JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 99/2000

BEFORE: **THE HON. MR. JUSTICE DOWNER, J.A.**
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.

BETWEEN: **INFOCHANNEL LIMITED** **PLAINTIFF/APPELLANT**

AND **CABLE & WIRELESS JAMAICA LIMITED** **DEFENDANT/RESPONDENT**

Dr. Lloyd Barnett and Harold Brady instructed by Brady & Co. for the appellant

Hilary Phillips, Q.C. and Minett Palmer instructed by Grant, Stewart, Phillips & Co for the respondent

November 7, 8, 9, 10, 13, 14, 15 and December 20, 2000

DOWNER, J.A.

On 12th April 2000, Reckord J. granted an ex-parte mandatory injunction to the appellant Infochannel Ltd. against the respondent Cable & Wireless Jamaica Ltd.(Cable and Wireless). Cable & Wireless responded with promptitude by seeking to set aside or stay the interim injunction on the following day.

During the hearing of the summons to set aside the ex-parte injunction the appellant on 18th April, 2000 issued a summons for an interlocutory injunction. At the request of the parties there was a conjoint hearing of these summonses and the result was that the following Order was made:

> "1. The interim injunction granted on the12th of April is discharged and the Plaintiff's application for an Interlocutory Injunction is refused and the Summons dismissed.
>
> 2. Costs to be costs in the cause
>
> 3. Certificate for one counsel granted
>
> 4. Leave to appeal granted
>
> 5. Application for stay is refused."

It should be stated from the outset that although these are interlocutory proceedings, the issues raised at this stage are of exceptional public importance, and a decision ought to be given with promptitude. They might well involve huge financial sums by the parties as well as guarantees by the Government to Cable and Wireless. It also involves the immediate future structure of telecommunications services. The likely proceedings which will involve a full scale trial, or a further appeal, will also require prompt attention. The Attorney-General should also consider whether, in view of the issues raised, his intervention in any further stage of these proceedings is expedient.

Infochannel has appealed the above order so that the substantial issue before this Court is whether Record J. was right to refuse Infochannel the interlocutory relief sought. The following extract from the judgment in the Court below gives the pointer as to how the matter proceeded:

> "On the 12th of April, 2000 on the **ex-parte** application of the plaintiff I granted an interim injunction against the defendant whereby it was ordered that
>
> 1. The defendant reconvert from uni-directional to bi-directional and to restore the full characteristic of the telephone lines supplied by the defendant to the plaintiff so that they can operate in the manner in which they operated prior to Friday 31st March, 2000, forthwith.

2. The defendant by itself, its servants or agents, or otherwise howsoever be restrained from suspending, terminating, altering or compromising the facilities the defendant has supplied to the plaintiff pursuant to its All Island Telephone Licence issued under the Telephone Act preserved by the Telecommunications Act 2000, for a period of fourteen (14) days from the date hereof.

3. That plaintiff gives the usual undertaking as to damages.

4. The cost occasioned by this application be costs in the cause.

By the next morning on the 13th April, 2000, the defendant filed in the Registry of the Supreme Court, a summons seeking an order that the **ex-parte** order made the day before be stayed or discharged.

Because of the importance of the matter, with the consent of the parties, I commenced the hearing of this summons that same morning. The affidavit of the vice-president for Regulatory Affairs of the defendants company Miss Minnett Palmer was filed in support of the summons."

Then after dealing with the initial submissions by Ms. Phillips Q.C. to set aside or stay the interim order the learned judge interposed thus:

"Counsel pointed out that the plaintiff had only that day 18/4/2000 filed a summons for interlocutory injunction seeking a continuation of the interim injunction granted by me on the 12th of April, 2000 until trial."

The learned trial judge also noted that counsel for Cable and Wireless stated that:

"Voice over I.P. and voice over internet are bypass operations and the action taken by the defendant was pursuant to section 51 of the Act which states:

"A carrier or service provider may on application to the office and on such terms and condition as the office may specify:-

a. discontinue the provision of specified services to any person, or

b. disconnect any facility from that carrier's facility or another facility used to provide that service providers specified services,

> If that carrier or service provider believes on reasonable grounds, that the person who owns or operates that facility or person to whom those specified services are provided, is engaging in bypass operations or in conduct in respect of international services that is prohibited or regulated by the international service rules."

In this Court the initial submission of Ms. Phillips was that the interim injunction ought not to have been granted because Infochannel did not disclose to the learned judge the important agreement of 19th August 1999, between the Minister of Commerce & Technology, Cable & Wireless and Infochannel Ltd. This agreement was made before the Telecommunications Act (the "Act") which came into effect on March 1st, 2000, and it is obligatory to refer to it. The recitals read as follows:

> **"WHEREAS**
>
> The Minister of Commerce & Technology; is the recognised regulatory body for the telecommunications industry in Jamaica.
>
> Cable & Wireless Jamaica Limited has been granted five licences pursuant to the Telephone Act and the Radio and Telegraph Control Act, by virtue of which it claims entitlement to exclusivity in areas of telecommunications in Jamaica.
>
> Infochannel Limited has been granted a Special Licence pursuant to the Radio and Telegraph Control Act to provide wireless telecommunications in Jamaica for Internet Services as defined in its licence."

So the agreement recognised that there is a conflict between Cable & Wireless who claimed a monopoly position in the area of telecommunications and Infochannel who claimed they exercised a right in this area by virtue of a Special Licence. Be it noted that this Special Licence was claused as follows:

> "This station is permitted to transmit data only."

In the Act at Section 2 (1) there is the following definition, "data service" means a specified service other than a voice service.

Then the savings clause of Section 76(1) of the Act reads:

> "76.-(1) Any licence which was, before the appointed day, granted under the Radio and Telegraph Control Act and is subsisting on the appointed day shall, on and after that day, be deemed to have been granted under this Act and shall, with such modifications as may be necessary, and until a licence is granted under this Act, continue to have effect in accordance with the terms thereof and subject to the provisions of this Act.
>
> (2) The Minister shall, within fourteen days after the appointed day, grant a licence under section 13 to any person who, immediately before that day, was the holder of a licence with an unexpired term of six months or more and that licence shall cease to be valid upon the grant of a licence pursuant to this subsection."

Dr. Barnett for Infochannel placed great reliance on this Section as well as Section 85 both of which appear in Part XVII of the Act. This part of the Act is captioned "Repeal and Transitional." The agreement continues thus:

> "Infochannel Limited supports regulation of the telecommunications industry and the introduction of competition in the telecommunications market.
>
> Pursuant to their respective interests in the telecommunications market, Infochannel Limited and Cable & Wireless Jamaica Limited have filed the actions set out in the Schedule hereto.
>
> Cable & Wireless Jamaica Limited has lodged a complaint to the Minister of Commerce and Technology concerning by-pass activities involving the termination of International Voice Telephone Calls by Infochannel Limited into Cable & Wireless Jamaica Limited's network. [Emphasis supplied]
>
> Pursuant to the said complaint the Minister of Commerce and Technology has issued a letter dated 5 August 1999 in response to which Infochannel has agreed to provide Internet Services solely to Infochannel Internet Subscribers;
>
> Cable & Wireless Jamaica Limited has agreed to be a party to this agreement in order to facilitate a resolution of this matter. In furtherance of this process, Cable & Wireless Jamaica Limited and Infochannel Limited have

agreed that the actions set out in the Schedule hereto be discontinued upon the terms set out below."

After setting out definitions of Cable & Wireless, Infochannel and Minister, the agreement referred to the lawsuits which were to be discontinued and to arbitration pursuant to the Arbitration Act of any action that has not been settled on or before 17th September 1999. Then there was a specific reference in the agreement which refers to Infochannel internet services thus:

"INFOCHANNEL INTERNET SERVICES

2. Subject to clause 3 Infochannel shall not use its facilities to terminate International Voice Telephone Calls into the Cable & Wireless network. [Emphasis supplied]

3. The parties agree that Infochannel will provide, solely to its internet subscribers, VOIP and shall cease to provide such services to any other persons.

3.1 "VOIP" means interactive voice communication where speech is converted for transmission utilising TCP/IP data transmission techniques.

3.2. "Infochannel Subscriber" means any individual or organisation who by virtue of payment of a regular membership fee has purchased the range of Internet Services provided by Infochannel via or through the use of a computer."

Then paragraphs 4, 5 and 6 read as follows:

"4. The parties agree that this agreement shall continue in force until September 30, 1999. In the event that the legal and regulatory framework proposed to be formulated by September 30, 1999 for the regulation of the services being provided by Infochannel as set out above is not implemented by that date, the parties agree to extend this agreement until such time that the legal and regulatory framework is implemented."

Be it noted that this agreement was intended to govern the relationship between the three parties until the Act was passed. The agreed tribunal to resolve

the disputes was arbitration. When the Act was enacted specific tribunals were created to resolve disputes. Thereafter there was access to the Supreme Court by way of judicial review if Section 51 was invoked, or proceedings by Motion if Sec. 63 was invoked.

Then the agreement continues thus:

> "5. This agreement is without prejudice to Cable & Wireless' rights to initiate a fresh complaint to the Minister as regards any material change in the volumes of VOIP usage by Infochannel Subscribers and/or the number of Infochannel Subscribers, as at August 12, 1999.
>
> 6. Cable & Wireless shall be free to implement appropriate technologies and procedures to protect its network from the termination of International Voice Telephone Calls, inclusive of VOIP, provided that such technologies and procedures do not materially affect the provision by Infochannel of Internet Services to its Internet Subscribers or the provision of VOIP and/or Voice Over The Internet to the extent provided for in this agreement, nor will it constitute an unwarranted intrusion into Infochannel's network and facilities."

Then the concluding paragraphs read:

> "7. In the event of a breach of any of the terms of this agreement, the non-defaulting party shall notify the defaulting party, and the latter shall remedy the breach within 72 hours, failing which the matter shall be referred to the Office of Utilities Regulations for determination.
>
> 8. This agreement is without prejudice to either party's right to maintain their respective contention as to the definition of international voice telephony and does not constitute a waiver of either party's rights.
>
> 9. Each party will bear its own Attorneys-at-Law costs in respect of the preparation and completion of this agreement."

It was submitted that Reckord J. might not have exercised his discretion to grant the interim injunction if Infochannel had disclosed this agreement. That was

doubtful as this agreement was signed before the Act and the interim injunction relates to disputes which must be resolved in accordance with the Act. In any event the learned judge ought to have directed Infochannel to serve Cable & Wireless forthwith or stayed the interim injunction for five days and commence hearing the interlocutory injunction thereafter.

What is important on appeal is firstly what was the effect of Section 51 of the Act which Cable & Wireless invoked ? To determine this issue, Sec. 85 must be construed as this is the section on which Infochannel relies. Secondly, to reiterate if the injunctive relief is permissible whether in the circumstance of this case it ought to have been awarded. So stated, the first question which involved the construction of Sec. 51, raised a jurisdictional point as to the power of the Supreme Court to issue an injunction pursuant to Sec. 49(h) of the Judicature(Supreme Court) Act. Cable and Wireless contends that the Act provides for mandatory proceedings before specific tribunals, before there can be resort to the Supreme Court.

As regards the injunctive relief it was addressed thus in the grounds of appeal:

> "(a) The learned Judge erred as a matter of law in applying the test of whether or not he felt a high degree of assurance that the Plaintiff will succeed at Trial, which test was not appropriate in the circumstances of the instant case."

The other grounds read as follows:

> "(b) The learned Judge erred as a matter of law and of fact in finding that the right which the Plaintiff/Appellant was seeking to protect is a right which obtained for a period of ninety days which had expired.
>
> (c) The learned Judge erred in law and on the facts in holding that damages would provide an adequate remedy for the loss and the damages which would be suffered by the Plaintiff/Appellant."

The construction of Sec. 51 of the Telecommunications Act

It is important to examine Sec. 51 because where this special provision is invoked it is arguable that the general statutory discretion for injunctive relief pursuant to Sec. 49(h) of the Judicature (Supreme Court Act) is not applicable. The authority of **Barraclough v. Brown** [1897] A.C. 615 is helpful.

Section 51 of The Act which falls under Part VIII dealing with International Services reads:

> "51. A carrier or service provider may on application to the Office and on such terms and conditions as the Office may specify –
>
> (a) discontinue the provision of specified services to any person; or
>
> (b) disconnect any facility from that carrier's facility or another facility used to provide that service provider's specified services,
>
> if that carrier or service provider believes on reasonable grounds, that the person who owns or operates that facility or the person to whom those specified services are provided, is engaging in bypass operations or in conduct in respect of international services that is prohibited or regulated by the international service rules." [Emphasis supplied]

Perhaps to illustrate the future power of the Office, section 52 should be cited. It reads:

> "52.-(1) The Office may, where it considers necessary, decide that a particular service should be treated as a voice service and notice of that decision shall be published in such manner as the Office considers appropriate.
>
> (2) In making a decision under this section, the Office shall have regard to such factors as may be prescribed."

In an Act such as this replete with technical concepts, Section 2 which contains the definitions is of vital importance. Those which call for definition at this stage include:

> "carrier" means a person who is granted a carrier licence pursuant to section 13;
>
> "service provider" means a person who is the holder of a service provider licence issued under section 13;
>
> "the Office" means the Office of Utilities Regulation established under the Office of Utilities Regulation Act;
>
> "bypass operations" means operations that circumvent the international network of a licensed international voice carrier in the provision of international voice services;
>
> "existing telecommunications carrier" means Cable & Wireless Jamaica Limited and includes any wholly owned subsidiary or any successor or assignee of that company;
>
> "specified service" means a telecommunications service or such other service as may be prescribed;
>
> "voice service" means –
>
> (a) the provision to or from any customer of a specified service comprising wholly or partly of real time or near real time audio communications, and for the purpose of this paragraph, the reference to real time communications is not limited to a circuit switched service;
>
> (b) a service determined by the Office to be a voice service within the provisions of section 52,
>
> and includes services referred to as voice over the internet and voice over IP."

