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**AN ADMINISTRATIVE LAW CASE STUDY ON  
UTILITY REGULATION**

**Cable & Wireless (Barbados) Limited  
v.  
Fair Trading Commission**

**High Court Suit No. 1970 of 2003**

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The views expressed in the following document are solely those of the author and not the views of the Fair Trading Commission or any particular Commissioner.

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## INTRODUCTION

### What is Administrative Law?

Administrative law is part of the branch of law commonly referred to as public law; and may be defined as law which regulates the relationship between the citizen and the state involving the exercise of state power. Public law is to be contrasted with private law, which regulates the relationship between individuals such as the law of contract and tort.

Over the years, various authors have expounded on this definition. H.W.R Wade et al author of the text *Administrative Law* describes administrative law aptly where he states that:

*“A first approximation to a definition of administrative law is to say that it is the law relating to the control of governmental power. This at any rate is the heart of the subject...”*

*The primary purpose of administrative law, therefore, is to keep the powers of government within their legal bounds, so as to protect the citizen against their abuse. The powerful engines of authority must be prevented from running amok.”*

In addition, Professor Albert Fiadjoe author of *Commonwealth Caribbean Public Law*, shares a similar view with J.M. Evans et al. He states that:

*“The modern view is that public law encompasses such distinct components as constitutional and administrative law, criminal law and tax law. But a simple way of approaching public law for our purposes is to conceive of it as the body of law which deals with the powers and duties of government as such, but more particularly as the area of law which provides protection of the citizen against the enormous power of the state. This protection is offered by the courts using as their principal tool the power of judicial review.”*

In the context of administrative law, however, the term “governmental” is not restricted to central government in the form of the executive (the Prime Minister and cabinet) or central government departments, although these are clearly included within the term. In this context, “governmental” refers to all public bodies invested with power under the law and so includes, for example, statutory boards, the police and public corporations.

H.W.R Wade et al states that:

*“...The powers of all other public authorities are subordinated to the law, just as much in the case of the Crown and ministers as in the case of local authorities and other public bodies.”*

### **Judicial Review- A Useful Administrative Law Tool**

Judicial review may be defined as the jurisdiction of the superior courts to review laws, decisions, acts and omissions of public authorities in order to ensure that they act within their given powers. It is the power of the courts to keep public authorities within proper bounds and legality. It is perhaps the most important tool of Administrative Law.

The Administrative Justice Act Cap 109B of the Laws of Barbados “Administrative Justice Act” has revolutionized judicial review in Barbados. Under the “old system” of administrative law in Barbados, a litigant was required to seek leave to apply for one of the prerogative writs of certiorari, mandamus or prohibition. Before leave could be granted, the litigant first had to meet a threshold test, which was to demonstrate that he had *locus standi* and show that there were no other available remedies, which could be pursued.

Under the Administrative Justice Act, persons can now proceed directly to Court as long as there is an administrative act or omission by a government department.

An administrative act or omission is defined by section 2 of the Administrative Justice Act, which provides that:

*“administrative act or omission” means an act or omission of a Minister, public official, tribunal, board, committee or other authority of the Government of Barbados exercising, purporting to exercise or failing to exercise any power or duty conferred or imposed by the Constitution or by any enactment;”*

## **OBJECTIVES**

This paper will examine, the case of *Cable & Wireless (Barbados) Limited vs. Fair Trading Commission and others*<sup>2</sup>. It will also provide a comprehensive overview of the administrative law principles that arose therein.

In this paper the author has dissected the case into two (2) main issues. An examination of the two (2) parties arguments are presented, followed by the author’s explanation of the issues at hand.

This is concluded in each instance by the Court’s decision and rationale. The conclusion contains useful advice to other regulatory agencies.

### **The Fair Trading Commission and Its Mandate**

The Fair Trading Commission “the Commission”, as a statutory corporation therefore does not escape the scrutiny of administrative law. Its decisions are as such, subject to judicial review.

