Telecommunication Authority."

283. Further, section 4 of the Transfer Act 1988 stipulated that even litigation pending or in process at the commencement of the Act to which the Department was a party could be continued and enforced against or in favour of the licensee. Far from leaving a legacy of existing liabilities behind in the Department, the Transfer Act 1988 achieved a complete shift of the whole undertaking, including existing rights and liabilities whether

being actively pursued or dormant for the time being, so far as operating the network was concerned to the licensee, namely Mauritius Telecom Ltd.

284. Section 3(2)(b) of the Transfer Act 1988 assumed that the rights and liabilities of the Department other than those which are being vested in the operator were vested in the Telecom Authority. The parties were not able to point the Board to a corresponding vesting provision for those parts of the Department's work that concerned the regulatory function (which was probably much smaller at that stage). However, the clear intention of the regulatory regime established in 1988 was that both the operation of the network and the regulation of the sector would be given a degree of independence from central Government and would be separated from each other, one function going to Mauritius Telecom Ltd and one to the Telecom Authority.

285. Moving forward to the transfer from the Telecom Authority to the MTA, in the Board's judgment the reference in section 29 of the Telecoms Act 1998 to "every act done by, or in relation to," the Telecom Authority is a reference to the acts performed by the members of the Authority and those working for them in carrying out the functions conferred on the Telecom Authority under the Telecom Act 1988. It makes no difference whether during the currency of the Telecom Act 1988 those acts were properly described as the acts of the Telecom Authority or of the Government.

286. Section 17(3) of the Interpretation and General Clauses Act 1974 creates no difficulty for this analysis. That provides:

> "(3) Subject to subsection (4), the repeal of an enactment shall not—
>
> (a) revive anything not in force or not in existence at the time at which the repeal takes effect;
>
> (b) affect the previous operation of the repealed enactment or anything duly done or suffered under the repealed enactment;
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed enactment;
>
> (d) affect any penalty, forfeiture or punishment incurred in respect of an offence committed against the repealed enactment; or

> (e) affect any investigation, proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment, and any investigation, proceeding or remedy may be instituted, continued or enforced, and any penalty, forfeiture or punishment may be inflicted, as if the enactment had not been repealed."

287. The Board agrees that transitional provisions do not usually create a liability under the repealed legislation that did not exist when that legislation was in force. Emtel is not, however, attempting to create a legal claim that did not exist before the enactment of the Telecoms Act 1998 or ICT Act 2001. If an aggrieved person had wished during the currency of the Telecom Act 1988 to bring a public or civil law claim arising out of the exercise of the functions set out in section 5 of the Telecom Act 1988, they might have named the "the Telecom Authority" or "the Ministry" or "the Department" or some other public law entity such as the Attorney General as the defendant. Where the Appeal Court erred in the judgment under appeal is to suggest that if the Telecom Authority had been named, it would have had a "defence" sufficient to defeat the claim merely because the claimant had mistakenly named the "Telecom Authority" as the defendant rather than, say, the Government in some other guise. Proceedings are routinely issued against a particular Minister or a named Department or other named emanation of the state. If that named body objects that a different organ of the state should formally be the defendant, no doubt the claim can be amended and the appropriate name substituted to keep the litigation in good order.

288. The Appeal Court held that the effect of section 17(3) was to preserve the right of Emtel to pursue its proceedings against the ICTA but without prejudice to any defence that the ICTA might have raised that the Telecom Authority could not be validly sued as a party liable in tort. The Board accepts that is correct to a certain extent. If the Telecom Authority or the Government had had a valid defence to a claim brought during the currency of the Telecom Act 1988 then the MTA and the ICTA would have been able to take advantage of that defence. To the extent that Emtel's submissions do not accept that the Board does not agree with them. This point is relevant to the application of the immunity provisions discussed below. Emtel cannot succeed by weaving a winding path through the statutory provisions by arguing that (a) the acts of the Government qua the Telecom Authority are transferred to the ICTA but that (b) the immunity set out in section 29 of the Telecom Act 1988 does not apply because that applies only to the acts of the Government and not to the acts of the ICTA as these are now deemed to be and further (c) the immunity in section 45 of the ICT Act 2001 also does not avail the ICTA because that only applies to the actual and not the deemed acts of the ICTA in the exercise of its functions under the ICT Act 2001.

289. The important point is that simply misnaming the relevant emanation of the state as the defendant to an otherwise valid claim against the state, whether a public law or civil claim, does not provide the state with any defence. It is wrong therefore to suggest

that the Telecom Authority or the Minister or Department would have had a defence to the claim merely because of that mistake, and wrong to suggest that those proceedings would be a nullity.

