[2010] SC (Bda) 51 Civ (17 September 2010)

In The Supreme Court of Bermuda

CIVIL JURISDICTION

2010: No. 62

IN THE MATTER OF AN APPEAL UNDER THE TELECOMMUNICATIONS ACT

B E T W E E N:-

BERMUDA CABLEVISION LIMITED

Appellant

-AND-

THE MINISTER OF ENERGY, TELECOMMUNICATIONS AND E-COMMERCE

Respondent

JUDGMENT

Date of Hearing: July 19-22 2010

Date of Judgment: September 17, 2010

Mr. Narinder Hargun and Mr. Ben Adamson,

Conyers Dill & Pearman, for the Appellant

Mr. Mark Diel & Mr. Ronald Myers,

Marshall Diel & Myers, for the Respondent

Introductory

1. The Appellant, Bermuda Cablevision Limited ("BCV"), complain that the Minister was wrong to refuse on February 3, 2010 its appeal against the December 8, 2009 decision of the Telecommunications Commission ("the Commission"). BCV contends that the Commission's decision was made in breach of its legitimate expectations arising out of, most significantly, a letter dated March 5, 2009 sent to its attorneys by the Commission's attorneys. This letter concerned the terms on which BCV might be permitted by the Commission to alter the basis on which it re-transmitted channels for Bermuda Broadcasting Company Limited ("BBC"), following Court proceedings and a mediation of the related BCV-BBC commercial dispute.

2. Although the present proceedings were commenced by way of a Notice of Application for Leave to apply for Judicial Review dated February 23, 2010, on March 18, 2010 it was ordered by consent that the application should be treated as an appeal under section 60 of the Telecommunications Act 1986 ("the Act").

3. The present application calls for an analysis of the scope of the doctrine of legitimate expectation in the context of the distinctive regulatory framework under the 1986 Act. Interpreting the Act is often problematic to the extent that the meaning of unique provisions, not based on foreign legislation which has already been interpreted by foreign courts or text writers, is in controversy. The facts of the present case also reveal the logistical challenges faced by the Commission, a part-time volunteer body supported both by Department of Telecommunications staff (whose primary constitutional loyalty is to the Minister) and, occasionally outside counsel, in discharging its often complex and demanding duties.

4. Before considering the factual background against which the present appeal arose, it is necessary to appreciate the statutory framework within which the present dispute evolved.

The principal statutory provisions

5. The Department of Telecommunications is established by section 6 of the Act, which provides as follows:

> "*6 (1) There shall continue in existence the Department of Government known as the Department of Telecommunications which is charged with the duty of assisting the Minister in the discharge of his functions under this Act and to fulfill any duties assigned to it under this Act or the regulations.*
>
> *(2) Subject to section 61(5) of the Constitution [title 2 item 1] and to the general direction and control of the Minister, the Department shall be*

under the supervision of a public officer who shall be known as the Director of Telecommunications and shall consist of that officer and such number of other public officers as may from time to time be authorized by the Governor."

6. Section 7 of the Act establishes the Commission as follows:

> "**Establishment of Telecommunications Commission**
> *7 (1) There shall be established a body to be called the Telecommunications Commission which shall advise the Minister in the discharge of his functions under this Act and discharge such other functions as may be imposed or conferred upon them by or under this Act or any statutory provision.*
>
> *(2) The Commission shall consist of not less than five persons and not more than nine persons who shall be appointed as Commissioners by the Minister by notice in the Gazette to hold office during good behaviour for such terms not exceeding three years at a time as may be specified in their respective letters of appointment.*
>
> *(3) The Second Schedule shall have effect in relation to the Commission.*"

7. Paragraph 18 of the Second Schedule provides as follows: "*The staff of the Commission shall be public officers of the Department*". It is nevertheless clear from the scheme of the Act that the Commission is a quasi-judicial body which has a role which is separate and distinct from that of the Minister. For example, section 20A of the Act provides:

> "**Interim and *ex parte* decisions**
> *20A (1) The Minister or the Commission may make any decision under this Act on an interim basis and may make the final decision effective from the day the interim decision came into effect.*
>
> *(2) The Minister or the Commission may make an ex parte decision whenever the Minister or the Commission, as the case may be, considers that the urgency of a particular case justifies such ex parte decision, so, however, that within fourteen days or such longer period as the Minister or the Commission may determine, after an ex parte decision is made under this subsection the Minister or the Commission, as the case may be, shall hold an inter partes enquiry for the purpose of making an interim or final decision.*"

8. Two other sections in the Act are central to the present appeal; one other statutory provision relates to the antecedents of the present dispute. The first provides that a new service may not be introduced nor rates for an existing telecommunications service altered without (a) prior notice to the Commission, and (b) prior public notice inviting objections to the Commission. Section 23 of the Act provides as follows:

"**Specified Carriers must give notice to Commission of charges**

23 (1) Subject to this Act, no specified Carrier shall initiate a new telecommunication service or vary its rates and charges for existing telecommunication services unless it gives notice in writing of the new service and the proposed rates and charges therefor, the proposed variation in the rates and charges for the existing service and the amount thereof to the Commission and publishes a notice in accordance with subsection (2).

(2) A notice under subsection (1) shall be published in such form approved by the Commission on two separate days in not less than one local newspaper approved by the Commission and shall specify therein that any person may make objections and forward such objections to the Commission within twenty-one days from the second date of publication of the notice

(3) Where a notice under subsection (1) is given, then subject to subsection (4) or subject to the Commission giving a direction under section 24 a new service and the rates and charges therefor or a variation in the existing rates and charges shall not be introduced.

(4) Where the Commission is satisfied with the notice given under subsection (1) and informs the specified Carrier in writing or by notice published in the Gazette that it does not intend to inquire into the matter, the specified Carrier may introduce the new service and the rates and charges therefor or the variation in the existing rates and charges, as the case may be."

9. The next provision of the Act prescribes how the Commission is to adjudicate an application relevant under section 23(1) to introduce a new service or new rates for an existing service. Section 24(1) provides:

"**Decision of Commission**

24 (1) On receipt of a notice under section 23(1) the Commission may, after making such enquiry into the matter as they may think fit, give a direction —

(a) approving the new service and the rates and charges in respect thereof; or

(b) approving the new service and the rates and charges in respect thereof on a provisional basis; or

(c) changing the rates and charges for the new service in whole or in part; or

(d) disallowing the new service and the rates and charges proposed therefor; or

(e) approving the variation in the existing rates and charges; or

(f) disallowing the variation in the existing rates and charges either wholly or in part; or

(g) postponing the date upon which the variation in the existing rates and charges is intended to be effective to such other date as may be specified; or

(h) otherwise setting out the terms and conditions upon which new service or rates and charges in respect of a new service or the variation of existing rates and charges may be made,

and subject to section 25(5), the specified Carrier shall comply therewith."