Since internet is a live issue the definition of "internet access" is important. It is defined thus:

> "internet access" means access to the Internet or any similar global system for linking networks together using, as the basis for communications, transmission protocols or internet protocols or any protocols amending or replacing them."

Phase 1 which will be defined later links "internet access' with "voice services" and is critical to the outcome of these proceedings. The link is provided in Sec. 78(2)(c) (ii) of the Act. The effect of Section 78 is to restrict the power of the Office of Utilities Regulation ("OUR") during Phase I and leave the development of "voice service" to OUR to a later Phase. This aspect will be important for the development of telecommunications in Jamaica.

There is another set of definitions which are of cardinal importance:

> "telecommunications" means the transmission of intelligence by means of guided or unguided electromagnetic, electrochemical or other forms of energy, including but not limited to intelligence-
>
> (a) in the form of -
>
> (i) speech, music or other sounds;
>
> (ii) visual images, whether still or animated;
>
> (iii) data or text;
>
> (iv) any type of signals;
>
> (b) in any form other than those specified in paragraph (a);
>
> (c) in any combination of forms; and
>
> (d) transmitted between persons and persons, things and things or persons and things;
>
> "telecommunications service" means a service provided by means of a telecommunications network to any person for the transmission of intelligence from, to or within Jamaica without change in the content or form and includes any two way or interactive service that is provided in connection with a broadcasting service or subscriber television service;

> "transit service" means a service that is provided to any international carrier or service provider for use as a means of transit of international traffic through Jamaica;
>
> "transmission" means the despatch conveyance, switching, routing or reception of intelligence by any means including, but not limited to rendering into packets, digitisation and compression;"

The submission of counsel for Cable & Wireless did raise in an oblique way the jurisdictional point. The judgment below recorded it this way:

> "Counsel summarised the case in the following way.
>
> ...the defendant was entitled to act as it did pursuant to section 51 and on application to the Office, the O.U.R. changed the lines from bi-directional to uni-directional functionality.
>
> The court ought not to readily set aside the approval given by O.U.R. which is charged with the responsibility to monitor the players in the industry over which it has jurisdiction. The body has technical expertise.
>
> There is no serious question to be tried."

On the other hand Record J. records Dr. Barnett's submission in the Court below thus:

> "As a matter of law, a statute is not to be interpreted as taking away vested rights unless it is in expressed terms. The present service contract between the plaintiff and the defendant does not authorize the action taken by the defendant. Section 51 requires certain pre-conditions to be satisfied before it can be invoked."

The accuracy of this submission will depend on what was the vested right of Infochannel before the Act and how this right was preserved by the Act.

It must be acknowledged that the learned judge never attempted to deal with the jurisdictional point. The respondent Cable & Wireless instituted proceedings. pursuant to Sec. 51 on March 15, 2000, and the decision from the Office of Utilities Regulation (OUR) was in Cable & Wireless' favour. Infochannel was informed of the decision on March 31, 2000 and further on April 4, 2000. The ex-parte summons was delivered and was issued on the 12th April. The importance of these dates is that the statute provided a quick and inexpensive means of further redress which was not used. So in considering the appropriateness of the general remedy of an injunction the specific remedies must be examined.

The proceedings pursuant to Section 51 of The Act.
The special tribunals provided

Here is how Cable & Wireless instituted its application to the O.U.R.

> "Office of Utilities Regulation
> 36 Trafalgar Road
> Kingston 10
>
> March 15, 2000
>
> **Attention: Mr. Winston Hay**
>
> Dear Sirs
>
> **Re: Infochannel**
>
> We refer to our meeting on March 10, 2000 at which Cable & Wireless Jamaica Ltd. (CWJ) presented the OUR with evidence of Infochannel's bypass operations.
>
> This is to confirm CWJ's application under Section 51 of the Telecommunications Act to discontinue the provision of services to Infochannel. The evidence presented by CWJ demonstrates the existence of reasonable grounds for CWJ's belief that Infochannel is engaging in bypass operations.
>
> Under Section 51 such discontinuance of service can only be done on the terms and conditions specified by the Office, and while we will be guided by your response we urge that the terms and conditions be confined to an

obligation to avoid any undue interference with Infochannel's legitimate business operations.

Yours faithfully

Minette Palmer
Vice President, Regulatory Affairs."

A further letter on March 16th was put in evidence. It reads thus:

"Office of Utilities Regulations
36 Trafalgar Road
Kingston 10

March 16, 2000

Attention: Mr. Winston Hay

Dear Sirs

Re: Application under Section 51 Telecommunications Act; Infochannel Ltd.

We refer to our letter dated March 15, 2000.

Enclosed for your urgent attention is the detailed report of Infochannel's bypass operations. The report is complemented by a diskette titled "Infochannel bypass information" and dated March 16, 2000.

As promised, we have enclosed a copy of the Agreement dated August 19, 1999 between Infochannel, Cable & Wireless Jamaica Ltd. and the Minister of Commerce and Technology. Please note that under Clause 4, the Agreement ceases to apply after the implementation of the legal and regulatory framework contemplated by the September 30 Agreement between Cable & Wireless Jamaica Ltd. and the Government.

We await your urgent response to our application.

Yours faithfully

Minette Palmer
Vice President, Regulatory Affairs."

There was further correspondence from Cable & Wireless to OUR: and then March 24, 2000 OUR invited Infochannel to come in and discuss the matter. Here is the letter of invitation:

"OFFICE OF UTILITIES REGULATION

March 24, 2000

Messrs, Brady & Co
Unit # 9
1D Braemar Ave.
Kingston 5

Attention: Mr. Harold C.W. Brady

Re: Allegations of "Bypass Operations" by Cable & Wireless (Jamaica) Ltd. against InfoChannel Ltd.

We write to advise that Cable & Wireless (Jamaica) Ltd. has provided the Office with documentary information which suggests your client's involvement in the captioned activity. As you are aware, the OUR has a general duty to investigate possible breaches of the Telecommunications Act 2000. (Please note that the "appointed day" from which the Act in force has been gazetted is March 1, 2000. We refer you to the enclosure.)

We require that a representative from InfoChannel Ltd. attend our offices on **Tuesday March 28, 2000 at 9:00 A.M.** for the purpose of discussion of these issues. At the meeting we will formally present the information on which CWJ relies in support of said allegations. We take this opportunity to advise that we will require a written response by the close of business (4:30 P.M.) on Thursday March 30, 2000.

Yours sincerely

Deborah A. Newland
Senior Legal Counsel."

The summary of the evidence relied on by Cable and Wireless from two Customer Quality Service Survey Reports was put thus:

> "These call records from our local switches along with the independent Customer Quality of Service Survey Reports clearly show that Infochannel Ltd. is engaged in an operation that allows for the termination of international calls into the local network, bypassing Cable & Wireless Jamaica's International switches."

Here in part is the decision of the OUR:

"In carrying out the action to discontinue the provision of specified services, **Cable &Wireless Jamaica Ltd.** (hereinafter referred as **"CWJ")** shall comply with the following terms and conditions:-

- CWJ must provide a written notice setting out the date and nature of the action to discontinue the provision of specified services. The notice must be served on Infochannel Limited during normal business hours at its registered office, at least 24 hours (not including week ends or public holidays) prior to such action.

- Action by CWJ to discontinue the provision of specified services must be limited only to those of InfoChannel's telephone lines to which the evidence of bypass operations directly relates, namely the following lines."

Then after detailing the relevant lines the decision continues thus:

- Action to discontinue the provision of specified services shall take the form of barring outgoing calls from InfoChannel's lines listed above (i.e. providing one-way dial) which will allow incoming calls to such lines.

- After a period of **ninety [90] days** following the date of action by CWJ to discontinue the provision of specified services, the OUR may direct CWJ to recommence the provision of specified services on signing of undertaking by InfoChannel to CWJ. The purpose of such undertaking shall be to assist in the identification or prevention of any future bypass operations by InfoChannel. After the ninety [90] day period InfoChannel may make an application to the OUR, requesting that the OUR should direct CWJ to recommence the provision of specified services. In its application, InfoChannel may suggest undertakings that it considers appropriate. Within seven [7] days following the receipt of an application, the OUR shall inform CWJ of its contents and give CWJ the opportunity to suggest undertakings that it considers appropriate.

Issued by:
The Office of Utilities Regulation

Signed: Winston Hay
Director General"

To permit Cable and Wireless to discontinue specified services, the OUR must have made a finding on bypass adverse to Infochannel. This would be an important finding by the tribunal which was empowered to make it and should have been challenged pursuant to Section 60 of the Act. Further there are provisions to appeal to an Appeal Tribunal. In addition also there is judicial review enshrined in Sec. 1(9) of the Constitution.

Section 60 in Part XII of The Act makes provision for review of the decision of the OUR. Section 60 (4) reads:

> "(4) A person who is aggrieved by a decision of the Office may, within fourteen days of receipt of that decision, apply to the Office in the prescribed manner for a reconsideration of the matter.
>
> (5) An application under subsection (4) shall be heard only if the applicant –
>
> (a) relies upon new facts or changed circumstances that could not, with ordinary diligence have become known to the applicant while the matter was being considered by the Office; or
>
> (b) alleges that the decision was based upon material errors of fact or law."

The substance of Infochannel's complaint falls within Sec. 60(5)(b) and they should have resorted to this section. Alternatively, if there was a claim that the OUR had no jurisdiction under Sec. 51 then they should have made a complaint by way of judicial review. Then Sec. 60(6) continues thus:

> (6) The Office may, in relation to an application under subsection (4), confirm, modify or reverse the decision or any part thereof.
>
> (7) Where a decision is confirmed, the confirmation shall be deemed to take effect from the date on which the decision was made.
>
> (8) Where an application is made under sub-section (4) -

(a) the Office may, on an application by the applicant, order that the decision shall not take effect until a determination is made under subsection (6); and

(b) the Appeal Tribunal shall not hear an appeal under section 62 in relation to that decision until such a determination is made by the Office."

Part X11 is appropriately captioned "Review of Administrative Decisions" to indicate that we are in the area of administrative law.

Then to complete the scheme there is established an Appeal Tribunal. Here are the relevant provisions as to its establishment.

"61. There is hereby established for the purposes of this Act, an Appeal Tribunal and the provisions of the Second Schedule shall have effect as to the constitution of the Appeal Tribunal and otherwise in relation thereto."

Then come the provisions relating to those who have a right to appeal.

" 62.-(1) A person who is aggrieved by a decision of the Office may appeal against the decision to the Appeal Tribunal –

(a) if the person is a party, within twenty-one days after receipt of the decision; or

(b) in any other case, within thirty days from the date of notification of that decision."

Then as to the jurisdiction and power of the Appeal Tribunal Sec. 62 (2) reads:

"(2) On hearing an appeal under this section the Appeal Tribunal may, subject to subsection (3)-

(a) confirm, modify or reverse the decision of the Office or any part thereof; or

(b) by a direction in writing, refer the decision back to the Office for reconsideration by it, either generally or in relation to any matter specified in the direction

and the Tribunal shall state the reasons for so doing within thirty days.

(3) The Tribunal may, on application by an appellant, order that the decision of the Office to which an appeal relates shall not have effect until the appeal is determined

(4) The Appeal Tribunal may dismiss an appeal if it is of the opinion that –

(a) the appeal is frivolous or vexatious or not made in good faith; or

(b) the appellant does not have a sufficient interest in the subject matter of the Appeal.

(5) Where the Appeal Tribunal dismisses an appeal, it shall in writing inform the appellant and the Office, stating the reasons therefor.

(6) In making a decision the Appeal Tribunal shall observe reasonable standards or procedural fairness and the rules of natural justice and act in a timely fashion."

For the composition of the Tribunal, paragraph 1 of the Second Schedule of the Act reads:

"1, The Appeal Tribunal shall consist of three members appointed by the Minister as follows-

(a) one member shall be a former Judge of the Supreme Court or the Court of Appeal and shall be chairman of the Tribunal;

(b) one member shall be appointed on the recommendation of the Advisory Council; and

(c) one member shall be appointed on the recommendation of the Consumer Affairs Commission"

It is the intention of the legislation that when the "existing telecommunications carrier" defined as Cable & Wireless Jamaica Ltd. or any future carrier or service provider resorts to Sec. 51 then the mandatory procedures ordained by Sec. 51, 52, 60, 61 and 62 must be followed by the parties concerned. In this context the decision of **Barraclough v Brown** (supra) is instructive. Further the issue was one of jurisdiction

which can be taken by this Court, of its own motion see **Norwich Corp. v. Norwich Tramways**[1906] 2 KB 119 which was approved in **Westminister Bank v Edwards** 1942 AC 529. Lord Herschell's speech commenced thus at 619 of **Barroclough v. Brown.**

> "My Lords, at an early stage in the argument of the appeal the question was raised whether the High Court of Justice had any jurisdiction to entertain a claim for the recovery of expenses under the enactment I have just quoted, or to adjudicate upon it except by way of appeal from a court of summary jurisdiction. Unwilling as I am to determine the appeal otherwise than on the merits of the case, I feel bound to hold that it was not competent for the appellant to recover the expenses, even if the respondents were liable for them, by action in the High Court. The respondents were under no liability to pay these expenses at common law. The liability, if it exists, is created by the enactment I have quoted. No words are to be found in that enactment constituting the expenses incurred a debt due from the owners of the vessel. The only right conferred is "to recover such expenses from the owner of such vessel in a court of summary jurisdiction." I do not think the appellant can claim to recover by virtue of the statute, and at the same time insist upon doing so by means other than those prescribed by the statute which alone confers the right."