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<sup>2</sup> High Court Suit No. 1970 of 2003

The enabling legislation of the Commission is the Fair Trading Commission Act CAP 326B which came into force in January 2001. This Act is the over-arching legislation of the Commission and defines the role and jurisdiction of the Commission. It is also part of a statutory scheme, which includes the Utilities Regulation Act CAP 282, the Telecommunications Act CAP 282B, the Fair Competition Act CAP 326C and the Consumer Protection Act CAP 326D.

In enforcing this legislation, the Commission seeks to:

- Ensure efficiency in the operation of regulated utility companies;
- Promote competition in the various sectors; and
- Safeguard consumer welfare.

The Commission has been entrusted with administrative, prosecutorial, quasi-judicial and wide investigative powers to enable it to achieve these stated objectives.

By virtue of section 36<sup>3</sup> of the Fair Trading Commission Act, any determination, decision, or order given by the Commission is subject to review by the Commission itself or, may be appealed to a Judge of the High Court on a question of law.

In its short life span, in the regulatory arena, adjudicative panels of the Commission have deliberated on and handed down over fourteen (14)

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<sup>3</sup> Section 36 of the Fair Trading Commission Act states that:

*“The Commission may on application or on its own motion review, vary and rescind any decision or order made by it and, where under this Act, a hearing is required before any decision or order is made, such decision or order shall not be altered, suspended or revoked without a hearing.”*

regulatory decisions. Five (5) of our decisions have been the subject of review applications and three (3) of our decisions have been appealed in the law courts of Barbados on applications of judicial review.

In utility regulation hearings and matters, the Commission plays the role of adjudicator. In this role, the Commission acts very much like a Court. This role has been conferred on the Commission by the Utilities Regulation Act which provides that the Commission has a specific duty to sit, hear and determine utility matters and thereafter issue decisions on such.

#### **THE CASE BACKGROUND**

On August 5, 2003 Cable & Wireless (Barbados) Limited “the Applicant” submitted an application to the Fair Trading Commission to change its present rate structure. This application was brought pursuant to section 16 of the Utilities Regulation Act. With this application, Cable & Wireless was hoping to move from the present flat rate system to a usage-based system.

As a result, of the Applicant’s application, the Commission convened a rate hearing, this hearing being the first of its kind for the Commission since its establishment. Prior to the commencement of the substantive hearing, procedural conferences were held. Parties were advised during these initial conferences, that the Utilities Regulation (Procedural) Rules 2003 “the Procedural Rules” would govern the conduct of the entire rate hearing proceedings before the Commission.

During the course of the hearing, in support of its application, the Applicant submitted to the Commission several documents and claimed confidentiality in accordance with the Telecommunications (Confidentiality) Regulations S.I. 95 of

2003, the Fair Trading Commission Act and the Procedural Rules. In dealing with the request for confidentiality, the Commission determined that the Applicant should adhere to Rule 13 of the Procedural Rules, which sets out the criteria to be used when seeking to have documents treated confidentially.

Rule 13 of the Procedural Rules states, inter alia:

*“13 (1) A party may, upon filing of a document, request that all or any part of the document be held in confidence by the Commission.*

*(2) A request for confidentiality shall:*

*(a) include a summary of the nature of the information on the document;*

*(b) address:*

- (i) the reasons for the request, including the details of the nature and extent of the specific harm that would result if the document were publicly disclosed, namely either party’s information, which, if made public would likely create a competitive disadvantage for the party;*
- (ii) measures that have been taken by the party, by the party and the party’s customer or by the party’s customer, to prevent dissemination of the information in the ordinary course of business;*
- (iii) any objection to placing an abridged version of the document on the public record and the reason for such an objection;*

*(c) be filed with the Commission and served on the parties.*

*(3) A request under paragraph (1) shall be placed on the public record.*

*(4) Where a party has made a request under this Rule, the document, if filed with the Commission, shall be held in confidence unless the Commission decides, with a hearing, that the document should be placed on the public record.*

*(5) Where the Commission holds a hearing under paragraph (1), the Commission may direct that the hearing be held in the absence of the public in accordance with rule 39."*

The Applicant complied with the Commission's determination and submitted its documents under confidential cover and set out the information as required by Rule 13 (2).