10. Section 24(5) empowers the Commission, on receipt of either a complaint about rates or a direction from the Minister, having regard to subsection (2), to change the rates for a service in whole or in part. This suggests that even if a change in rates is approved after a full enquiry under section 24(1), a residual discretion exists under subsection (5) to modify such decision in response to either public or Ministerial demands. However, subsection (2) of section 24 in either case defines the grounds upon which the Commission may base its decision:

"*(2) In the exercise of their discretion under subsection (1), or subsection (5) the Commission shall have regard inter alia to —*

(i) the cost to the Carrier of the service in question;

(ii) the desirability and need to subsidize other nonprofitable services offered by the Carrier in the public interest;

(iii) the needs of the Carrier for adequate working capital and to establish reasonable reserves;

(iv) international accounting standards where applicable and modifications thereto;

(v) technological advances;

(vi) market conditions in Bermuda and overseas including the likely impact of a new service on other Carriers;

(vii) regulatory changes where applicable;

(viii) the need to afford investors a reasonable rate of return on their investment;

(ix) the question whether in the light of the foregoing, any proposed tariff is just and reasonable and any rates and

charges contained therein are applied equally to all persons in substantially similar circumstances and conditions;

(x) the question whether the Carrier, in respect of the application of rates and charges, the provision of services and the use of its facilities—

(a) gives any preference or advantage to any person or to any particular description of telecommunication:

(b) subjects any person or any particular description of telecommunication to any disadvantage;

(xi) the public interest."

11. So the matters to which the Commission must have regard in exercising its statutory discretion under section 24(1) may be said to be cast in stone, notwithstanding the fact that the Act contemplates both public and political input on any decision. The present appeal mainly turns on whether these statutory provisions leave scope for the Commission to make representations as to how it will exercise its section 24(1) discretion before a new service and proposed rates have been advertised which are binding in public law, it being accepted that as a matter of private law the Commission may not fetter its discretion. However, this issue arises out of an earlier election made by BCV in relation to the carrying on a "retransmission consent" basis of BBC channels under the Cable Television Services Regulations 1987 (as amended by the Cable Television Service Amendment Regulations 2008). Regulation 12 provides as follows:

"Local television programmes

12 (1) A licensee may carry on the System television programmes broadcast by a broadcasting radio station licensed in Bermuda.

(2) A broadcasting radio station shall elect for every period of three years commencing 1 November 2008 (in these Regulations referred to as the "election period") whether they wish their television programmes to be carried on a "must carry" or a "retransmission consent" basis.

(3) A broadcasting radio station must make its election for the first election period before 1 November 2008, and must make its election for each subsequent election period at least four months prior to the end of the then current election period.

(4) If "must carry" is elected, a licensee shall carry on the System, free of charge, all television programmes broadcast by a broadcasting radio station.

(5) If "retransmission consent" is elected, a licensee must, within 30 days, confirm whether or not they intend to carry the television programmes of a broadcasting radio station.

(6) Where "retransmission consent" is elected under paragraph (5) and a licensee chooses not to carry the television programmes they must within fourteen days inform the public via the public printed media and by direct notice to their customers and must also within that fourteen day period file revised tariff rates with the Commission for the programme tier in which the television programmes will no longer be available.

(7) Where "retransmission consent" is elected under paragraph (5) and a licensee chooses to carry the television programmes on a "retransmission consent" basis and the parties are not able to reach a commercial agreement within sixty days, then either party may refer the matter to the Commission for determination.

(8) The Commission shall, in not more than sixty days or such longer period as the Minister may allow, conclude its deliberations and forward a decision to the parties.

(9) The date of implementation of any new agreement shall be the day following the expiration of the previous election period.

(10) If either party is aggrieved by the decision of the Commission, they may appeal to the Minister in accordance with the procedures outlined under section 25 of the Act.

(11) During an election period in which a licensee has elected "must carry" or "retransmission consent" —

(a) neither party shall cause the television programmes of the broadcasting radio station to be unavailable on a licensee's System without the express permission of the Minister;

(b) television programmes shall be carried without material degradation in quality (within the limitations imposed by the technical state of the art); and

(c) television programmes shall, at the request of a licensee of a broadcasting radio station licensed in Bermuda, be carried by the System on the channel number on which the broadcasting radio station is transmitting, except where technically not feasible.

(12) Where television programmes are carried by a System pursuant to this regulation, the programmes broadcast shall be carried in full, without deletion or alteration of any portion."

10. This illustrates that BCV was not obliged by law to transmit BBC material. Since BBC elected to have its ABC and CBS programmes carried on a "retransmission consent" basis, it was for (a) BCV to decide if it wished to carry the channels at all, and if so (b) for BCV and BBC to agree the terms on which retransmission would occur. The Regulation empowers the Commission to resolve any dispute between the parties as to the applicable commercial terms.

The evidence: the background to the impugned decisions

12. BCV's counsel prepared the following Chronology which helpfully provides a timeline in tabular form:

Date	***Event (page numbers refer to Binder B)***
July 2008	*Cable Television (Amendment) Regulations 2008 come into force*
29 October 2008	*BBC elects retransmission consent*
29 November 2008	*BCV elects not to carry the Channels*
8 December 2008	*BCV seeks guidance from the Court whether it needs the Commission's permission to drop the Channels following its decision not to carry them.*
December 2008 / January 2009	*Emails regarding possible settlement*
9 January 2009	*Court rules that BCV does not need Commission's permission to drop the Channels*
20 January 2009	*Mediation talks between BCV and BBC break down*
5 February 2009	*ASW resurrect mediation talks*
7 February 2009	*ASW updates the Commission re mediation*
10 February 2009	*ASW email Maxanne Anderson (DoT) with the Commission's draft position statement*
11 February 2009	*February Mediation (successful), ASW sign agreement to mediate confirming they have authority on behalf of the Commission* *DoT distributes signed Mediation Agreement to the Commission*
13 February 2009	*ASW updates the Commission on mediation*

16 February 2009	*Press reports of agreement*
17 February 2009	*ASW send draft of First Comfort Letter to the Commission.* *First Comfort Letter sent to CDP*
17 February 2009	*ASW writes on behalf of the Commission to the Minister seeking exemption*
19 February 2009	*Email from ASW to CDP*
20 February 2009	*Exemption Order*
5 March 2009	*BCV formally asks for an 'indication that the anticipated structure would as currently advised be acceptable to the Commission'*
	ASW meets the Commission to discuss response
	Second Comfort Letter sent to BCV
6 March 2009	*Cablevision makes new election and agrees to carry the Channels; signs Retransmission Agreement*
9 March 2009	*ASW circulates the Second Comfort Letter to the Commission*
11 March 2009	*Commission meeting.*
13 March 2009	*BCV files application*
16 March 2009	*CDP emails ASW re meeting to determine 'X'*
16 March 2009	*ASW emails the Commission re timeline for determining 'X' for the BBC tier*

19 March 2009	*Court of Appeal rules that a licensee who chooses not to carry channels on a retransmission consent basis still needs the Commission's permission to drop the channels.*
20 March 2009	*Commission drafts press release re CA ruling .*
17 June 2009	*Commission Meeting*
6 July 2009	*ASW email to the Commission re Second Comfort Letter*
7 October 2009	*Commission Meeting*
8 December 2009	*Commission rules that "it is in the public interest to retain the Economy Tier, as to content and pricing, as is and to leave it unchanged"*
23 December 2009	*BCV appeals to the Minister*
3 February 2010	*Minister rejects the appeal*

13. After BBC made its election under Regulation 12 of the Cable Television Service Regulations 1987 through its attorneys, Trott & Duncan, by letter dated October 29, 2008, BCV's attorneys by letter dated November 28, 2008 advised BBC (in material part) as follows:

> "*While Cablevision has always been happy to carry channels 7 and 9 over its cable net work, and to do so free of charge, it does not believe that Cablevision and its customers should pay for channels free on antennae. Cablevision accordingly, and pursuant to Regulation 12(6) of the Cable Television Service Regulations 1987, chooses not to carry your client's programming on a retransmission consent basis. Cablevision remains willing to carry these channels on the old basis...*"

14. An ancillary controversy then arose as to whether or not BCV required the Commission's permission to discontinue its existing retransmission service. On December 8, 2008, BCV sought a declaration from the Court that it could discontinue its existing retransmission of BBC channels without the Commission's consent. On January 9, 2009, the Chief Justice ruled that such consent was not required. Meanwhile settlement discussions were taking place between BBC and BCV, in which the Commission's attorneys in the Court proceedings, Attride-Stirling & Woloniecki ("ASW"), became involved. While preparing to respond to BCV's application for declaratory relief, on December 17, 2008 Conyers

Dill & Pearman ("CDP") emailed ASW indicating that "*given the holidays, without prejudice discussions between the parties cannot take place before Monday 5th January*". A member of the Ministry staff, Hiram Edwards, on January 15, 2009 emailed ASW as follows:

> "*Please note that I have started being the go between in the setting up of talks between BBC and BCV....I am now waiting to hear from BBC on their preference for time and a mediator...*"

15. It appears from an internal January 19, 2009 ASW email between lawyers who appeared as counsel for the Commission in BCV's judicial review application, that Maxanne Anderson, (in-house) legal counsel to the Ministry of Telecommunications, was also involved in monitoring the mediation process. On January 21, 2009, Larry Mussenden (then of ASW) advised the Chairman of the Commission Ronald Simmons by email that mediation talks had broken down. On February 4, 2009, Mussenden emailed the Chairman (with a copy to Commission member Angela Berry) in salient part as follows:

> "*...We had a very productive meeting with counsel for all the parties today and they were all of the view that it would be good for the mediation to resume. They will seek instructions and by tomorrow afternoon we expect to be on email trying to bring mediation back online...*"

16. So long before the controversial Second Comfort Letter was written, ASW (the Commission's lawyers) and Ministry staff (presumably on behalf of the Commission or the Minister) were involved in the process of trying to facilitate a solution to the commercial dispute between BBC and BCV. The fact that the Act contemplates Ministry staff acting for the Commission may give rise to some ambiguity in the minds of third parties as to the identity of the staff's principal in many cases. In the present case, when the Commission had instituted legal proceedings in relation to the BBC/BCV dispute which were still pending before the Court, it would be entirely logical for the disputants to infer from the intervention of the Ministry staff and the Commission's attorneys of record in the mediation process that the relevant public officer and private legal actors were involved on the Commission's behalf. That this was the position in the period of time leading up the crucial events is clear based on the available documentary record. For example, after Venous Memari had been engaged in the revived mediation process, ASW's Mina Matin on February 10, 2009 emailed Ministry staff member Maxanne Anderson as follows:

> "*Maxanne,*
>
> *Please could you forward the following to Venous further to her request as to a short statement of the Commission's position....*"

17. The email from ASW to Anderson set out a position statement forwarded to Matin by ASW's Victor Lyon QC describing the Commission's position in relation to the

BBC/BCV dispute. On February 11, 2009, Anderson herself (as Senior Legal Consultant to the Department) forwarded the signed Mediation Agreement to both Lyon and the Commission Chair. However, the position as regards the signatories to the Agreement was different. The signed document indicates that ASW signed on behalf of the Commission beneath the Department's signatory, while the Schedule lists the individuals attending the relevant meeting on behalf of the Commission and Department separately, with the ASW lawyers alone recorded as representing the Commission. Also attached was a BBC/BCV settlement agreement. The following day, ASW's Mussenden emailed the Commission's Chair referring to the conclusion of the Mediation Agreement and noting: "*We need to meet with you today to discuss the way forward for the Commission*".

18. According to the evidence of Angela Berry, she was solely involved in giving instructions to ASW in relation to the court proceedings and she had no idea at the time of the extent of that firm's involvement in the mediation. I accept her evidence. However, the implication that there was a clear demarcation between "the usual litigation retainer" and facilitating through the Mediation a settlement of the dispute which triggered that litigation is not supported by the contemporaneous correspondence between ASW, the Commission Chair and the Department and Commission's staff, of which Mrs. Berry was not then aware.

19. According to Ronald Simmons' evidence, he consented to ASW becoming involved in the mediation on the explicit basis that the Commission was not involved in the commercial negotiations because the Commission would have to subsequently adjudicate an application under section 23 of the Act. I accept this evidence. I also find that Mr. Simmons was honestly mistaken in deposing that he was never copied with any correspondence evidencing ASW's involvement with the mediation. The true position appears to be that due to pressure of other professional and voluntary commitments, he was unable to either (a) actively monitor the flurry of emails, or (b) appreciate that ASW were manifestly acting for the Commission in a facilitative role but in a manner consistent with preserving the Commission's ability to fairly deal with either a reference of a dispute for settlement under regulation 12(7) or an application under section 23(1) of the Act.

20. The settlement agreement (inappropriately described as a "Mediation Agreement") was not signed on behalf of the Commission at all. The Mediation Agreement proper, by its terms, only bound the Commission and the Department to obligations of confidentiality. This was entirely consistent with the Chairman's injunction to preserve the Commission's impartiality when it came to adjudicate upon any application which might flow from whatever commercial resolution was achieved (or was not achieved) by the disputing parties. Moreover, to the extent that the Chairman himself was not actively monitoring the involvement of ASW in the mediation process, the Commission is and was by law expected to carry out its daily functions through the Department's staff. At least one staff member was during the mediation phase consciously aware of ASW's involvement in the mediation process, which was on any sensible view of the facts related (if not strictly ancillary) to the initial litigation retainer. It was to the Department that ASW would doubtless turn for settlement of their fees. It was entirely logical for the

Commission to have a firm of private lawyers dealing with the lawyers for BBC and BCV. It was also entirely logical for the Commission to be seeking to facilitate a settlement of a dispute which impacted upon a significant segment of the television viewing audience's ability to view BBC's channels, this Court having ruled that the Commission's permission was not required for BCV to discontinue its existing service.

21. In these circumstances, I find that it is clear that ASW had actual authority (express and/or implied) to act for the Commission in a facilitative role in relation to the mediation in the period leading up to the issuance of the "Comfort Letters".

Findings: did ASW have express and/or implied authority to issue the Second Comfort Letter?

22. The First Comfort Letter is not in issue but it was sent by ASW on February 17, 2009 to CDP. On the same date a letter was sent to the Minister indicating the Commission's support for an exemption for BCV in respect of regulation 12(5) so that BCV could withdraw its election not to carry Channels 7 and 9. The Commission Chair agrees that he was emailed drafts of these letters by Victor Lyon QC who requested urgent instructions and opened the email, but (under cross-examination) (a) denied authorising the letter to CDP, and (b) admitted never recording in writing that the letter was sent without his instructions.