Lord Watson was even more emphatic. He put it thus at pages 621-622:

> "As already indicated, I am of opinion that the claim founded upon s. 47 of the Act of 1889 was not competently brought before the Court in this suit. The only right which the undertakers have to recover from an owner is conferred by these words: "Or the undertakers may, if they think fit, recover such expenses from the owner of such boat, barge, or vessel in a court of summary jurisdiction." The right and the remedy are given uno flatu, and the one cannot be dissociated from the other. By these words the Legislature has, in my opinion, committed to the summary court exclusive jurisdiction, not merely to assess the amount of expenses to be repaid to the undertaker, but to determine by whom the amount is payable, and has therefore, by plain implication, enacted that no other court has any authority to entertain or decide these matters. The objection is one which, in my opinion, it is pars judicis to notice, because it arises on the face of the enactment which your Lordships are asked to enforce in this appeal. It cannot be the duty of any Court to pronounce an order when it plainly appears that, in so doing, the Court would

> be using a jurisdiction which the Legislature has forbidden it to exercise."

In response to the claim that it was appropriate to make a declaration, Lord Watson said on the same page:

> "The appellant's counsel maintained that your Lordships ought to substitute for a debt decree, which is the only remedy claimed under s. 47, a declaration that, under that clause, he has a right to recover from the respondents, who were admittedly the owners of the **J. M. Lennard** at the time when she sank. It is possible that your Lordships might accede to such a suggestion, if it were necessary, in order to do justice. But apart from the circumstance that such a declaration would not be in accordance with law, the substance of it is one of those matters exclusively committed to the jurisdiction of the summary court. In the absence of authority, I am not prepared to hold that the High Court of Justice has any power to make declarations of right with respect to any matter from which its jurisdiction is excluded by an Act of the Legislature; and were such an authority produced, I should be inclined to overrule it. The declaration which we were invited to make could be of no practical utility, and it would be an interference by a court having no jurisdiction in the matter with the plenary jurisdiction conferred by the Legislature upon another tribunal."

Lord Shand's contribution was put thus on page 623:

> "I agree entirely with what has fallen from my noble friend Lord Watson on both points. It appears to me that the jurisdiction which can alone be exercised in a case of this kind belongs to a court of summary jurisdiction, and that therefore this suit could not be properly initiated in the court in which it has been brought. But further, I am clearly of the opinion, with all the judges who have considered the case, that on the merits of the question the appeal entirely fails."

Lord Davey's contribution at page 623 reads thus:

> "My Lords, I agree with your Lordships that there is no common law right of action in this case, and that the High Court had no jurisdiction over the subject-matter of this action under the Aire and Calder Acts, and that the appeal must consequently be dismissed."

Lord Davey makes a most useful statement concerning the declaration as a remedy which is equally applicable to injunctive relief as provided by Sec. 49(h) of the Judicature (Supreme Court) Act. The statement reads thus at page 624:

> "But there is nothing whatever in the rule to enable the Court to make a declaration on a subject as to which its jurisdiction to give relief is excluded by statute."

Section 49(h) of the Judicature (Supreme Court) Act which provides for the general injunctive relief reads:

> "A mandamus or an injunction may be granted or a receiver appointed, by an interlocutory order of the Court, in all cases in which it appears to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court thinks just, and if an injunction is asked either before or at or after the hearing of any cause or matter to prevent any threatened or apprehended waste or trespass, such injunction may be granted if the Court thinks fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title, and whether the estates claimed by both or by either of the parties are legal or equitable."

This section concerns the award of a remedy. It is part of the law of procedure and can only be resorted to when the Supreme Court has a general jurisdiction over the subject matter. When a complaint is made pursuant to Sec. 51 of the Act the Supreme Court has no jurisdiction to issue an injunction pursuant to Sec. 49(h). It has no jurisdiction because the civil remedies against a person engaged in bypass operations are provided by the Act and the tribunals are specifically named. At any stage resort may be had to judicial review pursuant to the Judicature (Rules of Court) Act as amended by the Judicature (Civil Procedure Code)(Amendment) (Judicature

Review) Rules, 1998. See Jamaica Gazette Proclamations Rules & Regulations August 5, 1998.

The tribunals previously adverted to have the sole right to adjudicate in accordance with Sec 51 of the Act. When there is judicial review the issues under consideration are matters of law. The common law powers of the Supreme Court preserved by Section 4(1) of the principal savings clause in the Jamaica (Constitution) Order in Council 1962 as regards judicial review, is enshrined in the Constitution by Sec. 1(9) which reads:

> "(9) No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in exercising any functions under this Constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has performed those functions in accordance with this Constitution or any other law."

Unless there is a constitutional prohibition against judicial review, as in Section 32(4) of the Constitution relating to the Prerogative of Mercy pursuant to Sec. 90, then review by the Supreme Court is permissible. A necessary consequence of the prohibition in Sec. 32(4) is that in accordance with Sec. 90 (1)(b) of the Constitution only the Governor –General is empowered to stay the execution of a death warrant see **Pratt and Morgan** (1993) 30 JLR 438, 480. If he refuses a stay then the law must take its course and a mandamus can compel the gaoler to do his duty. There is no such prohibition as to the procedure or decision of the OUR and the Appeal Tribunal set up under the Act.

Be it noted that under Part XIII the *Enforcement* section there are alternative remedies where the OUR acts on its own initiative or on the complaint of any person. Since a carrier or service provider is defined in Section 2 of the Act, 'any person' in Sec 63 of the Act does not seem to include 'carriers' and 'service providers' who have

an exclusive remedy, pursuant to Sec. 51, relating to bypass operations as defined in Sec. 2 and other conduct in relation to international services. It must be borne in mind that for the "existing telecommunications carrier" Cable and Wireless, would in the interest of its revenue, set up a compliance department with investigative functions to base its belief on reasonable grounds that bypass operations are taking place. If carriers and service providers have complaints relating to Section 63(2) (c) then they are entitled to resort to this section. The procedure under Sec. 63 gives a cease and desist order in accordance with Sec. 64 which was relied on by Dr. Barnett. Section 63 in part reads:

> "63. -(1) The Office may, where it is satisfied that there are reasonable grounds for believing that any conduct specified in subsection (2) is being carried out by any person, on its own initiative or on the application of any person, issue to the person concerned, a cease and desist order in accordance with section 64.
>
> (2) The conduct referred to in subsection (1) is as follows -
>
> (a) any bypass operations in contravention of this Act or regulations made under this Act;
>
> (b) ownership or operation of an unlicensed facility;
>
> (c) providing any specified services to the public without a licence issued under this Act.
>
> (3)...

Be it noted that the above prohibited conduct in 63(2) (a)(b) and (c) is much wider than that in Sec. 51 which is confined to international services.

Then Section 65 provides for the jurisdiction of the Supreme Court exercising a special statutory jurisdiction. Sec. 63(2) is concerned with other activities apart from "bypass operations" as defined by the Act and it defines the contents of a cease and

desist order. Section 65 further demonstrates how the powers of the Supreme Court are exercised when its jurisdiction is invoked.

> "65.-(1) If the Court is satisfied on an application by the Office that a licensee –
>
> (a) has failed to comply with any term or conditions of the licence; or
>
> (b) has contravened any provision of this Act or any regulations made hereunder,
>
> the Court may exercise any of the powers specified in section 66."

There is no warrant for Dr. Barnett's forceful submission that Cable and Wireless ought to have proceeded by way of Section 63 instead of Section 51.

Then the Court is accorded special statutory powers by Sec. 66 thus demonstrating that the principles adumbrated in **Barraclough v. Brown** are also applicable when Sec. 63 is invoked. Here is how it is provided:

> "66.-(1) The Court may, pursuant to an application under section 65 (1) –
>
> (a) order the offending licencee to pay to the Crown such pecuniary penalty not exceeding five hundred thousand dollars in the case of an individual and not exceeding three million dollars in the case of any other person;
>
> (b) grant an injunction restraining the offending licensee from engaging in conduct described in subsection (1) (a) or (b) of section 65; or
>
> (c) make such other order as the Court thinks fit,
>
> in respect of each contravention or failure specified in that subsection."

Further by Section 67 the Court is empowered to award damages, to those who contravene the obligations or prohibitions specified in the relevant provisions of the Act. In these circumstances also there is no direct approach to the Supreme Court.

The Supreme Court is acting as an appellate court from the decision of the OUR and the normal way of invoking its jurisdiction in such circumstances is by Motion. See **Jaundoo v. Attorney-General of Guyana** [1971] A.C. 972; [1971] 3 WLR 13.

The discretionary nature of the interlocutory injunction pursuant to 49(h) of the Judicature (Supreme Court) Act.

To appreciate the nature of the submission on this aspect of the matter it is necessary to examine the Amended Statement of Claim by the appellant in the following sections: Paragraphs 16, 17 and 18 read:

> "16. The legal and regulatory framework has not to date been implemented, in that the new licences have not been granted, the necessary regulations have not yet been promulgated and the required ministerial directions have not yet been given
>
> 17. Notwithstanding the foregoing, the Defendant on or about March 24, 2000 applied to the Office of Utilities Regulation under section 51 of the Telecommunications Act for its approval for the discontinuance of the service to the Plaintiff and/or the disconnection of the Plaintiff's facility from the Defendant's facility.
>
> 18. In the further alternative the plaintiff says that section 51 is inapplicable to the Plaintiff in the circumstances and/or having regard to the provisions of the Act and the Agreement for Settlement."

Then the claim for relief reads in part at paragraph 23:

> "23.(5) An order for the Defendant to restore the full characteristics of the telephone lines assigned by the Defendant to the Plaintiff so that they can operate in the manner in which they operated prior to March 31, 2000 in providing full Internet services including Voice-Over Internet to its subscribers.
>
> (6) The Defendant by itself, its servants or agents, or otherwise howsoever be restrained from suspending, terminating, altering or comprising the facilities the Defendant has supplied to the Plaintiff pursuant to its All Island Telephone Licence issued under the Telephone Act preserved by the Telecommunications Act 2000.

> (7) An order for the Defendant to supply to the Plaintiff the telephone lines requested by the Plaintiff and which the Defendant has agreed and is obliged to supply."

In my view the Supreme Court has no direct jurisdiction pursuant to Sec. 51 of the Act, save by way of judicial review and therefore the redress sought by way of interlocutory injunction cannot be granted. So despite the citation of many cases pertaining to interlocutory injunctions the only ones to which I will refer are those which state that the grant of the relief would be an injustice.

The grant of the remedy would mean that the appellant would have his prayers answered at this stage and would have no need for a subsequent trial. The three relevant cases on this aspect are **NWL Ltd. v. Woods** [1979] 3 All E.R. 614, **Cayne Global Natural Resources plc.** [1984] 1 All E.R. 225 and **W.D. Miller & W. Parkes v. O'Neil Cruickshank** (1986)23 JLR 154. Although these cases were cited below there was no analysis of them. Also they were not adverted to nor were they part of the reasons for the **Findings** in the Court below. In summarising the submissions of counsel for Cable & Wireless, Reckord J. said:

> "See also **Cayne & Another vs Global Natural Resources** (1984) 1 AER 225. In this case it was held that where the grant or refusal of an interlocutory injunction will have the practical effect of putting an end to the action, the court should approach the case on the broad principle of what it can do in its best endeavour to avoid injustice and to balance the risk of doing an injustice to either party. In the instant case, counsel submitted that the plaintiff's application for injunction should not be granted. The plaintiff has not said that it is entitled to provide voice IP, or voice over internet, nor has it assured the court that it is not engaged in by pass operations.
>
> See S.C.C.A. No. 19/86 **W.D. Miller and W. Parkes vs. Oneil Cruickshank."**

Then turning to the submissions of counsel for Infochannel, Reckord J. responding said:

> **"Shepherd Homes vs. Sandham-** this concerning mandatory injunction. **Esso Standard Oil vs. Chan** (1988) 25 JLR 110 **David Rudd vs. Crowne Fire Exl.** (1989) **Locabail Information Finance vcs Agro-export** (1986) 1 All ER 901 page 906-907 **Cayne and Another vs. Global Natural Resources** (1984) 1 AER 225. Where grant or refusal of an interlocutory injunction will have the practical effect of putting an end to the action. **Luganda vs. Service Hotels Ltd.** (1969) WLR 1056. **Films Rover Information Ltd. and Others vs. Cannon Film Sales Ltd.** [1980] 3 All ER 272. The court was required to feel a high degree of assurance that the plaintiff would succeed at trial before an injunction would be granted. **Infochannel Ltd. v. Cable & Wireless Jamaica Ltd. (Suit No. EO14/99).** Similar relief claimed as in instant case. **The Cruickshank case."**

As for Suit E.014 799 that was a decision of Marva McIntosh J. (ag.), before the Act, in favour of the appellant Infochannel. There was no appeal by Cable and Wireless as this was one of the suits discontinued by the Agreement for Settlement of 19th August 1999, that Ms. Phillips stated was not exhibited at the ex-parte hearing before Record J.

Turning to the Findings of the learned judge the essential part of his judgment reads:

> "As in the previous 1999 Infochannel case, I find that there are serious issues to be tried. The plaintiff has said his loss, because of the defendant's interference, is about $2 million per month together with other losses which could not be satisfied in monetary terms. In these circumstances would the court be justified in granting an order for mandatory injunction? I think not.
>
> 'Before granting a mandatory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction'
> See **Locabail International Finance Ltd. vs. Agro-export and others** (supra).
>
> I do not now have that high degree of assurance. The claim for prohibitory injunction also fails. If the plaintiff succeeds at trial, I am of the view that damages will suffice

> and that the defendant is in a position to satisfy such a judgment.
>
> Accordingly, the interim injunction granted on the 12th of April is discharged and the plaintiff's application for an interlocutory Injunction is refused and the summons is dismissed."

With respect to the learned judge's findings above on the issue of an interlocutory injunction, there is room for an alternative view as to why it ought not to be issued in the circumstance of this case. Two short passages from the speech of Lord Diplock illustrate the principle which was applied in **NWL Ltd. v Woods** (supra). At page 626 Lord Diplock said:

> "...Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other."