290. In the Board's judgment, the effect of section 29 of Telecoms Act 1998 was to transfer to the MTA any liability that arose from the performance of the functions conferred on the Telecom Authority by the Telecom Act 1988. Whether the Telecom Authority was a separate legal entity or not makes no difference and it does not matter whether the Telecom Authority would have been the correct defendant if the proceedings had been brought by Emtel before the repeal of the Telecom Act 1988 or whether the correct defendant would, despite the terms of the Transfer Act 1988, have been the Department or other government entity.

291. The same reasoning applies to the transfer of liability from the MTA to the ICTA under section 51 of the ICT Act 2001. Section 51 clearly mirrors section 29 of the earlier Act. An argument which the ICTA raised briefly to the effect that section 51 served only to carry forward actions of the MTA during the short period when the Telecoms Act 1998 was in force and not to carry forward acts deemed to be acts of the MTA under section 29 was an obviously bad point which Mr Vassall-Adams wisely did not pursue at the hearing.

292. The Board concludes that Emtel's appeal against the *ICTA* Judgment must succeed because the Appeal Court was wrong to construe the transitional provisions in the Telecoms Act 1998 and ICT Act 2001 as narrowly as it did. Emtel's claim arises out of acts done by the Telecom Authority established under section 4 of the Telecom Act 1988. Those acts were deemed to have been done by the MTA pursuant to section 29 of the Telecoms Act 1998 and were further deemed to have been done by the ICTA pursuant to section 51(1) of the ICT Act 2001. Acts were "done by" the relevant regulator if they were part of the exercise of the regulator's functions conferred on it by the legislation which set it up and gave it the powers it needed to conduct itself so as to fulfil those functions.

(c) The immunities

293. The Board can deal briefly with the scope of the immunities conferred by the legislation in respect of liability arising from the exercise of the regulatory functions.

294. The immunity conferred by the Telecom Act 1988 was in the following terms:

> "29. Immunity of Government

> No liability shall attach to the Government in respect of any action, claim or demand by any person in consequence of any damage arising from anything done or omitted to be done by a licensee."

295. The corresponding provision in the Telecoms Act 1998 provided:

> "22. Extent of liability
>
> (1) No liability, civil or criminal, shall attach to the [MTA] or to any member or officer, in respect of any loss or damage arising from the exercise in good faith by the [MTA], or by a member or officer, of its or his functions under this Act."

296. The provision in the ICT Act 2001 provided:

> "45. Protection of members and officers
>
> No liability, civil or criminal, shall attach to any member or officer of the Authority, or to the Authority, in respect of any loss arising from the exercise in good faith by a member or an officer or the Authority of his or its functions under this Act."

297. Although section 29 of the Telecom Act 1988 does not expressly disapply the immunity in the event of bad faith, Mr Vassall-Adams on behalf of the ICTA accepted at the hearing that under Mauritian law, the immunity is treated as if it extends only to the exercise of statutory functions in good faith. The Board accepts the ICTA's submission that if it had been open to the Telecom Authority to rely on the immunity in section 29 of the Telecom Act 1988, then the MTA was, and the ICTA is, entitled to rely on that as a defence to Emtel's claim to the same extent.

298. Emtel submit that the immunity conferred by section 29 of the Telecom Act 1988 does not assist the ICTA for three reasons. The first is that it confers protection on the regulator only in respect of damage arising from anything done or omitted to be done "by a licensee" whereas the claim against the Telecom Authority and now the ICTA arises from the regulator's own action or inaction. The second is that the immunity relates only to the conduct of a public operator exercising powers conferred by sections 15 and 16 of the Telecom Act 1988 to enter private property, install telecommunication infrastructure and remove obstructive trees and hedges. Emtel's third submission is that

the ICTA's reliance on the immunity conferred on its predecessor cannot survive the robust findings of fact made by the Judge.

299. As regards the third submission, in the Main Judgment, the Judge dealt first with another pleading point taken by the ICTA. It argued that an allegation that bad faith defeated the immunity conferred by the legislation should have been specifically pleaded by Emtel and Emtel had failed to plead this sufficiently clearly: para 281. She rejected this because Emtel had pleaded in its Statement of Claim that the Telecom Authority "has shown bias" towards Mauritius Telecom Ltd and tolerance of the tortious acts of Mauritius Telecom Ltd and Cellplus. Those allegations were, she held, serious enough if proved to constitute bad faith and even "*faute lourde"*.