23. If the Commission was aware that this letter was sent and did not wish to authorise it, in my judgment ASW ought to have been instructed to withdraw the letter as soon it was discovered that it had actually been sent. The letter to CDP, moreover, did not stand by itself. ASW on behalf of the Commission requested the Minister to grant an exemption from the requirements of regulation 12(5) of the 1987 Regulations, in the public interest, to enable BCV to retract its initial refusal to offer the relevant service to BBC. The February 17 letter to the Minister set out a proposed form of wording for the exemption. The letter to CDP provided as follows:

> "***Re: Bermuda Cablevision and Bermuda Broadcasting Corporation***
>
> *We write on instructions from the Commission.*
>
> *The Commission understands that your clients, Cablevision, and Bermuda Broadcasting Corporation ("BBC") have reached an understanding of the possible terms upon which Cablevision might carry BBC's channel 7 & 9 on a retransmission consent basis.*
>
> *The Commission understands that, in order for this agreement to be carried into effect, the Minister needs to exempt Cablevision and Bermuda Broadcasting Corporation from Regulation 12(5) of the Cable Television Service Regulations 1987 (as amended) ("Regulations") to permit*

Cablevision to withdraw its apparent election of 28th November 2008 not to carry these channels and to confirm that it does now intend to carry those channels.

Having seen a copy of the agreement that emerged from the recent Mediation, the Commission is prepared to recommend to the Minister that an order for the necessary exemption is made. The Commission encourages Cablevision and Bermuda Broadcasting Corporation to write to the Minister requesting the necessary exemption as soon as possible.

Your clients will be aware that, if Cablevision does withdraw its previous apparent election not to carry the channels, it will be required to confirm that it now irrevocably elects to carry these channels within a short (probably 14 day) period after the publication of the Order. Thereafter, it will have a short (probably 7 day) period in which to agree commercial terms with the BBC pursuant to Regulation 12 (7) (as opposed to 60 days). It is not anticipated that any other exemption will be necessary or granted. Accordingly Regulation 12 will remain in full force and effect, save as modified in respect of the time limits in 12 (5) and (7) and the permission to withdraw the apparent election already made and make a further election pursuant to 12 (5).

Should the parties fail to reach agreement on those commercial terms within the 7 day period, either party can refer the matter to the Commission for it to decide those terms, subject to the further provisions in Regulation 12 such as an appeal to the Minister etc. Further, once the Commercial Terms are agreed/decided, the new tariff to be charged to the public by Cablevision will be subject to the Commission's approval pursuant to the Telecommunications Act 1986 ("Act"), in particular, sections 14, 23 and 24 thereof.

In these circumstances, Cablevision has asked the Commission to indicate in advance whether, in principle or as a matter of policy, the Commission could not approve of Cablevision offering the public the choice of whether it wants the receive channels 7 & 9 by means of a separate tier set at a price by the Commission (as per the current understanding with BBC).

In response, the Commission has to reaffirm that, under the framework of the Regulations, it can give no binding indications of whether any proposed tariff or tariff structure will be approved, since it has to consider all the factors in s 24 (2) of the Act before approving any tariff changes and therefore cannot bind itself in advance to what it may decide after it

has considered those factors. Moreover, the Commission takes the view that, once Cablevision has elected to carry channels 7 & 9, then that is an irrevocable choice which cannot be made conditional upon Cablevision consenting to the tariff that the Commission (or Minister) may lawfully direct under the Act. Cablevision remedies appear to be confined to the appeal provisions under the Act and do not appear to include the option of dropping the channels once the election has been made.

However, the Commission can say that, as at present advised, it does not consider that the factors in s 24 (2) to which the Commission must have regard, negative the possibility of the Commission approving the offering of Channels 7 & 9 as a separate, optional, tier and charging separately. On the contrary, since BBC has lawfully declined to force Cablevision to carry 7 & 9 free of charge on a "must carry" basis, it currently appears to the Commission that offering these channels to the public on a separately charged for, optional, tier is within the range of possible tariff structures that Cablevision might reasonably be expected to offer to the public.

If the separate tier structure is approved, there will, of course, remain the issue of price and the impact of that price on the Basic Tier. It is to be anticipated, for example, that the Commission may take the view that it is in the public interest and otherwise consistent with the factors in s 24(2) that the cost of the Basic Tier plus the cost of the optional tier containing channels 7 & 9 should be equal to the cost of the Basic Tier as it is now ($30) and that the shortfall in income to Cablevision from the sale of the Basic Tier should be made up from an increase in the charges on the more expensive and optional "luxury" packages. However, the Commission could not take that view without knowing all the relevant figures, which it would invite Cablevision to submit and comment upon. Equally the Commission may like to know the anticipated impact on Cablevision receipts if the tier containing channels 7 & 9 were offered free to persons over 75.

We hope that this letter will assist in bringing a swift resolution to this matter."

24. The letter to the Minister provided as follows:

"*We write on the instructions of the Telecommunications Commission.*

We refer to the public announcement that Bermuda Cablevision Limited ("Cablevision") and the Bermuda Broadcasting Corporation ("BBC")

have reached an agreement whereby Cablevision has now elected to carry Channels 7 & 9. This is notwithstanding that, pursuant to the Regulation 12 of the Cable Television Service Regulations 1987, the BBC elected retransmission consent in a letter dated 29th October 2008 and that Cablevision, in response, appeared to confirm within 30 days of the date of that letter (i.e. by letter dated 28th November 2008) that it did not intend to carry Channels 7 & 9.

We have been in communication with Conyers Dill & Pearman, the attorney's for Cablevision who have advised us that Cablevision and Bermuda Broadcasting Corporation have indeed reached an outline agreement for Cablevision to carry channels 7 & 9 on a retransmission consent basis, but recognise that, if the parties are in to implement it, it will be necessary for the parties to be exempted from regulation 12 (5), to enable Cablevision to withdraw its election (or apparent election) not to carry those channels and now elect to carry them.

The Commission is of the view that it is in the public interest that Cablevision and BBC be granted the exemptions necessary for this to be done.

In light of this, we are instructed to convey to the Minister the Commission's recommendation that the Minister make an Order in the following terms:

> *1.Pursuant to section 66 of The Telecommunications Act 1986 ("the Act"), it is ordered that Bermuda Broadcasting Corporation ("BBC") and Bermuda Cablevision Limited ("Cablevision") are exempt from Regulation 12 (5) and 12 (7) of the Cable Television Service Regulations 1987 only insofar as:*
>
> *i. Cablevision may withdraw its apparent election in a letter dated 28th November 2008 from Cablevision's attorneys to the attorneys of BBC not to carry BBC's Channels 7 & 9 on the basis of retransmission consent; and*
>
> *ii. Cablevision must within 14 days of the date of the publication of this Order irrevocably confirm whether or not they intend to carry Channels 7 & 9 on a retransmission consent basis.*

iii. *If Cablevision confirms that it does so intend, then the Bermuda Broadcasting Corporation ("BBC") and Cablevision have 7 days (instead of 60 days) from the date of Cablevision's election to carry the Channels to reach a commercial agreement pursuant to Regulations 12(7).*

2.Save as aforesaid, Regulation 12 shall have full force and effect. Any resulting variation in the rates and charges of Cablevision's service will be subject to the approval of the Commission and subject to all other terms of ss 14, 23 and 24 of the Telecommunications Act, from which, for the avoidance of doubt, there is no exemption under the terms of this order."