Then on the same page Lord Diplock concluded thus:

> "My Lords, counsel for the defendants have invited this House to say that because it is singled out for special mention it is an 'overriding' or a 'paramount' factor against granting the injunction once it appears to the judge that the defence of statutory immunity is more likely to succeed than not. I do not think that your Lordships should give your approval to the use of either of these or any other adjective to define the weight to be given to this factor by the judge, particularly as the subsection does not apply to Scotland where, as my noble and learned friend, Lord Fraser of Tullybelton, explains, it would be but one of several factors to be taken into consideration whose relative weight might vary with the circumstances of the case. Parliament cannot be taken to have intended that radically different criteria should be applied by English and Scots courts. The degree of likelihood of success of the special defence under s 13 beyond its being slightly more probable than not is clearly relevant; so is the degree of irrecoverable damage likely to be sustained by the

> employer, his customers and the general public if the injunction is refused and the defence ultimately fails. Judges would, I think, be respecting the intention of Parliament in making this change in the law in 1975, **[See the Employment Protection Act 1975, s 125, Sch 16, Part III, para 6]** if in the normal way the injunction were refused in cases where the defendant had shown that it was more likely than not that he would succeed in his defence of statutory immunity; but this does not mean that there may not be cases where the consequences to the employer or to third parties or the public and perhaps the nation itself, may be so disastrous that the injunction ought to be refused, unless there is a high degree of probability that the defence will succeed.
>
> My Lords, the instant case presents no problem. On the evidence before the court at each stage of these proceedings, the defendants have a virtual certainty of establishing their defence of statutory immunity."

Equally it could be said, in view of the statutory provisions of the Act, in Phase 1 Cable and Wireless is very likely to succeed at a trial in relation to Infochannel's prayer of injunctive relief.

That part of Lord Fraser's speech at page 628 which is relevant to the instant case is as follows:

> "... but if the defender or respondent appears very likely to succeed at the end of the day it will tend to be convenient to refuse interim interdict because an interim interdict would probably only delay the exercise of the defender's legal activities."

Then Lord Scarman said at page 633:

> "If there is a trade dispute, the policy of the legislation is immunity, or (as the case may be) restriction of civil liability, for acts done in contemplation or furtherance of the dispute. There is to be, outside the criminal courts no judicial review of such acts. The existence of so sweeping a legislative purpose leads me to conclude that, if there is a likelihood as distinct from a mere possibility of a party showing that he acted in contemplation or furtherance of a trade dispute, no interlocutory injunction should ordinarily be issued. A balance of probabilities will suffice in most cases for the court to refuse it. I do not rule out the possibility that the consequences to the plaintiff (or others) may be so serous that the court feels it necessary to grant

> the injunction, for the subsection does leave a residual discretion with the court. But it would, indeed, be a rare case in which a court, having concluded that there was a real likelihood of the defence succeeding, granted the injunction."

Then in **Cayne v Global Natural Resources plc** [1984] 1 All ER 225, Eveleigh L.J. said at 233:

> "It is not necessary to go into all the evidence that one has seen on this matter. Suffice it to say that it would appear that shareholders came on the scene introduced by the finance house of Bear Stearns & Co in America with the view to persuading the company to adopt a policy of realisation of assets. That policy is one to which the present board is opposed, and that is what this application is all about. It is in order that the policy of the board may be changed to accord with the wishes and intentions of the holders of 10% of the equity. The court in that situation is not simply being asked to preserve the voting rights of the strength of the plaintiffs (that cannot be done anyway) but to prevent an issue of shares to McFarlane as part of a financial manoeuvre. The plaintiffs are perfectly entitled to make such an application to this court and ask the court to enforce the plaintiffs' rights. However, in an application for an injunction when the court is being asked to exercise its discretion in enforcing those rights, regard may be had to all of the circumstances. The real aim of Global is to change the policy of the board. We are not concerned with the rights and wrongs of that policy. The question, it seems to me, is: should the court exercise its discretion bearing in mind all the circumstances of the case, when to decide in favour of the plaintiffs would mean giving them judgment in the case against Global without permitting Global the right of trial? As stated that way, it seems to me that that would be doing an injustice to the defendants."

Kerr L.J. put the matter thus at p 235:

> "The practical realities in this regard are that, if the plaintiffs succeed in obtaining an injunction, they will never take this case to trial. The reasons are easy to see. This is a contest which centres on the respective voting power of the plaintiffs on the one hand and of the present board of directors on the other. This contest will be fought out at the annual general meeting in Jersey on 13 September next. The plaintiffs want to remove the present directors and put themselves into their place. The present directors, naturally, wish to retain their position."

Then he continues thus on the same page:

> "On that basis the realities are the following. If an injunction is granted, the plaintiffs may well become, or become able to control, the new board of directors. They will then manage and present the company. At that point it seems to me to be quite inconceivable that they would continue the present proceedings to trial against the company itself. In effect, as counsel for the defendant, Global, said, they would then be in the position of being both plaintiff and defendant, and it could hardly be imagined that they would consider it to be in the interest of the company, or of the general body of shareholders, to pursue these proceedings against the company. To do so would be a self-inflicted blood-letting in public. In that connection it must be remembered that, for reasons which we do not know, the present directors are not defendants to these proceedings. The sole defendant is the company itself. What has to be considered in envisaging the realities of the position if an injunction is granted is therefore whether or not the new board of directors, i e effectively the plaintiffs on the present prospects of the outcome of the battle of votes, would then continue this action against the company itself. I cannot see this happening for one moment."

As for May L.J. his stance was as follows at 238:

> "In general, as I say, where a plaintiff brings an action and in it seeks an interlocutory injunction on the basis that the defendant has breached the former's rights, then justice requires that that defendant should be entitled to dispute the plaintiff's claim at a trial, and if the grant of the injunction would preclude this then it should not be granted on an interlocutory basis."

Turning to a case from this jurisdiction **W.D. Miller and W. Parkes v. O'Neil Cruickshank** (supra), Rowe P. after referring to the grant of an interim injunction said at 157:

> "Consequently, if the injunction remains in force the respondent would have gained his total objective. Nothing of practical value would be left in the action and if the respondent elected to go to trial it would be of the merest academic interest to him, he having already reaped all the benefits he could ever obtain from the action."

Carey J.A. at page 160 said:

> "To avoid injustice, all the circumstances of the case must be looked at, and that means, having regard to all the practical realities. The practical realities in this situation are that if the injunction were granted, the plaintiff will have qualified for selection and would doubtless play in the semi-final and possibly in the final."

Be it noted this judgment expressly followed The House of Lords and Court of Appeal decision cited previously.

What is the effect of those principles on the circumstance of the instant case where the effective remedies sought by the plaintiff as set out in the particulars of the Statement of Claim to reiterate, are as follows?

> "(5) An order for the Defendant to restore the full characteristics of the telephone lines assigned by the Defendant to the Plaintiff so that they can operate in the manner in which they operated prior to March 31, 2000 in providing full Internet services including Voice-Over Internet to its subscribers.
>
> (6) The Defendant by itself, its servant or agents, or otherwise howsoever be restrained from suspending, terminating, altering or comprising the facilities the Defendant has supplied to the Plaintiff pursuant to its All Island Telephone Licence issued under the Telephone Act preserved by the Telecommunications Act 2000.
>
> (7) An order for the Defendant to supply to the Plaintiff the telephone lines requested by the Plaintiff and which the Defendant has agreed and is obliged to supply.
>
> (8) Such further or other reliefs as to the Court may deem fit"

The conclusion must be that interlocutory injunctions ought not to be granted in the instant case. An examination of the other claims reveal that they are for damages for breach of contract and for declarations. They read as follows:

> "(1) Damages for breach of Contract

(2) A Declaration that the Defendant committed an abuse of its dominant position in breach of the Fair Competition Act

(3) A Declaration that the Plaintiff was engaged in providing specified services inclusive of Internet services to the public for which no licence was required prior to March 1, 2000 within the meaning of Section 85 of the Telecommunications Act.

(4) A Declaration that the Plaintiff is entitled to be engaged in providing the aforesaid specified services inclusive of Internet services to the public for a period of at least ninety days or until a licence has been granted to the Plaintiff whichever is later."

As for damages for breach of contract the relationship between Cable & Wireless and Infochannel is now governed by Part VII of the Act captioned Consumer Protection. Sections 44 and 45 demonstrate the degree of protection offered and again shows that a specific tribunal is in charge of complaints to which resort must be made before invoking judicial reviews. Section 44 reads :

"44.-(1) Providers of retail services to consumers shall use reasonable endeavours to ensure that those services are –

(a) reliable;

(b) provided with due care and skill; and

(c) rendered in accordance with the standards reasonably expected of a competent provider of those services

(2) A complaint may be made to the Office by any customer who is dissatisfied with the services provided to him by a carrier or service provider or who claims to be adversely affected by the actions of a carrier or service provider.

(3) The Office may make rules subject to affirmative resolution prescribing quality standards for the provision of specified services in relation to all service providers or dominant service providers, as the case may be.

(4) The Office may make rules relating to the administration and resolution of customer complaints."

Then 45 reads:

"45. Service providers may –

(a) refuse to provide retail services to consumers; or

(b) discontinue or interrupt the provision of such services to a customer whether or not that customer is a customer, pursuant to an agreement with that customer,

only on the grounds which are reasonable and non-discriminatory and where any such action is taken, the service provider shall state the reasons therefor."

As for the declaration on internet services, the VSAT Licence granted by the Minister on 6th June 1997, is governed by the transitional provision in the Act.

As for the declaration on dominant position, Sec. 73 (1) of the Act reads:

"73.-(1) The provision of the Fair Competition Act shall not affect an agreement between the Minister and a universal service provider in relation to the universal service obligation or any agreement approved by the Office after consultation with the Fair Trading Commission.

(2) Except as provided in subsection (1) nothing in this Act shall be construed as affecting the right of any person to refer a matter to the Fair Trading Commission in accordance with the Fair Competition Act."

If the interlocutory injunction were granted Infochannel would obtain all they would seek at a trial. Such a trial even with an order for speedy trial would not take place under thirty months. By that time Phase III as envisaged by the Act would be in operation and there would be a competitive regime for telecommunications. That would be an injustice to Cable & Wireless, since on my reading they are very likely to succeed at a trial. It is on this basis that I would refuse the prayer for an interlocutory

injunction assuming that the equitable remedy was permissible having regard to the law as explained earlier in this judgment.

On this aspect of the case, to reiterate for emphasis, the learned judge said in his finding at page 275 of the record:

> "The question that has to be asked now is what is the right that the plaintiff is seeking to protect. Is it the right to engage in bypass operations? This is now illegal under section 9 of the new Act and is attended by a sentence of $3 million or 4 years imprisonment. Is it a right to voice over IP or voice over internet? This area is not yet settled and is hotly contested but may incur penalty of $500,000.00 or 12 months imprisonment. Is it the right to operate for up to 90 days after the commencement of this new Act-the transitional period? In any event that period has long passed.
>
> As in the previous 1999 Infochannel case, I find that there are serious issues to be tried. The plaintiff has said his loss, because of the defendant's interference, is about $2 million per month together with other losses which could not be satisfied in monetary terms. In these circumstances would the court be justified in granting an order for mandatory injunction? I think not."

Then the learned judge continued thus:

> "Before granting a mandatory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction. See **Locabail International Finance Ltd. vs. Agro-export and others** (supra).
>
> I do not now have that high degree of assurance. The claim for prohibitory injunction also fails. If the plaintiff succeeds at trial, I am of the view that damages will suffice and that the defendant is in a position to satisfy such a judgment."

The relationship of the criminal sanction to the issue of an injunction

The learned judge responded to counsel for Cable & Wireless on the issue of criminal sanctions. He recorded her submission thus:

> "Counsel pointed out that a person engaged in bypass operations is liable on conviction to a fine of $3 million or 4 years or to both such fine and imprisonment."

and implied as stated earlier that in the light of Infochannel's criminal conduct the injunctive relief prayed for would not be granted. It was inappropriate to make any finding as regard the criminal sanctions. That is a matter for the criminal courts with a different standard of proof from that which obtains in civil courts . Also the issue of mens rea has peculiarities in the criminal law which have no exact counterpart on the civil side. If Cable & Wireless wishes to test the criminal law they should seek the assistance of the Director of Public Prosecutions. In this regard **Attorney-General v. Confidence Bus Services Ltd.** (1990) 27 JLR 414 at 419, a decision of this Court,the ruling was:

> "Secondly, there is a rule of law, that the declaration, a civil remedy, is seldom granted when Parliament has entrusted the contravention of a statute or regulation to criminal tribunals. This issue does not seem to have been examined in the court below. Judicial notice could have been taken of reports that there were criminal prosecutions for breaches of paragraph 123A of the Regulation. These press reports further state that as a result of the declaration granted, prosecutions had been suspended. So Confidence Bus Services Limited, an employer of drivers and conductors halted the prosecution of drivers and conductors who disregarded the law. Lord Dilhorne recognised that such dangers could arise and said of a decision of the Court of Appeal in England in **Imperial Tobacco Ltd. v. A-G** [1980] 1 All E.R. 966 at 875 –
>
> > 'Donaldson J thought it could but did not grant it as he thought that the Spot Cash scheme was a lottery and an unlawful competition. The Court of Appeal, holding that it was neither, granted it. That decision, if it stands, will form a precedent for the Commercial Court and other civil courts usurping the functions of the criminal courts. Publishers may be tempted to seek declaration that what they propose to publish is not a criminal libel or blasphemous or obscene. If in this case where the declaration sought was not in respect of future conduct but in respect of what had already taken place, it could be properly granted, I see no reason why in such cases a declaration as to future

> conduct could not be granted. If this were to happen, then the position would be much the same as it was before the passing of Fox's Libel Act 1843 when judges, not juries, decided whether a libel was criminal, blasphemous or obscene.
>
> Such a declaration is no bar to a criminal prosecution, no matter the authority of the court which grants it'."