By virtue of Rule 13 (4) the Commission was required to convene a hearing to determine whether the documents should continue to be treated confidentially or whether they should be placed on the public record.

The Commission also determined that by virtue of Rule 13 (5), due to the commercially sensitive documents submitted by the Applicant, that the hearing was to be held in the absence of the public in accordance with Rule 39 of the Procedural Rules. As a consequence, only intervenors who had submitted objections to the request for confidentiality in accordance with Rule 13 (6) and (7) were permitted to participate in the confidentiality hearing.

Rule 39 (1) and (2) of the Procedural Rules states:

*"39 (1) The Commission may hold an oral hearing or part of an oral hearing in the absence of the public where the Commission is of the opinion that*



- (a) *the circumstances so warrant;*
- (b) *matters involving public security may be disclosed; or*
- (c) *trade secrets, financial, commercial, scientific, technical or personal matters may be disclosed at the hearing of such a nature and that the desirability of avoiding disclosure in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public.*

*(2) Subject to paragraph (3), where in any proceeding the Commission directs an oral hearing or part of the hearing to be held in the absence of the public, the hearing may be attended only by*

- (a) *the persons testifying before the Commissions;*
- (b) *commission employees and advisers authorised by the Commission;*
- (c) *counsel of the Commission;*
- (d) *representative for the persons testifying and for each party to the proceeding, unless the Commission is of the opinion that there is good reason why a representative should not be permitted to attend the hearing;*
- (e) *a consultant, to assist a representative, at the discretion of the Commission and on such conditions as the Commission considers appropriate; and*
- (f) *such other persons as the Commission is of the opinion should be present, and on conditions the Commission considers appropriate."*

On October 23, 2003, the Commission convened the confidentiality hearing in the absence of the public to determine the procedure that should be followed throughout the hearing and to hear the request for confidentiality made by the Applicant in respect of various documents.

At the hearing the Commission acting by a sole presiding Commissioner advised the parties inter alia, that the Procedural Rules would govern the confidentiality hearing, and also fixed the time and place where the substantive confidentiality hearing would commence.

The Applicant expressed dissatisfaction with the Commission's determination made on that day and instituted proceedings in the High Court seeking judicial review on the grounds that:

- (a) The Commission exceeded its jurisdiction in that, section 5 of the Fair Trading Commission Act and section 6 of the Utility Regulation Act required a minimum of 3 Commissioners to sit, hear and determine matters in relation to utility regulation; and that
- (b) The Commission erred in law in holding that the Procedural Rules should solely govern the confidentiality hearing to the exclusion of the Telecommunications (Confidentiality) Regulations.

Section 5 of the Fair Trading Commission Act CAP 326B states:

*"5 (1) A panel of 5 Commissioners shall sit to hear and determine matters relating to utility regulation in accordance with this Act and the Utilities Regulation Act, 2000.*

*(2) Notwithstanding subsection (1) for the purpose of exercising its jurisdiction the panel shall be constituted in accordance with the directions of the Commissioners and may consist of an uneven number of Commissioners such number being not less than 3.*

*(3) A decision of the panel on a hearing is as valid and binding as if it was made by the Commission."*

Section 6 of the Utilities Regulation Act CAP282 states:

*"6 (1) The panel of Commissioners referred to in Section 5 of the Fair Trading Commission Act, 2000 shall sit, hear and determine*

- (a) complaints by consumers regarding billings and standards of service supplied by service providers;*
- (b) applications made by service providers for increases in rates, and*
- (c) any other matter relating to utility regulation.*

*(2) A decision of the panel is as valid and binding as if it was made by the Commission.*

## **DISCUSSION**

### **Issue No. 1**

#### **Whether a sole Commissioner could preside over the confidentiality hearing?**

The Applicant argued that the Commission sole Commissioner acted in excess of jurisdiction and thus in breach of section 5 of the Fair Trading Commission Act by hearing and ruling on several matters at the confidentiality procedural hearing on October 23, 2003. By virtue of section 5 (2) of the Fair Trading Commission Act it is provided that the minimal panel may consist of an uneven number of Commissioners, such number being not being less than 3 and in that

regard the Applicant contended that the Commissioner acted in breach of the statutory requirements of the Fair Trading Commission Act.