25. The mediated settlement agreement contained the following clause which is particularly relevant to the Commission's impugned decision in this matter:

> "*2. That Bermuda Cablevision ('BCV') will agree to establish a tier available to any subscriber, who has any established level of service, which subscribers can elect to subscribe to at a rate to be fixed by the Commission. In any event, this clause and the following clauses are not effective unless the Commission fixes the basic tier rate at a level acceptable to BCV.*"

26. It was against this background that the February 17, 2009 letters were written by ASW. The commercial settlement was contingent upon the Commission fixing a rate which was acceptable to BCV which understandably wished some comfort that it would not be "flying blind" in reversing its previous decision not to carry the BBC channels on the requested basis. The First Comfort Letter was heavily qualified; Victor Lyon QC advised the Chairman before sending the letter that: "*I have told them in clear terms it does not bind the Commission in any way and that the Commission retains the full legal scope to betray Cablevision's trust completely once Cablevision have elected to carry the channels.*" The exemption supported by ASW on behalf of the Commission was granted by the Minister on February 20, 2009 making BR 15/2009, Bermuda Cablevision Limited and Bermuda Broadcasting Company Limited Exemption Order 2009. This Order provided in salient part as follows:

> "*2 Bermuda CableVision Limited is exempted from the 30 day limitation period in Regulation 12(5) of the Cable Television Service Regulations 1987 if— (a) it withdraws the apparent confirmation made on 28th November, 2008 that it did not intend to carry the Bermuda Broadcasting Company Limited channels 7 and 9; and (b) it confirms on or before 6th*

March, 2009 it intends to carry channels 7 and 9 on a retransmission consent basis.
3 Upon an exemption of Bermuda CableVision Limited under paragraph 2, Bermuda CableVision Limited and the Bermuda Broadcasting Company Limited are exempted from the 60 day period in Regulation 12(7) of the Cable Television Service Regulations 1987, provided that— (a) both parties make every effort to reach a commercial agreement within 7 days after the day that Bermuda CableVision Limited confirms its intention to carry the Bermuda Broadcasting Company Limited channels; and (b) failing the conclusion of a commercial agreement within that period, either party may immediately refer the matter to the Telecommunications Commission for determination."

27. Bearing in mind that the Commission and the Minister share the Department's staff, it seems reasonable to infer that the Commission through its staff (if not its members) was aware: (a) that ASW had on behalf of the Commission invited the Minister to make the Order, and (b) that the Minister had acted consistently with this invitation in making the Order, imposing a 14 day deadline for BCV to decide whether it wished to carry channels 7 and 9 on a retransmission consent basis. There is no evidence that the Commission or its staff took any steps during this period to indicate to BCV, BBC, the Minister or ASW that one or both of the ASW February 17, 2009 letters were sent without authority of the Commission. This is hardly surprising as the Commission is an entirely voluntary body dependent for technical and logistical support upon the staff of the Department who also owe potentially conflicting duties to the Minister. It seems clear that the Minister was happy, for whatever political or other public policy reasons, to facilitate a settlement of the BBC/BCV dispute. At this juncture with the Court of Appeal hearing still pending, it is important to remember, the legal position was that BCV was entitled to discontinue its existing service without the permission of the Commission. Nevertheless, BCV harboured anxieties about whether it should agree to change its position. In a February 19, 2009 email, when the Exemption Order had already been finalised, ASW sought to allay CDP's concerns. CDP on March 4, 2009 requested a meeting the next day to attempt to resolve their concerns. On March 5, 2009, one day before the last day for changing BCV's election, CDP wrote ASW as follows:

"*Further to your letter dated 17 February 2009 and our without prejudice meeting this morning, we set out the anticipated structure for the carriage of channels 7 & 9 by our client if our client agrees to retransmit those channels on a Retransmission Consent basis.*

The channels would be carried on a separate tier in accordance with the mediation agreement which you have seen. This tier ("the New Tier") would be available to all subscribers who currently subscribe to the Economy Tier.

Our client's tariffs under the anticipated structure would be as follows:

The price of the New Tier would be X, with X to be determined by the Commission.

The price of the Economy Tier would be reduced from its current price to ($30 less X)

Our client would be allowed to increase the prices of some of its higher (so-called luxury tiers) so that the revenue impact to Cablevision would be revenue neutral-in other words, revenue loss caused by the price reduction to the Economy Tier would be offset by price increases to luxury tiers.

We would be grateful for an indication that the anticipated structure would, as currently advised, be acceptable to the Commission."

28. The Second Comfort letter of March 5, 2009 was written in response to this entreaty:

"*This letter is written on instructions from the Telecommunications Commission.*

As we have already advised you, the Commission cannot give a binding or formal pre-approval of any tariff or tariff structure of which Cablevision may give notice to the Commission under s 23 (1) of the Telecommunications Act 1987 ("the Act")

However, the Commission has instructed us to say that, having regard to the proposed tariff structure and tariff set out in your letter of today's date, on the information currently available and as at present advised by Attride-Stirling & Woloniecki, the Commission would be minded to accept the principles of the proposed tariff structure and tariff there set out having regard (as they must) to the matters set out in s 24 (2) of the Act, in particular the principles that:

(1)Channels 7 & 9 should be in an optional tier outside the basic tier, subscribed to in addition to the basic tier and open to be selected as an option with any other tier selected;

(2)the price of the tier of the elements relating to channels 7 & 9 should in principle not exceed the value reasonably placed upon that service by Bermuda Broadcasting Corporation (i.e. currently $3 for the two channels per subscriber);

(3)The price of the basic tier should be lowered by the cost of the extra tier containing channels 7 & 9, so that those at the lower end of the economic spectrum will receive the basic tier plus channels 7 & 9 (if they opt for them) at the same $30 price as now;

(4)Cablevision can recoup the money lost on the reduction in price on the basic tier by raising the prices of the current tiers beyond the basic tier;

(5)There will need to be a migration period in which customers may elect to take the extra tier with channels 7 & 9 or not, following which period channels 7 & 9 will be dropped from the basic tier and carried as part of the special tier.

We hope the forgoing is of assistance to the Cablevision and Bermuda Broadcasting."

29. The first sentence of the Second Comfort Letter is relevant to the issue of apparent authority which is addressed separately below. The arguments relating to actual authority may be summarised as follows. As the crucial evidence comes from the Commission's side alone, it is this position which must primarily be considered. According to the Respondent's counsel's Skeleton Argument:

"*72. It is submitted that the evidence establishes that ASW did not have the actual authority to make those representations. It is further submitted that were not clothed with ostensible authority either. It should be borne in mind that the burden of proof is on the person alleging ostensible or apparent authority.*

73. ASW were on the evidence appointed to conduct the litigation which culminated in the judgments of the Supreme Court and the Court of Appeal referred to in Mrs. Berry's affidavit. As such they had the following authority:

'**797. Acts authorised by retainer in litigation.**
A solicitor whose name is on the record is authorised:
(1) to accept service of all documents which are not required to be served personally;
(2) to make formal written admissions in the course of proceedings for the purposes of those proceedings;

(3) to bind his client by a compromise of existing proceedings on terms which do not involve extraneous matters, unless the client has limited his authority and has communicated that limitation to the other side, and subject to the discretionary power of the court, if its intervention by making an order is required, to inquire into the circumstances and grant or withhold its intervention as it thinks fit;
(4) to refer the action to arbitration;
(5) to receive payment or tender of debt, damages or costs, except when the litigant or client is under disability, or to a particular person; and
(6) generally to act as the client's authorised agent in all matters which may reasonably be expected to arise for decision in the proceedings.
Accordingly, unless expressly authorised, the solicitor cannot bind his client by a compromise which extends to matters outside the action …"[1]