The same principles would apply to the finding of criminality in the circumstances of this case. In fact it ought to be noted that criminal proceedings were instituted in the Resident Magistrates' Court against Infochannel which were not successful.

Do the transitional provisions in Part XVII of the Act favour Infochannel?

To appreciate the provisions of the Act, it must be appreciated that Cable & Wireless enjoys for a duration of a further three years, a privileged position in telecommunication services. A bargain was struck between the Government whereby Cable & Wireless gave up its monopoly status, and would operate in a competitive arena during Phase III as defined in the Act.

There was litigation between the Government and Cable & Wireless concerning the extent of the monopoly which was discontinued and the Telecommunications Act was enacted after consultation with a wide range of parties who had an interest in providing and receiving telecommunications services.

In this context there is an important contract between the Government and Cable & Wireless dated 30th September 1999 which explains the mischief which the Act was meant to remedy. The following paragraphs are of importance:

> **"WHEREAS**
>
> (1) CWJ is the telecommunications carrier in Jamaica operating under five telecommunications operating licences (the "Existing Operating Licences") granted by the then Minister of Public Utilities and Transport each dated 31st August 1988 and each

for a period of 25 years. By virtue of the Existing Operating Licences, CWJ has authority to provide telecommunications in Jamaica.

(2) CWJ has agreed to surrender the Existing Operating Licences in consideration for the adoption and implementation and bringing into law new legislation that fully reflects the Drafting Instructions approved by Cabinet and issued to the Chief Parliamentary Counsel and the issuance of new licences as set out in Annexures A,B and C to this Agreement, consistent with the Drafting Instructions and resulting legislation.

(3) The Drafting Instructions are consistent with the Government's telecommunications Policy, and a copy of those Drafting Instructions has been seen and accepted by CWJ."

Then the agreement continues thus:

"(4) CWJ has agreed to perform certain obligations in relation to the provision of telecommunications lines and investment in informatics development in Jamaica as provided for in this Agreement.

(5) The Drafting Instructions and any resulting legislation are intended to establish a framework whereby all sections of the telecommunications market will move towards full, fair and competitive conditions on a phased basis and will ensure that existing and future services to uneconomic areas and uneconomic customers will be supported by universal service contributions from all licensees on an equitable basis.

(6) CWJ and the Minister of Commerce and Technology ('the Minister") are parties to legal proceedings under Suit No. M-89 of 1998 (the "Proceedings") in which CWJ has applied to the Full Court of the Supreme Court of Jamaica for Orders of Certiorari and Prohibition in respect of certain licences granted by the Minister for the operation of radio and telegraph stations for the purposes of international wireless telecommunications under the Radio and Telegraph Control Act of 1973. CWJ claims that these licences and the Kasnet Licence issued on similar terms (collectively, "the VSAT Licences") breach its exclusivity under the External Telecommunications Special Licence for external

telecommunications. The Minister has contended that CWJ has no such claim to exclusivity. The Proceedings are currently part heard.

(7) CWJ and the Minister now intend to resolve their differences with respect to the Proceedings and to facilitate the new framework for the licensing and regulation of competing providers of telecommunications services and equipment in Jamaica. They have entered into this Agreement for the purpose of setting out the terms of such resolution and to give effect to such terms and to the new framework.

(8) The parties recognise that before Drafting Instructions can be implemented into law the Bill prepared consistent with those Instructions will be the subject of Parliamentary debate and possible modification or rejection by Parliament. The parties also recognise that such modification or rejection may give rise to certain rights including, *inter alia,* an obligation on the Government to compensate CWJ in accordance with this Agreement.

NOW THIS AGREEMENT WITNESSETH that, in consideration of CWJ agreeing to the surrender of the Existing Operating Licences on the terms set out herein and of the mutual covenants herein exchanged, the adequacy of which is hereby acknowledged and agreed:
..."

To ensure an orderly transition to the new regime for telecommunications the Act provided for three Phases thus in Section 77.

" 77. In this Part –

"Phase I" means a period of eighteen months beginning on the appointed day;

"Phase II" means a period of eighteen months commencing on the day next after the day on which Phase I ends;

"Phase III" means the period beginning on the day next after the day on which Phase 11 ends."

The appointed day was gazetted as March 1, 2000. Here is how the Act grants a privileged position to Cable and Wireless. Section 75(3) & (4) reads as follows:

"(3) The Minister shall, within fourteen days after the appointed day, grant a licence under section 13 of this Act to the existing telecommunications carrier.

(4) The existing telecommunications carrier shall not be required to make application for a licence under this Act the grant of which is authorized by subsection (3)."

Since the rights claimed by Infochannel in these proceedings relate to Phase I, it must therefore be appropriate to confine our attention to the statutory transitional provisions which are in effect during that period. Sec. 78 reads in part as follows:

"78.-(1) During phase I, the Minister may grant the licences specified in subsection (2).

(2) The licences referred to in subsection (1) are as follows -

(a) spectrum licences;

(b) the following types of carrier licences only –

(i) two domestic mobile carrier licences authorizing the licensees to own and operate domestic mobile networks solely for the purpose of providing domestic mobile services;

(ii) FTZ carrier licences;

(iii) paging carrier licences solely for the purpose of providing paging services; and

(iv) licences to authorize persons referred to in sections 75 (3) and 76(2) to continue their operations as carriers;

(c) ..."

As regards Sec. 75(3) and Sec. 78(2) these sections have already been cited but Sec. 76 is repeated because Infochannel's licence was granted and preserved pursuant to this section. It reads:

"76.-(1)Any licence which was, before the appointed day, granted under the Radio and Telegraph Control Act and is subsisting on the appointed day shall, on and after that day, be deemed to have been granted under this Act and shall, with such modifications as may be necessary, and

> until a licence is granted under this Act, continue to have effect in accordance with the terms thereof and subject to the provisions of this Act.
>
> (2) The Minister shall, within fourteen days after the appointed day, grant a licence under section 13 to any person who, immediately before that day, was the holder of a licence with an unexpired term of six months or more and that licence shall cease to be valid upon the grant of a licence pursuant to this subsection."

Here is how Infochannel sets out its case in its Amended Statement of Claim:

> "7. On February 3, 1995 the Plaintiff and the Defendant entered into an agreement for the provision of, *inter alia,*
>
> (1) local access lines to the Defendant's public telephone network;
>
> (2) voice grade local lines to the Defendant's public telephone network; and
>
> (3) leased international digital data communication circuit, interlinking the Plaintiff's local offices with its foreign offices.
>
> 8. For the purpose of providing full Internet Services to the Jamaican public via satellite InfoChannel utilizes the services of a Very Small Aperture Terminal (VSAT) for which InfoChannel applied and was granted a special licence under the radio and Telegraph Control Act for the transmission of data to and from Jamaica.
>
> 9. The Plaintiff said special licence was granted for a period of five years commencing on June 16, 1998 and is renewable for a further period of five years unless the Minister decided otherwise."

It is desirable to cite the salient points in the licence to understand the nature of Infochannel's claim. The commencement reads thus:

"**RADIO AND TELEGRAPH CONTROL ACT**

INFOCHANNEL LIMITED

(WIRELESS TELECOMMUNICATIONS SPECIAL LICENCE, 1998)

Licence granted by the Minister under the provisions of Section 6 (1) of Radio and Telegraph Control Act ("the Act") authorising Infochannel Limited to establish maintain and use radio and telegraph stations or apparatus for the purposes of wireless telecommunications services.

WHEREAS

(i) under the provisions of Section 6 (1) of the Radio and Telegraph Control Act the Minister may grant to any suitable applicant a Special Licence whether exclusive or non-exclusive to establish, maintain or use any radio or telegraph station or apparatus for such period on such terms and conditions as he may determine:

(ii) Infochannel Limited a Company duly incorporated under the laws of Jamaica (hereinafter referred to as "Infochannel") has applied for the grant of a non-exclusive Special Licence under the Act to establish, maintain and use radio or telegraph stations or apparatus for the purpose of wireless telecommunications in respect of the provision of its Internet Services in Jamaica."

Certain definitions in the Special Licence are important. They are as follows:

"the Convention" means the International Telecommunication Convention, of Nairobi, 1982 and the General and Administrative Regulations Thereof or any Convention and/or Regulations which may from time to time be in force in revision thereof or supplementary thereto and to which the Government of Jamaica is a party;

"Internet" means the global system linking computer networks together using transmission control protocols or internet protocols as the basis for communications

"Internet Services" means services provided using the internet.

"International Radio Regulations"	means the Radio Regulations annexed to the Convention and includes any Regulation made in amendment, addition to or substitution for the said Radio Regulations;
"the licenced apparatus"	means any radio or telegraph station or apparatus, authorised to be established, maintained and used under or by virtue of clause 1 of this Licence;
"Licensee"	means Infochannel Limited or any other person or body corporate to whom this Licence is assigned."

It might have been useful if "the Convention" had been exhibited, but it was not.

Then turning to the clause which contains the grant it reads:

"Grant of Licence: 1.	The Licensee is hereby licensed for the period hereinafter appearing, subject to the provisions of the Radio and Telegraph Control Act and any regulations made thereunder and to the terms set out in the Schedule to this Licence, to establish, maintain and use any radio or telegraph station or apparatus as shall from time to time be necessary or suitable for the purpose of operating a wireless telecommunications service between its offices in Jamaica and its offices located outside of Jamaica in respect of the provisions of its Internet Services in Jamaica."

There is an arbitration clause which reads:

"Arbitration:	17. In the event of any difference whatever arising under this licence between the Government and the Licensee or between the Postmaster and the Licensee, or between the Minister and the Licensee the matter in difference shall be referred to

> arbitration in accordance with the Arbitration Act and the decision thereon shall be final and conclusive."

There is no indication in these proceedings that this Arbitration clause was ever tested.

As regards the Schedule it reads:

"FIRST SCHEDULE

Item	Name and Location of Station	Call Sign	Assigned Frequency kHz/MHz	Frequency Tolerance Parts in 10^6	Emission Designation	Transmitter Power	Remarks
	Satellite Earth Station 85 Hope Road Kingston	INFO-CHANNEL	6/4 GH,	50	2048 KB/S	37 dBm	The station is permitted to transmit data only."

To reiterate, disputes are to be settled by arbitration and although there is a definition clause there is a restriction that only data is to be transmitted. In this context it is necessary to examine paragraph 4 of Infochannel's amended Statement of Claim. It reads:

> "4. The said value-added information services also include (but is not limited to) electronic mail transmission (e-mail); electronic mail to facsimile machines (fax), USENET news services, WORLDWIDE WEB, (WWW), ARCHIE, File Transfer Protocol (FTP), GOPHER, INTERNET Talk Radio and voice over Internet (I.P. telephony), video over Internet (video over I.P.) streaming broadcasting and fax over Internet (fax over I.P.) by employing technology known as I.P. protocol and TCP protocol."

Cable and Wireless in its defence averred as follows:

> "3. The Defendant avers and says that in respect of paragraph 4 of the Statement of Claim, the Plaintiff was never authorised under any law or licence to provide any voice services."

The restriction in the First Schedule to transmit data only, is the fact which, if there is resort to arbitration on issues of dispute before the Act, could be settled as to what is the scope of that clause.

Referring to Sec. 78 (1) and (2) (c) of the Act pertaining to Phase I, it continues thus:

> "78.-(1) During Phase I, the Minister may grant the licences specified in sub-section (2)
>
> (2) The licences referred to in subsection (1) are as follows –
>
> (a) ...
>
> (b) ...
>
> (c) the following types of service provider licences only–
>
> (i) two domestic mobile service provider licences, authorizing the licences referred to in paragraph (b)(i) to provide domestic mobile services to the public;
>
> (ii) service provider licences authorizing the licensees to provide services (excluding voice services) to the public in relation to internet access through the use of facilities owned and operated by the existing telecommunications carrier; [Emphasis supplied]
>
> (iii) service provider licences authorizing the licensees to provide to the public, data services through the use of facilities owned and operated by the existing telecommunications carrier; [Emphasis supplied
>
> (iv) international voice service provider licences for the resale of international switched minutes obtained from the existing telecommunications carrier;
>
> (v) FTZ service provider licences;

(vi) licences to authorize persons referred to in sections 75 (3) and 76 (2) to continue their operations as service providers;

(vii) service provider licences authorizing the licensees referred to in paragraph (b) (iii) to provide paging services (excluding voice services) to the public;

(d) ..."

Section 78(2) (c)(ii) (iii) and (iv) demonstrate how the Act entrenches Cable and Wireless' privileges during Phase I. Having regard to the Contract dated 30th September 1999, between the Government and Cable and Wireless these sub-sections are not surprising. Since we are still in Phase I perhaps Section 79 should be noted. It reads:

"79.-(1) On and after the date of commencement of Phase I, the existing telecommunications carrier shall offer its switched international voice minutes to international voice service providers on a wholesale basis, determined in accordance with subsection (2).

(2) The wholesale rate for switched international voice minutes shall be the amount arrived at by subtracting from the retail price for such minutes, the amount representing the net costs that the service provider will actually avoid by providing the minutes on a wholesale basis.

(3) The Office shall act as arbitrator in relation to any dispute arising between the existing telecommunications carrier and a prospective reseller as to the wholesale rate or any other term or condition for switched international voice minutes and, in determining any such dispute, the Office shall apply rules referred to in section 34 (2) (pre-contract disputes), so, however, that the price shall be determined in accordance with subsection (2) of this section."

It is now appropriate to turn to Sec. 85 on which Infochannel rests its case. It reads:

"85. Where –

(a) immediately before the appointed day, any person -

(i) was engaged in providing specified services to the public or in the selling, trading in or importation of prescribed equipment; or

(ii) owned or operated a facility, for which no licence was required under the Radio and Telegraph Control Act or the Telephone Act; and

(b) within ninety days after the appointed day, that person has applied for a licence under section 11 of this Act,

that person shall be entitled to be so engaged or to own or operate a facility for a period not exceeding ninety days beginning with the appointed day or until a licence has been granted or the application has been withdrawn, whichever is the later."