On the contrary, however, the Commission took the view that the initial proceeding convened on October 23, 2003 to deal with the confidentiality requests was merely procedural in nature and was governed by Rule 35 of the Procedural Rules. The Commission argued that the substantive hearing was not convened on that day, and that the process on that day was merely to iron out procedural issues, such as the time and date for the substantive hearing (set later for October 30, 2003 at 10:00 a.m.). The procedural confidentiality hearing was also to remind the parties that the hearing was to be governed by the Procedural Rules.

Rule 35 of the Procedural Rules states:

*“35 (1) in addition to technical conferences and issues conferences, the Commission may direct the parties to make submissions in writing or to participate in procedural conferences for the purpose of*

- (a) admitting certain facts as proof of them by affidavit;*
- (b) permitting the use of documents by any party;*
- (c) recommending the procedures to be adopted before the Commission;*
- (d) setting the date and place for the commencement of the hearing; or*
- (e) deciding any other matter that may aid in the disposing of the proceeding in a just or expeditious manner.*

***(2) The Chairman may designate a member of the Commission to preside at a procedural conference.***

*(3) A member of the Commission who presides at a procedural conference may make such orders in accordance with these Rules, as he or she considers appropriate with respect to the conduct of the proceeding.*

*(4) A procedural conference shall be open to the public unless the Commission otherwise directs."*

The Commission was further of the view that under Rule 35 (2) of the Procedural Rules, (see above), where the matter to be addressed was simply a procedural proceeding, such proceeding may be discharged of by one Commissioner. It was the Commission's submission that Rule 35 of the Procedural Rules and section 5 of the Fair Trading Commission Act are not so inconsistent that one should be struck down. It is merely a case of the Commission acting in differing capacities.

In summary therefore, the Commission's views were simply that in the context of a hearing a full panel of three (3) or five (5) should preside by virtue of section 5 of the Fair Trading Commission Act, however, alternately for procedural proceedings one Commissioner may preside by virtue of Rule 35 (2) of the Procedural Rules.

The Applicant did not agree with the Commission's view and sought judicial review under section 3(1) of the Administrative Justice Act CAP 109B of the Laws of Barbados. The Applicant also applied for an order of certiorari under section 3 (2) of the Administrative Justice Act 109B quashing any decisions made at the proceeding by the Commission acted by the sole presiding Commissioner. The Applicant also applied for an injunction staying a further confidentiality hearing proceeding until the outcome of the Court's decision.

Section 3 (1) and (2) of the Administrative Justice Act states:

*"3 (1) An application to the Court for relief against an administrative act or omission may be made by way of an application for **judicial review** in accordance with this Act and with rules of court.*

*(2) Where the Court is of opinion that a person or body against whom an application for judicial review is made is not an authority of the Government of Barbados, the Court may allow the proceedings not governed by this Act and not seeking any remedy by way of certiorari, prohibition or mandamus.*

In seeking judicial review, the Applicant relied on the ground of excess of jurisdiction. In Barbados, under the Administrative Justice Act section 4 provides the grounds upon which the court may grant relief to an applicant seeking judicial review, and includes inter alia, at section 4(b) the ground of excess of jurisdiction.

Section 4 (b) of the Administrative Justice Act CAP 109B states, inter alia:

*“The grounds upon which the Court may grant relief by way of the remedies mentioned in this Act include the following;*

*(b) excess of jurisdiction”*

### **Excess Of Jurisdiction - A Ground Which A Court May Grant Relief To An Applicant Seeking Judicial Review**

This issue of excess of jurisdiction ties into the principal weapon in the judicial armory for the control of state power, which has traditionally been the doctrine of *ultra vires*.