300. The Judge went on to hold that it had been clearly established that the Telecom Authority had failed to take any action to prevent cross-subsidisation by Mauritius Telecom Ltd of Cellplus. This finding was based on the following:

a. Mr Mooroogen, one of Mauritius Telecom Ltd's witnesses giving evidence at the trial, had admitted that Cellplus had been operating commercially since September 1996 without an interconnection agreement in place between it and Mauritius Telecom Ltd. He also admitted that no interconnection fees had been paid by Cellplus to Mauritius Telecom Ltd at that stage.

b. The notice served by Emtel on the Telecom Authority dated 28 November 1996 had asked for the appointment of an independent auditor and for the Telecom Authority to ensure that Cellplus was paying interconnection fees. Later, in March 1997, Emtel wrote what Mr Brealey had described as a "*cri du coeur*" to the regulator saying that it had had to reduce its own call charges to uneconomic levels to meet the highly subsidised prices charged by Cellplus. The Judge said, "The above letter does not seem to have been answered by the [Telecom Authority] let alone to have prompted any action on the part of the [Telecom Authority]": para 289.

c. This stance contrasted with the evidence of Mr Dabeesing given on behalf of the Telecom Authority at trial where he admitted that a person operating a telecommunications service without a licence should be prosecuted for the criminal offence and further that the Telecom Authority "had assumed a greater responsibility to ensure compliance when it modified condition 7(b) by deleting the requirement of an independent auditor."

301. The Judge referred to a Conseil d'Etat case in which the French banking regulator was found to have committed *faute lourde* by failing to impose stringent terms on bank directors as to a bank's capital requirements. She concluded:

> "291 To my mind, there is no doubt that the context in which conditions 7(a) and (b) came into being put upon the TA a responsibility to ensure compliance with the conditions which it had itself set. Instead, the TA completely disregarded its responsibility, failed to administer '*des prescriptions plus fermes*' and shown tolerance of the breach of the conditions. In these circumstances, it can only be concluded that it has committed a '*faute lourde*'."

302. Among the several grounds of appeal which the Appeal Court did not address in its *ICTA* Judgment were challenges to the Judge's findings of *faute lourde* against the Telecom Authority and to the existence of a causal link between any such *faute lourde* and the loss claimed by Emtel. These include Ground 24 alleging that the Judge "set the expected standard of monitoring of competition by the [Telecom] Authority ... far too high" given that it was "a very young regulator".

303. The Board is not called upon in these appeals to decide whether any of the challenges can undermine the Judge's conclusion that the Telecom Authority's failures in 1996 amounted to *faute lourde* sufficient to preclude reliance on the immunity. Nor does the Board need to comment on the other two arguments Emtel raises to preclude the application of the immunity.

(d) Did the Telecom Authority have legal personality?

304. As a result of the Board's decision on the proper construction of the transitional provisions, it makes no difference to the application of the transitional provisions whether the Telecom Authority had legal personality separate from central government or not.

305. The *ICTA* Judgment describes various pointers in the Telecom Act 1988 as indicating that the Telecom Authority was not a separate *personnalité juridique*. These include the difference in wording of the Telecom Act 1988 establishing the Telecom Authority as compared with the wording of the later Acts. Those Act expressly provide that the MTA and the ICTA shall be bodies corporate: see section 4(1) of the Telecoms Act 1998 and section 4(2) of ICT Act 2001. The Appeal Court held that it "has been the invariable practice of the Mauritian legislator to use clear and express terms to indicate the creation of a statutory body as a statutory corporation" (page 16). The Appeal Court described the Telecom Authority as bearing "all the characteristics of a body operating as an integral part of the executive arm of Government" including that it had no Board of Administration, there was no provision in the Act for the funding of its expenses and the immunity conferred by section 29 was conferred on the Government not on the Telecom Authority.

306. Emtel referred the Board to factors pointing the other way, although their primary case, which the Board has accepted, was that this issue was irrelevant to the determination of its claim. In particular, they relied on the principal intention of the legislature in 1988 to distance both the operation of the network and the regulation of the sector from central government and the power conferred on the Minister by section 9 of the Telecom Act 1988 to give directions to the Telecom Authority: see para 17.7, above.

307. In the Board's judgment, it was unfortunate that so much of the argument before the Appeal Court focused on this question rather than on the question of the proper construction of the transitional provisions. Since it is not necessary for the Board to come to a concluded view on this issue, and it is an issue best considered in the particular context of a case in which it arises for decision, rather than as a matter of abstract principle, the Board declines to decide it.

(e) Abuse of process

308. As the Board has rejected the ICTA's arguments on the merits there is no need for Emtel to rely on abuse of process arguments to prevent the ICTA relying on those arguments.