As regards Sec. 85 (a)(i) it speaks of "specified service" and it is pertinent to reiterate the definition. It is stated in Sec. 2(1) of the Act that "specified service" means a telecommunications service or such other service as may be prescribed. So Infochannel was licenced to transmit "data only" pursuant to the Radio and Telegraph Control Act.

Even if an application was made under Sec. 11 of the Act to provide voice services direct to the public then Minister as adverted to above is circumscribed by the provisions of Sec. 78.(2)(c) (ii), (iii) and(iv) which debars him from granting such a licence during Phase I. At this stage I must make reference to **Davy v. Spelthorne Borough Council** [1983] 3 All E.R. 278 cited by Dr. Barnett which recognised the right of the plaintiff Davy to institute his claim for damages for negligence in the Supreme Court by ordinary action rather than resort to judicial review. In the instant case however there is provision for mandatory proceedings pursuant to Sec. 51 before the OUR and Appeal Tribunal with resort to judicial review if necessary as regard the complaint that Infochannel was involved in bypass operations. There is no provision in the common law for such a complaint. Even by way of Sec. 63(1), the means by which

a cease and desist order is to be obtained, the Act provides for mandatory proceedings before the OUR, before resort to the new statutory jurisdiction exercised by the Supreme Court. In the light of this analysis the transitional provisions have not assisted Infochannel in its quest for injunctive relief.

The constitutional implications pursuant to Chapter III of the Constitution

In its Statement of Claim Infochannel claims damages for breach of contract and the following declarations:

> "(2) A Declaration that the Defendant committed an abuse of its dominant position in breach of the Fair Competition Act.
>
> (3) A Declaration that the Plaintiff was engaged in providing specified services inclusive of Internet services to the public for which no licence was required prior to March 1, 2000 within the meaning of Section 85 of the Telecommunications Act.
>
> (4) A Declaration that the Plaintiff is entitled to be engaged in providing the aforesaid specified services inclusive of Internet services to the public for a period of at least ninety days or until a licence has been granted to the Plaintiff whichever is later."

The appellant Infochannel is not precluded from continuing those claims for what they are worth. But as explained earlier Infochannel is likely to fail. A contention was also made during the oral and written submissions that Infochannel's freedom of expression guaranteed by Section 22 of the Constitution was being infringed.

It must therefore be emphasised that Infochannel preferred to rely on the provisions of Chapter III of the Constitution instead of relying on the provisions of Chapter I Section 1(9) which enshrine judicial review.

It is therefore necessary to examine the specific words which enshrined freedom of expression. They read as follows:

> "22.-(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this section the said freedom

> includes the freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence and other means of communication."

The specific clause relevant to Infochannel's case reads "to receive and impart ideas and information without interference". But the Constitution recognises in Section 13 that freedom of expression as well as the other fundamental rights and freedoms enjoyed before 1962 and enshrined in Sections 14 to 24 must be limited so as to ensure the rights of others and the public interest. The limitations are stated broadly thus in Sec. 13:

> "the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

It is Parliament which is accorded the powers to make laws for the "peace order and good government of Jamaica" and in relation to freedom of expression it is empowered to limit freedom of expression in the public interest. The specific clause reads in Sec. 22 (2) of the Constitution:

> "(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –
>
> (a) which is reasonably required –
>
> (i) in the interest of defence, public safety, public order, public morality or public health; or
>
> (ii) for the purpose of protecting the reputations, rights and freedoms of other persons, or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and

> independence of the courts, or regulating telephony, telegraphy, posts, wireless broadcasting, television or other means of communication, public exhibitions or public entertainment; or
>
> ..."

The Telecommunications Act now regulates "Telecommunications" as defined in the Act and Parliament was empowered before 1962 and still continues to be empowered to regulate this service to the extent that it is reasonably required. Here is how Parliament recognised its constitutional responsibility in Section 3 of the Act. It reads:

> "3. The objects of this are –
>
> (a) to promote and protect the interest of the public by-
>
> (i) promoting fair and open competition in the provision of specified services and telecommunications equipment;
>
> (ii) promoting access to specified services;
>
> (iii) ensuring that services are provided to persons able to meet the financial and technical obligations in relation to those services;
>
> (iv) providing for the protection of customers;
>
> (v) promoting the interest of customers, purchasers and other users (including, in particular, persons who are disabled or the elderly) in respect of the quality and variety of telecommunications services and equipment supplied;"

Then Section 3 continues thus:

> "(b) to promote universal access to telecommunications services for all persons in Jamaica, to the extent that it is reasonably practicable to provide such access;

(c) to facilitate the achievement of the objects referred to in paragraph (a) and (b) in a manner consistent with Jamaica's international commitments in relation to the liberalization of telecommunications; and

(d) to promote the telecommunications industry in Jamaica by encouraging economically efficient investment in, and use of, infrastructure to provide specified services in Jamaica."

So in view of this analysis of the Act and the Constitution, Infochannel cannot with justice claim that its constitutional right to freedom of expression was infringed by Section 15 of the Act on which Cable and Wireless relies. This challenge by Infochannel illustrates the scope and limits of Chapter III. It deals with the infringement of fundamental rights by organs of the state or by laws which are inconsistent with those rights. The law of torts, contract, and restitution is preserved by the principal savings clause in Section 4(1) of the Jamaica (Constitution) Order in Council. These areas are part of private law, and form part of the law of obligations. As regards these areas of private law, Parliament is empowered to regulate agreements by statutory provisions. In the Act section 45, referred to previously has regulated the contractual agreements between Cable and Wireless and Infochannel formerly governed by the Telephone Act.

CONCLUSION

Before parting it is necessary to advert to two clauses of the important agreement between the Government and Cable & Wireless dated 30th September, 1999 prior to the Act. It was necessary that the issue of bypass be addressed. So the following passage appears in the agreement at page 7:

"8. **Orderly transition to competition**

8.1. The Government and CWJ agree that bypass of CWJ's international gateway in the provision of international voice

telephony ("Bypass") contrary to the Drafting Instructions and/or the New Telecommunications Legislation is detrimental to the interests of Jamaica and that:

8.1.1. from the date of this Agreement, during Phases 1 and 2 of the Transition Period, and during the time that Bypass is prohibited under the New Telecommunications Legislation, both parties will, from the date of this Agreement, use their best endeavours:

(a) to prevent and stop Bypass, whether by taking regulatory or other action, to the full extent permitted by law;

(b) to ensure that the Jamaican public understands that during the Transition Period prohibition of Bypass is necessary in order to promote an orderly transition to competition and:

(i) that Bypass is detrimental to Jamaica and is illegal,

(ii) that the Government will not tolerate Bypass in any form; and

(iii) that the Government will act to prevent and stop, and will support action by others to prevent and stop, such Bypass to the full extent permitted by law."

So firstly, both the Government and Cable and Wireless were preparing to test the force and effect of the Act as regards bypass. As to whether bypass was permissible before the Act remains uncertain since there was no authorative decision on the scope and limits of Infochannel's licence.

Secondly, Cable & Wireless is virtually insured by the following clause in the Agreement:

> "9.2.1. Government shall pay to CWJ damages to be assessed based on CWJ's loss, such assessment to include a determination as to what rights CWJ has lost (including, but not limited to, any loss arising from any rights to exclusivity under the Existing Operating Licences) as a direct or indirect consequence of the issuance of the VSAT Licences (including but not limited to loss arising from Bypass by the holders of the VSAT licences or loss from action under clause 9.1.2) and CWJ shall not be taken to have waived any of its rights under its Existing Operating Licences (including, but not limited to, its right to claim compensation or damages) as a consequence of the discontinuance of the Proceedings as contemplated in clause 5.1; and
>
> ..."

Thirdly, once again there is a special tribunal to determine disputes. Clause 10.3 of the Contract reads:

> "10.3. All disputes, differences or questions between the parties with respect to any matter arising out of or relating to this Agreement including but not limited to any claim or claims for compensation or damages and/or for any other relief pursuant to clause 9 above or any claim or claims for compensation and/or for any other relief arising from any breach of this Agreement shall be resolved in the first instance by consultation between the Minister and a person nominated by CWJ and in the event the parties are unable to resolve their differences within 30 days then the dispute shall be referred to arbitration in accordance with the provisions of the Jamaican Arbitration Act. The parties agree to reserve their right to appoint an arbitrator who is not a Jamaican or British citizen or resident in Jamaica or in the United Kingdom if that person so appointed has suitable knowledge, skills or experience relevant to the matters in dispute."

It is in the light of all the foregoing reasons that I am dismissing the appeal and affirming the order by Reckord J in the Court below although I have reached my conclusion by a somewhat different route from that of the learned judge. Cable & Wireless must have the agreed or taxed costs of the appeal.

BINGHAM, J.A.:

I have taken the opportunity to read in draft the judgments of Downer and Harrison, JJA. They have both clearly identified the issues and fully addressed the matters falling for consideration in this appeal. For the reasons advanced by Harrison, J.A., and the conclusions reached by him, I agree that the appeal be dismissed with the order for costs as proposed.

There is nothing further that I could usefully add.

HARRISON, J.A.:

This is an appeal from the order of Reckord, J., on August 17, 2000, discharging an interim mandatory injunction granted *ex parte* on April 12, 2000, for fourteen days ordering the respondent, Cable and Wireless Jamaica Limited, to re-convert from uni-directional to bi-directional and to restore the full characteristic of telephone lines and restraining said respondent from suspending, terminating, altering or compromising the facilities supplied to the appellant, Infochannel Limited, pursuant to its All Island Telephone licence. He also refused the application of the appellant for a mandatory interlocutory injunction against the respondent sought in similar terms.

The relevant history of this matter is concerned principally with the provision of voice telephony to the public. Cable and Wireless Jamaica Limited (the respondent) was granted a licence under the Telephone Act, with the exclusive right to operate wire telephone services in Jamaica, for everyone wishing such service. The said respondent also held a special licence under the

Radio and Telegraph Control Act to operate, in Jamaica, radio and telegraph operations providing telecommunication services for persons desiring to communicate with areas outside Jamaica.

In December 1989, Infochannel Limited, the appellant, was incorporated and was granted a licence under the Radio and Telegraph Control Act to operate communications apparatus. On February 3, 1993, the appellant leased from the respondent local access telephone lines and commenced providing to customers certain value-added information services, including electronic mail (e-mail), fax, internet services, involving the storing and obtaining of information in a vast network of computers worldwide. In February 1995, the respondent agreed to provide to the appellant local access lines and voice grade local lines to the respondent's public telephone system and also leased international digital data communication circuit, providing access by the appellant to its foreign office. On June 16, 1998, the appellant was granted a special licence for a period of five years, also under the Radio and Telegraph Control Act, for the transmission of data to and from Jamaica, in order to provide internet services to Jamaica, utilising the services of VSAT, namely, a Very Small Aperture Terminal. The schedule to the said licence stipulated that the licence was restricted. It stipulated:

"This station is permitted to transmit data only."

Thereafter a dispute arose between the respondent and the appellant. The respondent complained that the appellant, by the use of its VSAT licence, was routing international voice telephone calls into the respondent's local

telephone lines bypassing the respondent's international gateways. In June 1998, the respondent, with the aid of the police, seized the computer equipment at the appellant's office and its managing director was arrested in pursuance of the respondent's complaint. A subsequent prosecution ended in the appellant's favour. Still complaining of the breach by the appellant, the respondent, on January 7, 1999, restricted the appellant from providing VOIP or voice services by its Internet services, but was restrained by injunction by the Supreme Court on February 3, 1999.

Thereafter, several suits were filed in the Supreme Court between the appellant and the respondent concerning the said complaint. Because of an earlier suit, in which the respondent sought to have the Supreme Court quash the VSAT licence granted by the Minister of Commerce and Technology on August 19, 1999, the said Minister met with the parties, and an Agreement for Settlement dated August 19, 1999, was effected between all three entities, in an attempt to resolve the contention. By the terms of the said Agreement, the appellant and respondent agreed to discontinue their actions and any action not settled prior to September 17, 1999, would be referred to arbitration. It was further agreed, in respect of Infochannel's Internet services, that:

> "2. Subject to clause 3 Infochannel shall not use its facilities to terminate International Voice Telephone Calls into the Cable & Wireless network.
>
> 3. The parties agree that Infochannel will provide, solely, to its internet subscribers, VOIP and shall cease to provide such services to any other persons.

3.1 'VOIP' means interactive voice communication where speech is converted for transmission utilising TCP/IP data transmission techniques.

3.2 'Infochannel Subscriber' means any individual or organisation who, by virtue of payment of a regular membership fee has purchased the range of Internet Services provided by Infochannel via or through the use of a computer.

4. The parties agree that this agreement shall continue in force until September 30, 1999. In the event that the legal and regulatory framework proposed to be formulated by September 30, 1999 for the regulation of the services being provided by Infochannel as set out above is not implemented by that date, the parties agree to extend this agreement until such time that the legal and regulatory framework is implemented.

5. This agreement is without prejudice to Cable & Wireless' rights to initiate a fresh complaint to the Minister as regards any material change in the volumes of VOIP usage by Infochannel Subscribers and/or the number of Infochannel Subscribers, as at August 12, 1999.

6. Cable & Wireless shall be free to implement appropriate technologies and procedures to protect its network from the termination of International Voice Telephone Calls, inclusive of VOIP, provided that such technologies and procedures do not materially affect the provision by Infochannel of Internet Services to its Internet Subscribers or the provision of VOIP and/or Voice Over The Internet to the extent provided for in this agreement; nor will it constitute an unwarranted intrusion into Infochannel's network and facilities.