30. I accept the evidence of Angela Berry to the effect that, as far as she was personally concerned, the Commission only expressly engaged ASW in relation to the litigation and did not formally retain the firm in relation to the mediation. I accept the evidence of Ronald Simmons to the effect that he did not consciously instruct ASW to act in relation to the mediation and that, due to his absence overseas, he played no active role in authorising the Second Comfort Letter. However, in my judgment, ASW had actual (implied if not express) authority to act in relation to the Mediation on behalf of the Commission and to facilitate a settlement of the BBC/BCV dispute within the framework envisaged by the February 20, 2009 Exemption Order. If the Commission was comprised of even some full-time members or permanent staff dedicated to the statutory body alone, a special meeting might have been convened to deal with the concerns of BCV of which prompted the First Comfort Letter and which had not been resolved by the time the Second Comfort Letter was sought on March 5, 2009. By this juncture, considerable time and expense had been incurred by, in particular, BCV and the Commission (acting by their respective lawyers) towards the goal of having BCV agree to carry channels 7 and 9 by March 6 within the deadline contemplated by the Exemption Order. The option of persuading the Minister to make yet another Exemption Order with an extended deadline would not have been a straightforward one. In these circumstances it is entirely understandable that ASW approached the only Commissioner in the Island whom they could logically seek instructions from to approve the Second Comfort Letter, strongly motivated to ensure that the labours of so many would not have been in vain.

31. On March 6, 2009, CDP wrote to BBC on behalf of BCV electing to carry their channels on a retransmission consent basis. On March 9, 2009, ASW forwarded to the Chairman by email both a copy of the Second Comfort Letter and CDP's March 6 election letter.

32. Angela Berry in her March 11, 2009 report on the March 5, 2009 meeting to the Board described being "summoned" by Victor Lyon QC to ASW's offices to discuss the draft letter. She was perhaps not wholly familiar with the English legal tradition of solicitors being afforded an audience by regal leading counsel in Chambers, where advice is often

[1] *Halsbury's Laws of England*, Volume 66 (2009) 5th Edition, Title '*Legal Professions*'.

dispensed in so compelling a manner that only the bravest of solicitors or clients will dare to question it. Mr. Lyon, for his part, may well not yet have become wholly familiar with Bermuda's more informal legal communication style. Be that as it may, a clearly less than happy Mrs. Berry attended ASW's offices, suggested changes to the draft letter (at least one of which was incorporated in the final draft) and, I find, effectively authorised ASW to send the Second Comfort Letter. This conclusion is inevitable because (a) the documentary record does not suggest that any protest was uttered by Mrs. Berry, before the present proceedings, and in the immediate aftermath of the sending of the March 5 letter, and (b) the sending of the letter was retrospectively approved by the Commission.

33. As Mr. Hargun established through his careful cross-examination, when the Commission next met on March 11, 2009, Mrs. Berry (in true corporate lawyer fashion) sought ratification of her actions in attending the meeting at ASW's offices after which the Second Comfort Letter was sent. She did, not, according the meeting record, report that the letter had been sent without her consent. On the contrary, the transcript reads as follows:

> *"AB: Yeah, with regard to the conclusion that we've just had a summary of from Larry and Victor I was summoned to their office last Friday. There was a time sensitive matter ...and Ronnie was unavailable and they caught me at almost the 11th hour. So I went and they, essentially, CD and P's position was they wanted an indication from the Board...from the Commission...and we have said consistently, well you know, we remove/review/renew a thing. We can't pre-approve, particularly without seeing details, but with sufficient amending words I went ahead and gave a position for the Board that we may be...well I wanted to say we would be minded if they...the way they were spelled out the way that it is now, you know, because it's trying to get the objectives that we've been after all along. We would be minded to be, you know, approve it rather than the initial language they said we would. Let's back it down a bit, because we need to have the consensus of the Board. So, I really just wanted the Commission to approve, ratify and confirm that action by me on your collective behalves.*
>
> *CHAIRMAN: Yes,*
>
> *JC: Approve, ratify and confirm?*
>
> *AB: Yes.*
>
> *CHAIRMAN: Okay. All in favour, then? Thank you. And thank you, Angie for doing that."*

34. In the light of this somewhat garbled but essentially unequivocal record, it is not fairly open to this Court to find that the Commission did not, albeit retrospectively, approve the sending of the Second Comfort Letter.

35. Whether this ratification took place with or without each and every member of the Commission reviewing the letter which was sent is beside the point. The Commission had, at the very least, constructive knowledge of the letter which had been emailed to the Chairman two days before the meeting. Mrs. Berry told the Board in terms that she authorised ASW to give further comfort to CDP about the Commission's position and her actions in this regard were approved. It is equally irrelevant whether or not the Commission appreciated or considered at this juncture the public law implications of the Second Comfort Letter. All appeared to understand that Mrs. Berry had acted in the interests of all concerned ("*trying to get the objectives that we've been after all along")* under time-constraints which were as real as they were less than ideal. Ratification of her actions appears to have been sought and obtained without any debate as to whether the letter embodied any or all of Mrs. Berry's suggested changes. I infer from this that she did no more than to suggest changes to the letter, rather than to say, in effect: "You may only send the letter if you incorporate all my suggested changes".

36. While unsophisticated clients may seek to tell their lawyers what to do, professional clients rarely do so, unless the relationship with their lawyers has all but broken down. Professional clients hire lawyers to exercise legal and tactical judgment on their behalf, within certain general parameters; not to act as automatons obeying every command. While the clients, like jockeys astride racehorses, theoretically have the power to control the reins and apply the whip, the relationship is in practice usually one of collaboration, with the lawyer "horse" often exercising primary control. BCV and BBC were both acting through lawyers who had gained an intimate familiarity with the commercial dispute; ASW by early March, 2009 were in a similar position on behalf of the Commission.

37. While Mrs. Berry was understandably anxious about having authorised a potentially significant letter as the Commission's sole representative with the March 6, 2009 deadline breathing down everyone's backs, it is difficult to imagine what grounds she would have had for rejecting ASW's advice and seeking to positively demand what the final version of the letter should be. In the event, and quite unsurprisingly, Mrs. Berry's evidence did not support a finding that the Second Comfort Letter was sent by ASW contrary to her express instructions. And her eagerness to obtain ratification from the Commission at its next meeting for the role she had played in authorising the Second Comfort Letter, in light of the pivotal role this document would later play, is proof of how acute Mrs. Berry's corporate legal instincts are.

38. Accordingly, I reject the Respondent's submission that the Second Comfort Letter was sent without the Commission's authority.

Findings: was the Second Comfort Letter, alternatively, sent within ASW's apparent authority?

39. My primary finding is that the Second Comfort Letter was sent with actual authority. However it is ultimately clear, alternatively, that the letter was sent within the scope of ASW's apparent authority. From the perspective of CDP, BCV's lawyers, there was in light of the evidence outlined above no reason to doubt that ASW were not acting for the Commission. CDP themselves were acting for their clients both in relation to the Court proceedings and the mediation.

40. If ASW had, bizarrely, decided to sign the Mediation Agreement on behalf of the Commission, write the First and Second Comfort Letters "*on the instructions of the Commission*" and expend hours of lucrative billable time on a frolic of its own, the notion that CDP should have been aware of such a wildly improbable turn of events is itself devoid of any sense of reality and wholly lacking in evidential support. But the evidential position must be viewed through the prism of the applicable law on apparent authority, which one would hope would not be too far removed from the rules of common sense.