309. However, the Board considers it appropriate to address these points. An allegation against a public body that it should be debarred from raising a point on appeal because its conduct in the litigation has been so unfair or so unreasonable that it would amount to an abuse of process is a serious matter. It merits consideration by the Board even if it is not determinative of the appeal.

310. The Board is concerned at the lengths to which the Ministry, the MTA and the ICTA have gone, the amount of court time that has been consumed and the legal costs that have had to be incurred by Emtel in order for these public bodies to avoid proper scrutiny of the lawfulness of their conduct.

311. There are two matters which the Board regards as causing particular concern.

312. The first is what Emtel rightly referred to as the "drip feed" of objections and defences taken by these public bodies at every stage of the civil claim, each of which has ultimately been rejected as having no merit.

313. In the 2011 Interlocutory Judgment the Judge disposed of several points raised *in limine*. These were:

a. A submission by the ICTA that the transitional provisions covered only acts of the Telecom Authority and not omissions or failures to act.

b. A submission by the Ministry that it should have been sued under article 1384 of the Civil Code rather than article 1382.

c. A submission by the Ministry that Emtel had failed to comply with section 4 of the POPA and that it had not waived this defence.

314. The points relied on by the respondents in the present appeals were not mentioned in that hearing nor, it appears, when that judgment was challenged in the Appeal Court.

315. There were two occasions shortly before the trial where the respondents again tried to bring the claim to an end without consideration of the merits. At a hearing on 28 April 2016, four further points were raised by the ICTA:

a. It relied on delay as infringing "the reasonable time guarantee" under section 10(8) of the Mauritian constitution.

b. It asserted that Emtel's claim was "null" for not having been instituted within 2 years from the alleged breach of statutory duty in breach of section 4(1)(b) of POPA.

c. It raised again the supposed failure of Emtel to give notice of the claim required under section 4(2)(a) of POPA.

d. It challenged the admissibility of some of the evidence tendered by Emtel, also relying on section 4(2)(b) of POPA.

316. The Judge noted in her ruling that no explanation had been given for the motion raising these points being made at such a late stage, given that the claim had been lodged in June 2000, that the date for the trial had been fixed in October 2015 and the parties were now a few days away from the start of the six-week trial.

317. A further ruling was handed down by the Judge on 4 May 2015 giving further reasons for her rejection of the points relying on POPA.

318. In the Main Judgment the Judge dealt with yet further preliminary points raised by the respondents before dealing with the substance of the allegations made by Emtel. These were:

a. The assertion for the first time that the interconnection requirement and the cross-subsidy prohibition were not conditions of Cellplus' licence: para 246.

b. The assertion also for the first time that the ICTA could not be liable for the *faute* of the Telecom Authority because the latter was not a body corporate: para 280.

c. The assertion that the ICTA could rely on the immunity conferred by the Telecom Act 1988 because it had acted in good faith: para 281.

d. A further repetition of the points already rejected by the Judge that the action was "null and void" for having been instituted in breach of the requirements of POPA: para 282.

e. A further repetition of the allegation that delay had worked unfairly against the ICTA and deprived it of its constitutional right to a fair hearing: para 283.

319. All of these points were dismissed by the Judge but repeated in the grounds of appeal to the Appeal Court, the first two with success which this Board has now overturned.

320. In addition to these procedural points the respondents relied on a series of pleading points both before the Judge and before the Board, arguing that bad faith had not been sufficiently alleged in Emtel's statement of claim, or the claim did not extend to loss in Period 1 because it was limited to breach of licence conditions. These points have all been found to be without merit by the Judge and by the Board.

321. The second source of unfairness is the dismissal of the judicial review proceedings on the application of the respondents expressly on the basis that the merits of the claim could better be dealt with in the civil proceedings. Having succeeded in having the judicial review proceedings set aside on that basis, it is extraordinary that the Ministry and the ICTA thought it was appropriate then to attempt to stop the civil claim in its tracks with a series of preliminary points again designed to avoid consideration of the merits of Emtel's claim.