Professor Wade author of ‘Administrative Law’ calls *ultra vires* “the central principle of administrative law”. *Ultra vires* is a Latin phrase meaning, simply, acting beyond one’s power or authority. A decision or action of a functionary or government agency is therefore said to be *ultra vires* when that functionary or government agency acts outside the ambit or scope of its authority.

Professor Albert Fiadjoe identifies two (2) types of ultra vires. Substantive ultra vires and procedural ultra vires.

In the Cable & Wireless case, the focus was more on substantive *ultra vires*, that is, where a public authority has been granted powers by statute or some other instrument and has exceeded its powers by electing to do some act that it does not have the legal capacity to do. Whereas, procedural ultra vires on the other hand occurs when a public authority fails to follow procedure laid down by the law.

At every step, the Court was mindful that the body of legislation administered by the Commission as well as the Commission's enabling statute is part of an overall statutory scheme.

On this issue of the sole Commissioner there were primarily two pieces of legislation and one piece of subsidiary legislation being examined and interpreted by the Courts, the Fair Trading Commission Act, the Utilities Regulation Act and the Procedural Rules.

It is true that on the face of it, section 5 of the Fair Trading Commission Act and section 6 of the Utilities Regulation Act are clear and unambiguous.

However, when we look deeper at the issue it is not so clear and straight forward. In interpreting the Utilities Regulation Act, An examination of section 39 (1) reveals that this provision authorises the Commission to make Rules, prescribing the procedure for the conduct of reviews, hearing of complaints and other proceedings before the Commission.

The Procedural Rules were developed pursuant to of section 39 of the Utilities Regulation Act.

When the Commission convened those confidentiality proceedings, it merely intended that it was convened merely for the purpose of ironing out any procedural issues before the actual substantive hearing begun.

Therefore, this begged the question, was the proceeding construed as a confidentiality hearing or a procedural conference?

This was an important consideration. The word 'hearing' is defined the Procedural Rules, to mean "*a hearing in any proceeding before the Commission and includes an oral hearing and written hearing*". Much turned on this definition of the word "hearing". The definition is so wide it encompasses any proceeding before the Commission. Thus, it is arguable that even procedural conferences dealt with under rule 35 of the Procedural Rules may be deemed hearings, as these are proceedings before the Commission.

One may further argue, that if it were intended that a confidentiality hearing were to be treated as a procedural conference, the draftsmen of the legislation would not have used the word 'hearing' in Rule 13 (4) of the Procedural Rules.

However, before any proceeding or hearing is convened by the Commission, the Commission has the authority under Rule 35 of the Procedural Rules to convene a procedural conference to address how the proceeding or hearing will be conducted. Therefore, is it not possible that before the substantive confidentiality hearing, a procedural conference could be convened to address such matters? If this were the case then Rule 35 (2) of the Procedural Rules may be invoked. This rule provides that the Chairman can designate a member of the Commission to preside at a procedural conference.



Therefore, if the confidentiality hearing is deemed a 'hearing' in the context of the Procedural Rules, then section 5 of the Fair Trading Commission Act and section 6 of the Utilities Regulation Act apply and therefore a panel of three (3) or five (5) Commissioners would have been required to preside over that hearing.

### **What the High Court Decided in relation to Issue #1**

The Courts, determined that the provisions of the Fair Trading Commission Act and the Utilities Regulation Act are clear and unambiguous. These Acts are the parent legislation and as such hold more weight than the subsidiary procedural rules.

Counsel for the Applicant cited the case of **Reg. vs. Secretary of State for Social Security Exparte Joint Council for the Welfare of Immigrants [1997]** WLR Vol 1 275 at page 293 where Wgite L.J. stated:

*"The principle is undisputed. Subsidiary legislation must not only be within the vires of the enabling statute but must also be so drawn as not to conflict with statutory rights already enacted by other primary legislation."*

The trial judge agreed with the arguments of the Applicant and held that the submission of Counsel for the Commission was therefore not correct in law. The Court was of the view that the Commission's argument ignored that the Fair Trading Commission Act and the Utilities Regulation Act are statutes in *pari materia*, that is, on the same subject or relating to the same matter. Further, that the panel established by section 6 (1) of the Utilities Regulation Act with power to sit, hear, and determine "any other matter relating to utility regulation" is the same panel established by section 5 of the Fair Trading Commission Act. Therefore, the panel itself has a similar function under the Fair Trading

Commission Act and the Utilities Regulation Act with a mandate to perform that function.