41. The Appellant submitted as follows in counsel's Outline Submissions:

> "25. *The law in this area was recently analysed in Dilton Robinson v Bank of Bermuda [2010] 29 Civ (6 June 2010). Where (page 11) the Chief Justice cited the following extracts from Brightman LJ's ruling in Waugh v Clifford [1982] Ch 374 at 387 and 388 with approval:*
>
> > *'The law thus became well established that the solicitor or counsel retained in an action has an* implied *authority as between himself and his client to compromise the suit without reference to the client, provided that the compromise does not involve matter "collateral to the action"; and* ostensible *authority, as between himself and the opposing litigant, to compromise the suit without actual proof of authority, subject to the same limitation; and that a compromise does not involve "collateral matter" merely because it contains terms which the court could not have ordered by way of judgment in the action; for example, the return of the piano in the Prestwich case, 18 C.B.N.S. 806; the withdrawal of the imputations in the Matthews case, 20 Q.B.D. 141 and the highly complicated terms of compromise in Little v. Spreadbury [1910] 2 K.B. 658.*

I think it would be regrettable if this court were to place too restrictive a limitation on the ostensible authority of solicitors to bind their clients to a compromise. I do not think we should decide that matter is "collateral" to the action unless it really involves extraneous subject matter, as in Aspin ***v***. Wilkinson *(1879) 23 S.J. 388, and* In re A Debtor *[1914] 2 K.B. 758. So many compromises are made in court, or in counsel's chambers, in the presence of the solicitor but not the client. This is almost inevitable where a corporation is involved. It is highly undesirable that the court should place any unnecessary impediments in the way of that convenient procedure. A party on one side of the record and his solicitor ought usually to be able to rely without question on the existence of the authority of the solicitor on the other side of the record, without demanding that the seal of the corporation be affixed; or that a director should sign who can show that the articles confer the requisite power upon him; or that the solicitor's correspondence with his client be produced to prove the authority of the solicitor. Only in the exceptional case, where the compromise introduces extraneous subject-matter, should the solicitor retained in the action be put to proof of his authority. Of course it is incumbent on the solicitor to make certain that he is in fact authorised by his corporate or individual client to bind his client to a compromise. In a proper case he can agree without specific reference to his client. But in the great majority of cases, and certainly in all cases of magnitude, he will in practice take great care to consult his client, and I think that his client would be much aggrieved if in an important case involving large sums of money he relied on his implied authority. But that does not affect his* ostensible *authority vis-à-vis the opposing litigant.'"*

42. The Respondents rely on the following propositions taken from *Halsbury's Laws of England*, Volume 66 (2009) 5th Edition, paragraph 1136 :

> "***—1136. Implied authority of counsel.***
> *Apart from such express authority as is conferred by his instructions, a barrister is ordinarily instructed on the implied understanding that he is to have complete control over the way in which the case is conducted, and has, unless and until his instructions are withdrawn, unlimited authority to do whatever he considers best for the interests of his client with regard to all matters that properly relate to the conduct of the case. This authority extends to all matters relating to the claim, including the calling and cross-examination of witnesses, challenging a juror, deciding what points to take, choosing which of two inconsistent defences to put forward, and even to agreeing to a compromise of the claim, or to a verdict, order or judgment. The implied authority of counsel to agree a compromise is limited, however, to the issues in the claim, and a compromise affecting collateral matters will not bind the client unless he expressly assents."*

43. I accept Mr. Diel's submission that if the question of apparent authority is analysed with regard to the question of whether the Mediation-related dispute was, in the requisite technical sense, ancillary to the ASW retainer in relation to the Court proceedings, no apparent authority to issue the second Comfort Letter may be found to exist. The subject-matter of the Court proceedings was the regulatory power of the Commission with respect to the discontinuance of an existing service. The underlying dispute between BBC and BCV to which the Mediation and the Comfort Letters related was completely collateral to court "action", and was not even a dispute to which the Commission itself was party. The Mediation Agreement in no way resolved the issue in the pending appeal to the Court of Appeal, which proceeded notwithstanding. The present position is to be distinguished from the more apposite situation of the settlement of the subject-matter of the contentious dispute, as in the British Industrial Tribunal context:

> "*It is well recognised that in accordance with normal common law principles, a party's solicitor has ostensible authority to bind their clients to such a conciliation agreement. This is so, even where the legal representative has settled the claim without or contrary to the client's instruction (see* ***Times Newspapers Limited v Fitt [1981] ICR 637****). Further, in the case of* ***Freeman v Sovereign Chickens Limited [1991] ICR 853****, a Citizens Advice Bureau adviser was held to have ostensible authority to negotiate and reach a settlement on behalf of a party, in circumstances where he was named in the originating application as the claimant's representative."*[2]

44. In my judgment, this analysis does not frame the relevant issue correctly, having regard to the applicable facts. The Second Comfort Letter and the entire involvement of ASW in facilitating a settlement of the dispute is more accurately characterised as a solicitor or

[2] N. Drennan QC (Chairman), *Gutulan-v-Rainbow Telecom*, Industrial Tribunals, Case Reference 811/07, Reasons for Decision, paragraph 5, a case not referred to in argument and cited here for illustrative purposes only.

other agent acting on behalf a client in a non-contentious setting. Having regard to the totality of the evidence, I find that the Commission held out ASW as having authority to write the Second Comfort Letter by knowingly permitting ASW, who were attorneys of record in related (but not ancillary) litigation to: (a) sign the Mediation Agreement on behalf of the Commission; (b) make representations to the Minister on behalf of the Commission resulting in the Exemption Order; and (c) write the First Comfort Letter on behalf of the Commission. Applying the well known agency law principles of apparent authority, BCV were in my judgment entitled to rely on the Second Comfort Letter as having been issued with the Commission's authority even if such authority was actually lacking. The application of these general agency principles may be illustrated by citing the following extract from the judgment of Dame Elizabeth Gloster in *Seb Trygg Holding Actiebolag-v-Manches* [2005]EWHC 35 (Comm) in a case which concerned termination of pre-existing authority:

> "85.*It was also common ground that, as a general rule, the putative agent cannot clothe himself with ostensible authority. SEB accepted that it does not rely on any of the exceptions to that rule. SEB, however, relies on the rule that an agent whose actual authority has been revoked will continue to have ostensible authority as regards a third party who has previously dealt with him and who has not had notice of the revocation. In support of that proposition, SEB relies on Article 123 in Bowstead & Reynolds on Agency, 17th Edition, and the Canadian case of Rockland Industries Ltd v Amerada Minerals Corp. of Canada [1980] 2 SCR 2, which approved the article. It states that:*
>
> > *'Where a principal, by words or conduct, represents or permits it to be represented that an agent is authorised to act on his behalf, he is bound by the acts of the agent, notwithstanding the termination of authority (unless perhaps by the death or insolvency of the principal), to the same extent as he would have been if the authority had not been terminated, with respect to any third party dealing with the agent on the faith of such representation, without notice of the termination of his authority'."*

45. Although the present case is not one of termination of authority, the analogy is apposite because ASW had actual authority to act in the related litigation and the Commission clearly knew that its attorneys were purporting to act on its behalf in relation to the Mediation for several weeks before the Second Comfort Letter was written and permitted ASW to continue to represent that it was acting for the Commission without contradiction. Moreover the broader general principle of ostensible authority is substantially the same:

> "*The law as to the circumstances in which an agent having ostensible authority binds his principal is not in doubt. Bowstead on Agency, 14th edition, at p. 235 puts the matter thus:—*

> *'Where a person by words or conduct represents or permits it to be represented that another person has authority to act on his own behalf, he is bound by the acts of such other person with respect to anyone dealing with him as an agent on the faith of any such representation, to the same extent as if such other person had the authority that he was represented to have, even though he had no actual authority.'"*[3]

46. This would be my finding were I required to find that ASW had no actual authority to issue the Second Comfort Letter.