322. In the judgment dismissing the judicial review claim on 11 June 2002, the Supreme Court recorded that during the hearing, they had highlighted to counsel for Emtel that:

> "(a) it would be in the best interests of the applicant itself if court proceedings are not unduly protracted and if its civil claim which encompassed all the core issues canvassed in the application could be expeditiously heard and disposed of;
>
> (b) the applicant has shown on affidavit evidence that it has a good arguable case but it is not relieved of its burden of proving ultimately on a balance of probabilities that (i) the respondent and the second co-respondent have acted in breach of their duty towards it under the Act and (ii) it has suffered prejudice as a result of the tortious acts committed by the respondent and all the co-respondents. All these issues can be more aptly determined in open Court when the civil claim is heard;"

323. Emtel at that stage agreed. Emtel contends before the Board in this appeal that at no point in the course of the disposal of the judicial review proceedings did the MTA or the other respondents suggest that there were further legal obstacles to the consideration of the substance of Emtel's complaint against them. There was no challenge by any of the respondents to that contention. The court therefore brought the judicial review proceedings to an end on the basis that the issues were "going to be thrashed out in the civil claim."

324. All the respondents accept that the Telecom Authority would have been the appropriate respondent for the judicial review claim. Having therefore succeeded in having those public law proceedings set aside relying on the civil claim as providing a better forum, the ICTA then performed a volte face arguing that the civil claim was a nullity on the grounds that the Telecom Authority did not have legal personality. If the ICTA considered that the civil claim was inherently defective because of the Telecom Authority's lack of legal personality, it was incumbent on it to raise this before inviting the court to bring the judicial review proceedings to an end, and it was wrong not to do so. Similarly, there was no good reason for the failure by the ICTA to raise this point during the interlocutory hearing when advancing its many other *in limine* objections to being a party to the civil claim (leading to the 2011 Interlocutory judgment, and an appeal where this point was never raised), or during the case management hearing shortly before the trial, when yet further objections were raised, but this one was not.

325. The Board agrees with the submission made by Emtel that this was an abuse of process: "the ICTA and the MTA could not, for 16 years, keep such a defence up their sleeve, only to deploy that and ambush Emtel at trial": para 125 of their written case. It may be that changes in the legal team acting for the respondents prompted a fresh consideration of available defences. But later additions to the legal team must take the case as they find it and are to this extent constrained by the conduct of the litigation before they became involved.

326. Whether or not the ICTA waived its ability to rely on the supposed defence of lack of legal personality, the Board concludes that it was an abuse of process for the ICTA to raise the point when it did in light of (a) its failure to raise the point in the course of the pre-trial stages where various procedural points were adjudicated upon and (b) its conduct in relation to the setting aside of the judicial review proceedings in favour of the civil claim.

(f) Conclusion on the ICTA appeal

327. The Board therefore allows Emtel's appeal against the *ICTA* Judgment on the grounds that:

a. the transitional provisions, properly construed, impose liability on the ICTA for the regulatory failings of the Telecom Authority between 1996 and 1998;

b. that is the case regardless of whether the Telecom Authority had legal personality or was separate from central government;

c. it was an abuse of the process of the court for the ICTA to raise this argument at trial to prevent a consideration of the merits of the civil claim.

6. CONCLUSION ON BOTH APPEALS

328. Having determined that both appeals should be allowed, the Board must now consider how to dispose of the appeals.

329. The result of the conduct of the state in this litigation is as follows:

a. It is now over 25 years since the events which occurred and from the launch of Emtel's judicial review proceedings.

b. The Judge, after what appears to be a thorough analysis of the economic and factual evidence, has rejected the factual evidence of the respondents and accepted Emtel's evidence.

c. The hope that allowing the matter to proceed by way of the civil claim would prevent the proceedings from becoming "unduly protracted" has certainly not been realised, owing to the way the ICTA, in particular, has chosen to conduct itself in these proceedings.

d. Given that the Appeal Court only dealt with a few of the many and varied grounds of appeal raised by the respondents in their comprehensive challenge to the Main Judgment, the parties are agreed that the Board must now remit the matter to the Appeal Court.

330. The functions of the ICTA as set out in section 16 of the ICT Act 2001 include "to create a level playing field for all operators in the interest of consumers in general" and "to promote the efficiency and international competitiveness of Mauritius in the information and communication sector."

331. The Board notes that Mauritius Telecom Ltd's and Cellplus' conduct as described in the Main Judgment was neither complicated nor subtle. It was exactly the conduct which any telecoms regulator should have anticipated and prevented. The contemporaneous documentary evidence before the Board clearly shows that the legislature and the Telecom Authority did anticipate it and put in place the mechanisms to prevent it.

332. But then, according to the findings of the Judge, the Telecom Authority wholly failed to implement or enforce those mechanisms. That will be a matter for the Appeal Court to consider if the ICTA continue to pursue their remaining grounds of appeal. The Board, however, urges the respondents to consider the circumstances and events leading to and surrounding Emtel's claim, and the proceedings that have followed, to reassess whether their continued resistance to Emtel's claim is consistent with the ICTA's statutory objectives and with the public interest.