The Court did an in-depth analysis of the Acts and the Procedural Rules all of which the scope of this paper does not permit me to discuss. The trial judge referenced the cases of **A. G. V. Prince Ernest of Hannover [1957] 1 ALL ER. 49 and Re: Biddie General Accident Fire vs. Life Assurance Corporation [1942] 2 ALL ER 995 at 998 (C. A.)**. However, it is note worthy that in her analysis the judge showed that the modern approach to the construction of a statute is to ask the question:

*“what does the word mean in the context in which we find it here, both in the immediate context of the section or subsection in which the word occurs and in the general context of the Act, having regard to the declared intention of the Act and the obvious evil it was designed to remedy?”*

By using these cases the Court illustrated that the Fair Trading Commission Act and the Utilities Regulation Act are Acts in *pari materia* with commonality of terms and provisions and together with the Procedural Rules constitute a regulatory framework for the provision of utility services. The Court determined that it is clear from the language used in section 5 (1) and (2) of the Fair Trading Commission Act and section 6 (c) of the Utilities Regulation Act what parliament intended.

The Commission therefore had erred in law by advising that a sole Commissioner should sit to preside over the confidentiality hearing. By so doing, the Commission acted outside the scope of the power given under the Fair Trading Commission Act and the Utilities Regulation Act and by extension the Procedural Rules.

Thus, the Applicant's request for certiorari<sup>4</sup> under the Administrative Justice Act CAP 109 was granted.

The Court's arguments though comprehensive do not however solve the issue of Rule 35 (2) of the Procedural Rules which may be inconsistent with its enabling Act the Utilities Regulation Act particularly section 6. The question thus remains when is rule 35 (2) invoked? If **all** proceedings before the Commission are considered hearings and must be presided over by three (3) or five (5) Commissioners, and the procedural conferences are no exception, what then happens to rule 35 (2) of the Procedural Rules?

### **Issue No. 2**

**Did the Commission err in law or exceed its jurisdiction in directing that the Utilities Regulation (Procedural) Rules, 2003 shall govern the proceedings?**

This issue is somewhat narrower than the first in that it essentially involves an interpretation of Rule 3 of the Procedural Rules. This rule provides that the Procedural Rules apply to all proceedings under the Utilities Regulation Act CAP 282 and the Fair Trading Commission Act CAP 326B.

In relation to this issue, the Applicant argued that the Commission acted contrary to law and in breach of the Telecommunications (Confidentiality) Regulations, 2003 "the Confidentiality Regulations" by its failure to consider them together with the Procedural Rules as the statutory and procedural basis upon which claims for confidentiality in the hearing should be dealt with. As such, the Applicants were contending that the Commission's actions constituted an error of law.

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<sup>4</sup> Certiorari is a Latin word meaning "to be informed of, or to be made certain in regard to." It is also the name given to certain appellate proceedings for re-examination of actions of a trial court, or inferior appeals court.

Conversely, the Commission stated that the Applicant had filed its application for rate adjustment under section 16 of the Utilities Regulation Act (there is no section in the Telecommunications Act under which the application could be made for rate adjustment). It was against this background that the procedural rules became applicable.

The short title of the Utilities Regulation Act informs that the Act is to make provisions for the regulation of utility services in Barbados. Section 39 of the Utilities Regulation Act authorises the Commission, after consultation with the service providers and the **Minister of Commerce** to make rules prescribing the procedure for the conduct of reviews, hearing of complaints and other proceedings before the Commission.