7. In the event of a breach of any of the terms of this agreement, the non-defaulting party shall notify the defaulting party, and the latter shall remedy the breach within 72 hours, failing which the matter shall be referred to the Office of Utilities Regulation for determination.

> **8.** This agreement is without prejudice to either party's right to maintain their respective contention as to the definition of international voice telephony and does not constitute a waiver of either party's rights."

On September 30, 1999, the respondent and the Minister also entered into an agreement for settlement, consequent on a suit filed by the respondent against the Minister, which was part-heard, complaining that the grant of the VSAT licences issued by the Minister breached the respondent's exclusivity in respect of external telecommunications. Both parties agreed to discontinue court proceedings in anticipation of new legislation in the form of a Telecommunications Act based on specific drafting instructions. The Agreement provided for, inter alia, the surrender by the respondent of its existing licences for new licences under the Act, the provision by the respondent of new lines over a three-year period, the substitution of new VSAT licences to existing holders, a transition period to full competition and a mutual intent to prevent bypass activities.

The Telecommunications Act (the "Act") was passed and came into operation on March 1, 2000. On March 14, 2000, the Minister granted to the respondent carrier, service provider, spectrum and mobile licences.

On March 15, 2000, the respondent complained to the Office of Utilities Regulation that the appellant was engaged in "bypass activities", and on March 16, 2000, the respondent provided the Office of Utilities Regulation with a detailed report. The respondent's application made under section 51 of the Act sought to discontinue services to the appellant.

The Office of Utilities Regulation (the "OUR"), by letter dated March 24, 2000, advised the attorney for the appellant that the latter was engaged in "bypass operations" and invited participation in a meeting. The letter reads:

> "We write to advise that Cable & Wireless (Jamaica) Ltd. has provided the Office with documentary information which suggests your client's involvement in the captioned activity. As you are aware, the OUR has a general duty to investigate possible breaches of the Telecommunications Act 2000. (Please note that the 'appointed day' from which the Act is in force has been gazetted as March 1, 2000. We refer you to the enclosure.)
>
> We require that a representative from InfoChannel Ltd. attend our offices on Tuesday March 28, 2000 at 9:00 A.M. for the purpose of discussion of these issues. At the meeting we will formally present the information on which CWJ relies in support of said allegations. We take this opportunity to advise that we will require a written response by the close of business (4:30 P.M.) on Thursday March 30, 2000."

By letter dated March 27, 2000, the respondent submitted to the OUR documentary material in support of its allegation of bypass by the appellant. The letter reads:

> "I refer to previous correspondence and to our telephone conversation a short while ago.
>
> Attached are two Customer Quality of Service reports and supporting documents. These reports form part of the evidence in support of our application."

The documentary evidence consisted in part of a "customer quality of service report", which indicated that two customers of the respondent received overseas telephone calls from the United States of America and England respectively, which calls were not reflected in the respondent's "international

switches." The records from the respondent's local switches and cellular switches revealed that both calls originated from local telephones with digits commencing with 980, each of which numbers were local numbers assigned to the appellant. In respect of one of the customers, he saw displayed on the screen of his cellular phone the number 980-7100, which was a local line assigned to the appellant by the respondent.

At a meeting at the office of the OUR on March 28, 2000, the respondent was presented with evidence of the bypass activities alleged by the respondent. Subsequently, the appellant responded by letter dated March 30, 2000, which reads, inter alia:

> "Our client is requested to reply in writing by March 30, 2000. Accordingly we set out below our client's response to your request.
>
> 1. InfoChannel provides telecommunications value added services to the public, including full Internet services inclusive of voice over IP or voice over the Internet.
>
> 2. InfoChannel provided these services prior to March 1, 2000 and continues to provide these services since that date.
>
> 3. As these services were not required to be licenced under the Radio and Telegraph Control Act or the Telephone Act prior to March 1, and may now be required to be licenced, section 85 of the Telecommunications Act applies; see our letter to you dated February 29, 2000.
>
> 4. Section 51, the provision under which the complaint is filed alleges that InfoChannel is in breach of the international service rules. Please provide us with a copy of the said rules.

> For the reasons set out above section 51 does not apply to InfoChannel in its provision to the public of full Internet services including voice over IP."

By letter dated March 31, 2000, the respondent sent to the OUR a list of all the telephone lines being used by Infochannel for bypass, and proposed that they be reduced to "one-way dial", pointing out that:

> "Infochannel has an additional 48 lines inclusive of those used for administrative purposes."

On the said March 31, 2000, the respondent converted the said offending telephone lines from bi-directional to uni-directional. The respondent maintained that the conversion would not affect the appellant's "legitimate activities."

The appellant complains that the said conversion affected not only the function of Voice Over Internet but also that of Fax Over Internet and E-mail communications (see affidavit of Patrick Aldous Terrelonge dated April 11, 2000).

As a consequence, the appellant filed its suit on April 12, 2000, and on the said date applied *ex parte* for the interim injunction which was issued by Reckord, J., to restrain the respondent's action.

Dr. Barnett for the appellant argued, inter alia, that the learned trial judge, in using the test of the necessity for a high degree of assurance, was in error to find that the right which the appellant sought to protect expired after ninety days, and erred similarly when he found that an award of damages was an adequate remedy. The appellant had accrued rights and had an existing licence to operate an Internet service, including VOIP, the validity of which section 76 of the Act which came into force on March 1, 2000, preserved, and which section 85 provided should continue to exist until an application for a new licence has been

withdrawn or the licence granted. The appellant was not engaged in bypass operations, as found by the learned trial judge, and even if it was, such activities were authorised both by the transitional provisions of section 85 of the Act and the contractual relationship with the respondent. The OUR failed to follow the relevant procedure in dealing with the application of the respondent, as outlined in section 63 of the Act, and in particular failed to observe the principles of fairness in that the appellant was not advised that enforcement was contemplated, nor of the material of the complaint, nor the terms and conditions of the proposed sanctions. The grant of the mandatory injunction in the instant case should not require a higher degree of assurance than the prohibitory injunction. It was erroneous for the learned trial judge to hold that damages were adequate; the appellant's loss of goodwill and customers are incalculable.

Miss Phillips, Q.C., for the respondent submitted that the appellant had no vested right in contract or by statute in the provision of "voice services" which is a bypass activity now prohibited by statute as unlawful and which the transitional provisions of section 85 of the Act will not protect. The provision of VOIP and voice over Internet by the appellant is specifically designated as "bypass", prohibited by section 85. Section 51 specifically contemplates the carrier or service provider taking action if it believes "on reasonable grounds" that bypass operations or prohibited conduct is being pursued by any person with whom the said carrier is in direct relationship, in respect of international services. Section 63 differs from section 51, and is inapplicable, in that it concerns action initiated by the OUR if "it is satisfied" that, for example, bypass operations are being

conducted. The OUR observed the principle of procedural fairness as required by section 4 of the Act in its dealings with the complaint against the appellant, under section 51 and the respondent acted as directed by the OUR. The provision of VOIP and voice over Internet by way of its VSAT licences is an erosion by the appellant of the respondent's international telecommunications network and, therefore, the appellant cannot claim any vested right to do so, being a breach of section 9, and being conduct consistently challenged by the respondent.

In any event, the provision of voice services by the appellant is now unlawful under the Act; the respondent has a monopoly over such services until 2003. Miss Phillips concluded that Reckord, J., was correct in finding that there was a serious question to be tried but absent was the high degree of assurance for the grant of a mandatory injunction, and damages were an adequate remedy.

Section 49(h) of the Judicature (Supreme Court) Act empowers a judge of the Supreme Court in his discretion to grant an injunction:

> "...by an interlocutory order of the court, in all cases in which it appears to the court to be just or convenient that such order should be made..."

In the exercise of his discretion, a judge considers the lawful right that the applicant seeks to protect by way of an injunction and, where relevant, the balance of convenience in granting such an injunction. The usual test to be applied to ground the issue of the injunction is that which was propounded and settled by the House of Lords in ***American Cyanamid v. Ethicon*** [1975] 1 All E.R. 504, namely, whether or not there is a serious question to be tried. The

court will not, however, grant an injunction to restrain a defendant, if damages are an adequate remedy, to compensate the appellant for the breach of his right complained of.

Unlike the prohibitory injunction, the court is more reluctant to grant a mandatory injunction at the interlocutory stage, if the effect of it is to give the appellant virtually all he seeks in the final analysis, thereby depriving the alleged offender of the opportunity of a full hearing at a subsequent trial. In considering the grant of a mandatory injunction, the court must feel a high degree of assurance that at the trial it will appear that the said injunction was rightly granted, thereby imposing a higher standard of proof than that required for the grant of a prohibitory injunction (***Shepherd Homes Ltd. v. Sandham*** [1970] 3 All E.R. 402). This court in ***Miller et al v. Cruickshank*** (1986) 23 J.L.R. 154, allowed on appeal from the grant of a mandatory injunction to restrain school authorities from preventing a school boy participating in a secondary school's cricket competition. Rowe, P., in agreeing that the mandatory injunction should be discharged, said at page 157:

> "...if the injunction remains in force the respondent would have gained his total objective. Nothing of practical value would be left in the action and if the respondent elected to go to trial it would be of the merest academic interest to him, he having already reaped all the benefits he could ever obtain from the action."

He referred to ***Cayne et al v. Global Natural Resources plc*** [1984] 1 All E.R. 225. The headnote to the latter case reads:

> "Where the grant or refusal of an interlocutory injunction will have the practical effect of putting an

> end to the action, the court should approach the case on the broad principle of what it can do in its best endeavour to avoid injustice, and to balance the risk of doing an injustice to either party. In such a case the court should bear in mind that to grant the injunction sought by the plaintiff would mean giving him judgment in the case against the defendant without permitting the defendant the right of trial. Accordingly, the established guidelines requiring the court to look at the balance of convenience when deciding whether to grant or refuse an interlocutory injunction do not apply in such a case, since, whatever the strengths of either side, the defendant should not be precluded by the grant of an interlocutory injunction from disputing the plaintiff's claim at a trial."

The case involved the refusal of Sir Robert Megarry, V.C., to grant a mandatory injunction to minority shareholders in a company to restrain its directors who sought to issue a large number of shares, presumably to maintain themselves in office.

Carey, J.A., at page 160 said:

> "To avoid injustice, all the circumstances of the case must be looked at, and that means, having regard to all the practical realities. The practical realities in this situation are that if the injunction were granted, the plaintiff will have qualified for selection and would doubtless play in the semi-final and possibly in the final."

In considering an application for the grant of a mandatory injunction at the interlocutory stage, a judge in the proper exercise of his discretion, must consider both whether or not there is a serious question to be tried and also whether or not it is an "unusually strong and clear case" on the evidence before him to give him a "high degree of assurance" that at the trial it would be evident that the mandatory injunction was quite rightly granted.

The VSAT licence granted to the appellant on June 16, 1998, under the now amended Radio and Telegraph Control Act concerned the operation of radio and telegraph apparatus. It did not include the provision of voice service which was the sole province of the respondent under the Telephone Act. More importantly, the said VSAT licence was specifically restricted to exclude voice services. The schedule to the said licence reads, "This station is permitted to transmit data only."

The appellant cannot, therefore, claim any initial right to engage in voice services. The provision of Internet services by the appellant by way of its VSAT licence would, therefore, exclude voice services, although no licence was required for the operation of Internet services, per se.

From the outset, when the appellant commenced providing its services, its operations were challenged by the respondent. In June 1998, the respondent, assisted by the police, entered the offices of the appellant, seized its equipment and had its managing director, Mr. Patrick Terrelonge, arrested, on the basis that the appellant:

> "...used its VSAT and satellite facilities to route international voice calls into its local network thereby bypassing its international gateways..."

The said managing director was prosecuted in the Resident Magistrate's Court. The charges were later dismissed.

Maintaining its stance, the respondent in August 1998 by Suit M89/98 against the Minister of Commerce and Technology sought prerogative orders to cancel the VSAT licences granted to the appellant by the said Minister under the

Radio and Telegraph Control Act. The respondent claimed an exclusive right to external telecommunications. The Minister denied any such claim by the respondent.

In January 1999, the respondent having refused to lease additional lines to the appellant, the appellant filed an action in the Supreme Court claiming damages, declarations and an injunction to order the respondent to restore its lines which the respondent had taken away and to supply the additional telephone lines. The appellant claimed a right to provide VOIP services as an aspect of its value-added Internet services. The injunction was granted on February 3, 1999.

By letter dated April 30, 1999, to the Minister the respondent complained that the appellant was routing incoming telephone traffic to Jamaica through its VSAT and other facilities, in breach of its the appellant's licence to the detriment of the respondent. By letter dated May 7, 1999, the Minister advised the appellant of the complaint and indicated that they ask the OUR to investigate it, and invited the appellant's response. By letter dated May 10, 1999, the appellant replied to the Minister that:

> "InfoChannel confirms that it is and continues to be engaged in the provision of internet services and at no time, since the grant of its licence, has the company been engaged in routing international telephone traffic through its VSAT in contravention of its licence."

As a consequence of the ongoing contention, the said Agreement for Settlement was arrived at on August 19, 1999, between the parties.

One may therefore conclude that there was no period of any clear or unimpeded existence, without challenge, of the appellant's operations, since the grant of its VSAT licence, in the provision of Internet services, including voice services.

The right that the appellant claims must, therefore, be examined against that background.

The Telecommunications Act which came into force on March 1, 2000, is in accordance with the drafting instructions referred to in the agreement dated September 30, 1999, between the Government of Jamaica and the respondent. Having repealed the Telephone Act (section 75) and only amended the Radio and Telegraph Control Act (section 74), the remaining enactments of the latter Act and the licences issued thereunder are specifically recognised.