Rule 13 of the Procedural Rules sets out the criteria and process to be adopted when determining confidentiality of documents filed with respect to a **proceeding before** the Commission.

By contrast section 110 (1) (n) of the Telecommunications Act gives the **Minister of Energy and Public Utilities** the power to make regulations for the treatment of confidential, information.

Section 110 (1) (n) of the Telecommunications Act states:

*“110 (1) The Minister may make such rules, regulations and orders as may be required under this Act, including regulations prescribing*

*..... (n) the treatment of confidential information; and .....*”

The Confidentiality Regulations determine how confidential information submitted under the Telecommunications Act should be treated **and do not apply to documents filed in a proceeding before the Commission.**

The Telecommunications Act does not deal with rate adjustments nor does it set out a regime or procedure for dealing with rate adjustments. The Act is specific in relation to the telecommunications sector and is not procedurally oriented. Further and as was previously stated, the relevant Minister under the Telecommunications Act is the Minister of Energy and Public Utilities Act who has no power under the Utilities Regulation Act.

The only reference to confidential information in the Telecommunications Act is found in section 7 and it relates specifically to information relative to applications for licences.

Section 7 of the Telecommunications Act CAP 282B states:

*“7 (1) The Minister shall take all reasonable steps to ensure that the information submitted to him, and to every person concerned with the administration of this Act, in respect of licensees and applicants for licences granted under this Act is treated confidentially except insofar as disclosure is necessary for the administration of this Act.*

*(2) The requirement to keep confidential information secret pursuant to subsection (1) shall not apply where*

*(a) disclosure of that information is necessary for the proper administration of this Act; and*

*(b) the Minister authorizes the release of that information.*

*(3) Where*

- (a) *a person claims that confidential information*
  - (i) *made available or to be made available by or on behalf of that person, whether in oral evidence or in a written statement, submission or other document, at a hearing pursuant to this Act; or*
  - (ii) *furnished, or contained in a document produced by the person;*

*is information the disclosure of which would be injurious to the interest of the person; and*

- (b) *the Minister is satisfied that the claim is justified and is not of the opinion that disclosure of the confidential information is necessary in all the circumstances,*

*the Minister shall take all reasonable steps to ensure that the confidential information is not, without the consent of that person, disclosed in the proceedings or by the person who receives the relevant information in the course of his duties."*

It is the author's view that the confidentiality regulations are therefore related to matters where licences are an issue and not to be used for rate adjustments.

### **Actions Contrary to Law/Error of Law**

On this issue, the Applicant also sought judicial review under the Administrative Justice Act CAP 109B. The Applicant applied to the Court for an order of certiorari quashing the decision of the Commission that only the Procedural Rules would govern the proceedings. The Applicant also applied for an injunction restraining the Commission from proceeding with the confidentiality hearing and from using solely the Procedural Rules to the exclusion of the Confidentiality Regulations.

Section 4 of the Administrative Justice Act empowers the High Court to grant relief on several grounds two of which are where there have been;

- “(a) *an administrative act or omission was in any way unauthorised or contrary to law,*
- “(j) *error of law, whether or not apparent on the face of the record;”*

According to Dr. Fiadjoe:

*“In the present culture of the new vistas of judicial review, where the courts seem to be annexing new territory whenever possible, they have found avenues to review ‘wrong decisions’. One example relates to a situation where there is an error of law on the face of the record, the record being liberally construed to include all the documents before the functionary as well as the reasons for the conclusion reached.”*

‘Error of law’ is probably the most frequency-invoked ground on which litigants ask the courts to review administrative decisions.

A tribunal or Commission may commit an error of law in a number of ways. For instance, it may be required in the course of deciding a dispute to take into account, or to rule on some question of general law, whether a rule of common law, or a provision in a statute of general application, on an appeal on a question of law or an application. For an order of certiorari or some similar proceeding, a court will decide for itself the disputed question of law, and set the decision aside if the tribunal did not decide it correctly.

Thus, the question arose did the Commission err in law by deciding that the Procedural Rules would govern the confidentiality proceeding to the exclusion of the Confidentiality Regulations?

**What the Court Decided in relation to Issue #2**

The Court determined that the Commission had not erred in law or did not act contrary to law when it decided that the Procedural Rules over the Confidentiality Regulation would govern the hearing. The rationale for this lay in the court's interpretation of section 7 (1) of the Telecommunications Act as previously cited.

The Court decided that according to section 7 of the Telecommunications act that there are two categories of persons other than the Applicant who may claim confidentiality in respect of information submitted to the Minister and Commission. They are:

- (1) persons to whom licences have been granted; and
- (2) applicants for licences under the Act.

It is all of these persons who may apply for or have been granted licences under the Telecommunications Act or who have applied for such licences who may invoke those Confidentiality Regulations. The Confidentiality Regulations cannot be invoked in a setting of rate hearing convened by the Commission under the provisions of the Utilities Regulation Act.

The court further held that Rule 3 of the Procedural Rules as previously cited is concise and direct.



Construed in its ordinary and natural meaning this rule means what it says i.e. that the procedural Rules apply to proceedings under the Utility Regulation Act and the Fair Trading Commission Act. There is no doubt or ambiguity in the words used in Rule 3.

The Commission was therefore correct when it held that the Procedural Rules were to govern the confidentiality hearing to the exclusion of the Confidentiality Regulations.

## **CONCLUSION**

The Applicant was not satisfied with the High Court's ruling insofar as the second issue, and thus the ruling was appealed to the Court of Appeal. The judges in the Court of Appeal however agreed with the reasoning of the High Court judge and the appeal was dismissed.

Following this case the Commission reconvened the Confidentiality Hearing under a three member presiding panel that reiterated that the Procedural Rules alone would govern the proceedings.

### **What did the outcome of this case mean for the Commission?**

The case and the principles therein have been insightful. On the issue of the sole Commissioner, it has clarified for the Commission that regardless of the type of proceeding being convened to deal with Utilities Regulation issues (no matter how minute the issue maybe) it is prudent for the Commission to err on the side of caution and have a quorum of a least 3 members sitting to hear the matter.

The Commission has also recognized that a conflict may arise between section 6 of Utilities Regulation Act and rule 35 (2) of the Procedural Rules.

If section 6 of the Utilities Regulation Act encompasses all matters relating to utility regulation, then that includes procedural conferences as well. Therefore, the legislation may need to be amended to show that it does not intend section 6 of the Utilities Regulation Act to apply, to procedural conferences or any other rule which states otherwise.

The body of legislation administered by the Commission as well as the Commission's enabling statute is part of an overall statutory scheme. The Act should therefore not be read in contradiction to each other. These statutes should be read conjunctively and in a manner sufficient to secure to the Commission the full measure of powers conferred upon it by Parliament.

With regard to the second issue, the Commission's Procedural Rules have endured the scrutiny of the Courts and is now recognised as an important statutory tool in the function of the Commission where any application is brought pursuant to the Utilities Regulation Act.

### **What this has taught us**

Regulatory bodies that have a plethora of legislation to enforce can learn from our experience. Regulators should be cautious when entrusted with several pieces of legislation which are interlinked statutory tools. This means that there may be instances where there is an area of ambiguity. Although draftsmen of legislation try to ensure that as much as possible the legislation is harmonised and straight forward, there is often scope for improvement through amendments of the legislation.

For many of us it has not been the first time our decisions have been appealed and we know that there may be times in the future when our decisions are reviewed or appealed in the High Court. Regulators must recognise that in the

area of administrative law, the exercise of the court's supervisory jurisdiction is not intended to detract from the authority of your agency to make decisions within its jurisdiction.

Moving to the future, we must continue to fulfill our mandates and try to ensure that our decisions are judicious and grounded in law.

Where the legislation is not clear or there is need for statutory interpretation what safer avenue for the aggrieved individual than to take it to the Courts by way of Judicial Review. This medium of appeal presents a useful way for highlighting areas of potential improvements to the Commission's legal framework.

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