The objects of the Act are set out in section 3 and are, inter alia:

> "(a) to promote and protect the interest of the public by—
>
> **(i)** promoting fair and open competition in the provision of specified services and telecommunications equipment;
>
> **(ii)** promoting access to specified services;
>
> **(iii)** ensuring that services are provided to persons able to meet the financial and technical obligations in relation to those services;
>
> **(iv)** providing for the protection of customers;
>
> **(v)** promoting the interests of customers, purchasers and other users (including, in particular, persons who are disabled or the elderly) in respect of the quality and variety of telecommunications services and equipment supplied;"

Further objects of the Act are "to promote universal access to telecommunications services for all persons in Jamaica... to promote the telecommunications industry" and "to facilitate the achievement of the objects".

The Office of Utilities Regulation established under the Office of Utilities Regulation Act is empowered under section 4 of the Telecommunications Act to regulate telecommunications in accordance with (the) Act and specifically to:

> "**4.—(1)** **(a)** regulate specified services and facilities;
>
> ...
>
> **(d)** carry out, on its own initiative or at the request of any person, investigations in relation to a person's conduct as will enable it to determine whether and to what extent that person is acting in contravention of this Act;
>
> ...
>
> **(g)** advise the Minister on such matters relating to the provision of telecommunications services as it thinks fit or as may be requested by the Minister;
>
> **(h)** determine whether a specified service is a voice service for the purposes of this Act;"

The Act particularly mandates the OUR, in section 4(2):

> "**4.—(2)** In making a decision in the exercise of its functions under this Act the Office shall observe reasonable standards of procedural fairness, act in a timely fashion and observe the rules of natural justice,..."

"Voice Service" is defined in section 2(1):

> " 'voice service' means—
>
> **(a)** the provision to or from any customer of a specified service comprising wholly or partly

> of real time or near real time audio communications, and for the purpose of this paragraph, the reference to real time communications is not limited to a circuit switched service;
>
> **(b)** a service determined by the Office to be a voice service within the provisions of section 52,
>
> and includes services referred to as voice over the internet and voice over IP;"

The respondent's complaints to the OUR of bypass operations by the appellant were sought to be substantiated by documentary proof.

By letter dated March 15, 2000, from the respondent to the OUR, the former referred to a meeting on March 10, 2000, between the respondent and OUR and confirmed that the respondent was applying under section 51 of the Act to discontinue the provision of services to the appellant, on terms to be specified by the OUR, on the basis of evidence presented that the applicant was engaged in bypass operations.

By letter dated March 16, 2000, the respondent sent to the OUR a "report on Infochannel's bypass operations."

Further, by letter dated March 22, 2000, to the OUR the respondent again repeated its complaint, and recommended the sanction:

> "Pursuant to Section 51 of the Act, CWJ intends to discontinue the provision of services to Infochannel Limited and by this application invites the Office to impose only such terms and conditions as will ensure the protection of Infochannel Ltd's legitimate activity. We would propose the introduction of one-way dial on all dial-up access lines supplied to Infochannel Ltd."

On March 31, 2000, the respondent reduced the appellant's telephone facilities to "one-way dialling", purporting to act under the provisions of section 51 of the Act, and complaining that the appellant was engaged in bypass operations, and by letter to the appellant dated April 4, 2000, stated, inter alia, that:

> "This should not interfere with any legitimate business activities of Infochannel. The lines remain connected and available for the provision of internet access services to inbound dial-up customers.'"

"Bypass operations" defined in section 2(1) of the Act,

> "means operations that circumvent the international network of a licensed international voice carrier in the provision of international voice services;"

The reports submitted to the OUR by the respondent concerned two of the respondent's customers who had complained of the poor quality of overseas telephone calls which they had received. The investigations of the respondent revealed telling details. The first report was in respect of one "Hyacinth Manning" who received a telephone call on March 23, 2000, at her address at "27 First Street" on her telephone "930-0792" from "America". The second telephone call concerned one "Phillip Hamilton" who received a telephone call on March 18, 2000, at his address at an apartment at "Constant Spring Road, Kingston 10" on his telephone "941-9495" from "England" and a second call to his cellular phone "700-3303" on March 18, 2000. The assessment of those reports by the respondent was itself contained in a report dated March 27, 2000. It reads:

> "CUSTOMER QUALITY OF SERVICE REPORTS
>
> Re: Infochannel Limited

Attached are (2) signed Customers Quality of Service Survey Reports from

1. Phillip Hamilton
2. Hyacinth Manning

Both reports state the date and approximate time that the customer received an overseas call, the quality of the call and other details such as the location of the calling party, the name of the caller and approximate duration of the call. The reports were voluntarily provided to Cable & Wireless Jamaica after the customers received the calls.

In both of these reports the customer complained that the quality of the international call they received was poor, and in Mr. Hamilton's case, he stated that he saw the number 9807100 displayed on his cellular phone, while talking to his overseas party Bernard Burrell.

I carried out a review of the call data from Cable & Wireless Jamaica's International Switches and found that there were no call records at the times identified in the Customer Quality of Service Reports to Phillip Hamilton or Hyacinth Manning's telephone numbers.

However, a review of the call records from our local switches and cellular switch showed the following:

Hyacinth Manning received a call from 9807039 on the 23 March 2000 at 14:20 hours

Phillip Hamilton received two calls:

- First call from 9807100 to his cellular phone 7003303 on 18 March, 2000 at 12:03 hours

- Second call from 9807096 to 9419495, on 18 March 2000 at 12:04:58 hours.

All three calls originated from 980 numbers assigned to Infochannel Ltd. and the calls corresponded with the date, time and duration reported on the Quality of Service Reports.

> These calls records from our local switches along with the independent Customer Quality of Service Survey Reports clearly show that Infochannel Ltd., is engaged in an operation that allows for the termination of international calls into the local network, bypassing Cable & Wireless Jamaica's International switches.
>
> Robert Shaw
> Network Fraud Control Manager"

The telephone numbers from which the calls originated to Manning and Hamilton, namely, "9807039" and "9807100 and 9807096" respectively, were all local lines leased to the appellant by the respondent. Neither person was shown to be an "internet subscriber" of the appellant, namely, an "Infochannel subscriber." The Agreement for settlement between the Minister, the respondent and the appellant, inter alia, reads, at page 190 of the record:

> "**2.** Subject to clause 3 Infochannel shall not use its facilities to terminate International Voice Telephone Calls into the Cable & Wireless network.
>
> **3.** The parties agree that Infochannel will provide, solely to its internet subscribers, VOIP and shall cease to provide such services to any other persons.
>
> **3.1** 'VOIP' means interactive voice communication where speech is converted for transmission utilising TCP/IP data transmission techniques."

In these circumstances, it could be argued that the appellant was in breach of the said agreement.

The application of the respondent under section 51 of the Act was based on the above breaches of the appellant, in that the latter was allegedly engaged in bypass operations, as defined in section 2 of the said Act, namely:

> "... operations that circumvent the international network of a licensed international voice carrier in the provision of international voice services;"

Reckord, J., had before him evidence to show that there was no clear right shown by the appellant to operate as it did and that the appellant was circumventing the respondent's international telephone network and terminating international calls into the respondent's local lines, in breach of the provisions of the Act and in breach of contract.

The appellant's contention that it is entitled to rely on the transitional provisions of section 85 and that its licence is preserved by section 76 of the Act, cannot be supported.

Section 85 reads:

> "**85.** Where—
>
> **(a)** immediately before the appointed day, any person—
>
> **(i)** was engaged in providing specified services to the public or in the selling, trading in or importation of prescribed equipment; or
>
> **(ii)** owned or operated a facility,
>
> for which no licence was required under the Radio and Telegraph Control Act or the Telephone Act; and
>
> **(b)** within ninety days after the appointed day, that person has applied for a licence under section 11 of this Act,
>
> that person shall be entitled to be so engaged or to own or operate a facility for a period not exceeding ninety days beginning with the appointed day or until

> a licence has been granted or the application has been withdrawn, whichever is the later."

If the appellant is seeking to rely on the statutory provisions, its activities must, therefore, be construed within the limits of the statute. The "specified services" contemplated is defined as a "telecommunications service" (section 2), and this would relate to the appellant's internet services, "for which no licence was required". Under the statute, voice communication would be excluded. The appellant's VSAT licence which was restricted to "data only" is equally caught by the statutory provisions. "Data service", as defined by section 2(1), means:

> "...a specified service other than a voice service;"

This approach is reinforced by the examination of section 76, which reads:

> **"76.—(1)** Any licence which was, before the appointed day, granted under the Radio and Telegraph Control Act and is subsisting on the appointed day shall, on and after that day, be deemed to have been granted under this Act and shall, with such modifications as may be necessary, and until a licence is granted under this Act, continue to have effect in accordance with the terms thereof and subject to the provisions of this Act.
>
> **(2)** The Minister shall, within fourteen days after the appointed day, grant a licence under section 13 to any person who, immediately before that day, was the holder of a licence with an unexpired term of six months or more and that licence shall cease to be valid upon the grant of a licence pursuant to this subsection."

If the appellant's licence is therefore "deemed to have been granted under this Act", it seems to me that that licence must conform with and cannot be inconsistent with the provisions of the Act. Specifically, such licence must be read as "subject to the provisions of the Act". Therefore, although the agreement

sought to permit the appellant to provide voice services to its Internet subscribers, it is arguable that that forbearance has been overtaken and overreached by the express provisions of the statute, restricting the appellant from providing voice services.

Section 85 must be read in harmony with section 76 of the Act and may thereby be reconciled with each other, and the stated objects of the Act.

Dr. Barnett advanced in argument that the respondent should properly have proceeded under section 63 of the Act and observed the specific procedural steps thereunder, instead of section 51. Section 51, couched in the permissive "may", as also section 63, allows a carrier or service provider to discontinue the services or disconnect the facility it provides to any person, on the terms and conditions stipulated by the OUR, if that "carrier or service provider believes on reasonable grounds... that the person... is engaging in bypass operations or a conduct in respect of international services that is prohibited or regulated by the international rules."

Section 63 allows the OUR on its own initiative, or on the complaint of any other person to issue a cease and desist order, where it is satisfied that any conduct prohibited by section 63(2) is being carried on, inclusive of bypass operations. Section 63 is, therefore, wider in its scope to permit the OUR to control the conduct of persons under the Act, and does not restrict the specific right of the carrier or service provider to make application under section 51. The latter section specifically concerns bypass operations as it relates to "international services".

Acting under section 51, the OUR is however expected to:

> "observe reasonable standards of procedural fairness, act in a timely fashion and observe the rules of natural justice (section 4)"

although this is not spelled out in section 51. Having received the complaint of bypass from the respondent in March 2000, the OUR properly advised the appellant of the complaint (vide letter dated March 24, 2000), invited the appellant for discussion "on Tuesday March 28, 2000 at 9:00 a.m." and requested a "written response by the close of business (4:30 p.m.) on Thursday March 30, 2000." It is my view that thereby procedural fairness was observed.

The injunctive relief sought by the appellant, is not, in my view, prohibited by the statutory provisions of the Act. The respondent is not an arm of the OUR which is a statutory body whose conduct is subject to judicial review, by any person who complains of its actions. The appellant's complaint is based on its contractual relations with the respondent, and therefore is not precluded from proceeding at common law for injunctive reliefs despite the statutory scheme of the Act. The appellant's rights in contract cannot be construed to be excluded by the Act except by express provision or necessary implication. The appellant was free to choose the procedure that suited him best (***Davy v. Spelthorne Borough Council*** [1983] 3 All E.R. 278). Reckord, J., therefore, was entitled to exercise his discretion in considering the grant of injunctive relief in accordance with section 49(h) of the Judicature (Supreme Court) Act.

Complaint was also made in argument by Dr. Barnett that the appellant's rights under section 22 of the Constitution which assures it freedom of

expression were being infringed. A parallel complaint was made to this court; albeit that the appellant's rights to enjoyment of its property were being infringed by a compulsory acquisition, in the case of ***Panton et al v. The Minister of Finance et al***, S.C.C.A. 113/96 (unreported) delivered November 26, 1998. As in that case, section 13 of the said Constitution, is applicable to the instant complaint of breach of the right to freedom of expression, in that it states, inter alia, that:

> "...the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest" (section 13).

As this Court said in ***Panton's*** case (supra):

> "This theme of non-infringement of other people's rights...is probably a part of the modern concept of 'live and let live'."

I see no basis for the said complaint.

In all the circumstances, on the evidence, I agree with Reckord, J., when he found that he did not feel that "high degree of assurance" that the appellant would succeed at the trial and refused to grant any injunctive relief. In any event, the respondent can rely on an acceptable defence to the suit, that it acted under the directions of the OUR, a statutory authority, within the provisions of section 51 of the Act.

The right which the appellant claims does not appear on the evidence to be a clear unchallenged right that survives the strictures of section 76 and to be

preserved to continue in Phase I, by the transitional provisions of section 85 of the Act, as contended for by the appellant.

The evidence discloses that the appellant may well have been engaged in bypass operations, that is, reducing into the local lines of the respondent, incoming international calls thereby evading the international gateway, to the detriment of the respondent. The recipients of these calls, for example, Hamilton and Manning, were customers of the respondent and not the appellant's Internet subscribers. The respondent may, therefore, have properly discontinued service to the appellant in respect of the offending telephone lines, under the provisions of section 51 of the Act.

There is a serious question to be resolved at a trial. However, the facts and circumstances do not favour the grant of an injunction, as Reckord, J., found. Damages will be an adequate remedy, in the event that the appellant should succeed at the trial. The proportionate increase in current business and the projected expansion reduced by the loss of clientele to the appellant, by the refusal to grant the injunction, is ascertainable and can be quantified, as damages.

The remedy of injunctive relief obtained at the *ex parte* stage by the appellant was correctly discontinued and the interlocutory injunction sought was properly refused. I would dismiss this appeal with costs.

ORDER

DOWNER, J.A.:

Appeal dismissed. Order of Reckord, J., in the court below affirmed.

Costs to the respondent to be taxed if not agreed.