Findings: does BCV have a legitimate expectation based on the representations made on behalf of the Commission in the Second Comfort Letter that its application in relation to the pricing of its carriage of BBC Channels 7 and 9 should be granted by the Commission?

47. The broad issue of whether the legitimate expectation contended for by BCV should be found to exist may best be addressed by using the sub-headings found in the Skeleton Argument of Mr. Diel and Mr. Myers, which helpfully identify the key legal elements of the umbrella issue.

<u>Preliminary issue-jurisdiction</u>

48. The Respondent's Skeleton Argument reads as follows:

> "8. *It is submitted as follows. The Commission had no jurisdiction in the narrow sense to enter upon an enquiry under section 24 of the Telecommunications Act 1986, because on the evidence no notice was given or received pursuant to the mandatory requirements of section 23 (1) and (2), fulfilment of which constitute a condition precedent to the Commission's jurisdiction under the former section. Those requirements are, in so far as relevant here, that there be a notice to the Commission containing proposed "rates and charges" (as defined) for a new service, or a proposed variation in rates and charges for an existing service, as well as a notice to the public in the approved form published in the required manner setting out the required matters. There was neither. As recognised in the Tariff Application, the application was premature. Accordingly, the Commission's decision purportedly made under section 24 in response to a notice under section 23 was made without jurisdiction in the narrow sense and therefore wholly void and a nullity.*
>
> *9. ……*
> *10. ……*

[3] Per Lord Jauncey, *British Bata Shoe Co Ltd v Double M Shah Ltd* [1980] ScotCS CSOH_4 (06 June 1980).

> *11. This approach to the question of nullity was recently confirmed by the Privy Council in McLaughlin15 and by the House of Lords in JJ [2008] 1 AC 385.*
>
> *12. The Minister could not, therefore, in the words of the learned Mr. Justice Kawaley, have "validly entertained" the appeal and his decision in relation to it was thus also without jurisdiction, void and a nullity.*
>
> *13. A similar problem affects the Court's jurisdiction. It is equally implicit in the language of section 60 that the decision appealed against is a valid one. Even if the Court has jurisdiction, the Court should hold neither the Minister, nor the Commission had jurisdiction in the narrow sense and that therefore the matter should be remitted for an application by the Appellant and decision by the Commission consistent with sections 23 and 24."*

49. Evaluating these arguments requires an understanding of the impugned decisions and how they were reached. The narrative of events outlined above ended with the March 11, 2009 Commission meeting at which I have found ASW's sending of the Second Comfort Letter as approved by Angela Berry was ratified by the Board as a whole.

50. Hopefully it does no disservice to all concerned to suggest that more attention was focussed on resolving the BBC/BCV commercial dispute and enabling BCV to change its election than on the regulatory process required to implement the desired resolution. The transcript of the March 11, 2009 meeting read as a whole suggests a somewhat wide-ranging discussion of what BCV proposed to do (based on a website announcement) without any or any focussed discussion on the implications of the Second Comfort Letter. The Chairman (at page 13) was alert to the importance of publication of the proposed new tariff for public input; Mr. Mussenden of ASW (at page 14 of the transcript) diplomatically explained BCV's expectations as follows:

> "*So, how would you, how do you see yourself approaching sorting that part out because they're asking you to sort out what the X is. And then after that it goes into the newspaper and then the public have a right to reply to that.*"

51. However, after the lawyers left the meeting, a more fluid debate seems to have taken place on the merits of the proposed new tariff system. No decision was taken, save for ratifying Angela Berry's attendance at ASW's offices to discuss the draft Second Comfort Letter. No further decision was required because BCV had yet to formally submit its new tariff system for approval by the Commission. This occurred on March 13, 2009 when CDP forwarded to ASW "*tariff filings pursuant to the Retransmission Consent agreement which provides for the Commission to determine the pricing for the new tier, the 'Broadcast Tier', and to re-price the Economy Tier.*" The March 13 letter anticipated, to some extent at least, the jurisdictional niceties raised by the Respondent's counsel in the context of the present proceedings as it went on to state as follows:

> "*Our client was unsure whether to actually sign the filing given the stated need to include a copy of the advertisement. As discussed, it seems premature to advertise given that the prices are yet to be determined by the Commission*
>
> *We look forward to an early meeting with the Commission so that the price of [X] can be determined.*"

52. In the tariff forms forwarded by CDP to ASW, under "*Dates of advertisement and name of newspaper:*" was written in manuscript hand: "*Cablevision will advertise the new tariff rates once the Commission has determined what X should be.*"

53. Neither of the March 5, 2009 letters, however, condescended to particulars as to the mechanics and timing of when the Commission was to determine the price of [X]. The ASW letter did not refer explicitly to this matter at all; instead it confirmed that, as regards the CDP letter, "*the Commission would be minded to accept the principles of the proposed tariff structure and tariff there set out.*" Obviously an important aspect of the proposed tariff structure entailed the determination by the Commission of the price of [X]; but whether it was agreed that this determination should take place prior to advertisement was also left to inference. The normal procedure would be for the carrier to determine the price of the service prior to filing and advertising an application under section 23(1), for the public to be able to comment on the price of a new or altered service (as seems self-evident from the relevant statutory provisions). The only reasonable inference to draw from the March 5, 2009 letters is that they each contemplated the Commission deciding the price of [X] before the application was formally filed and advertised. But the Respondent complains of a broader excess of jurisdiction on the Commission's behalf, asserting that the Commission wrongly entered upon a section 24(1) enquiry without complying with the mandatory advertisement provisions.

54. In a March 18, 2009 email to Ronald Simmons, Angela Berry and Ministry staff members, ASW enquired: "*Chairman, could you please inform us of your anticipated timeline for the determination of* [x] *for the BBC tier and the way forward.*" On March 19, 2009, the Court of Appeal allowed the Commission's appeal and the Chairman personally approved a Press Release which explained the Court proceedings and concluded as follows:

> "*After the Court of Appeal had heard the Appeal, Cablevision took advantage of that exemption and, as a result, lodged with the Commission its revised tariffs for carrying channels 7 and 9, and the Commission is very pleased to note that Cablevision proposes to carry channels 7 and 9 at no increase in the current cost to subscribers. The Commission hopes to approve Cablevision's new tariff structure as soon as possible, as well as to give its approval of arrangements under which subscribers can elect to receive channels 7 and 9 at no increase in their current costs of subscription.*"

55. Although the chronology is somewhat inaccurate (BCV submitted its proposed tariff before the Court of Appeal judgment, not afterwards), the Press Release clearly anticipated that the Commission would "*approve Cablevision's new tariff structure as soon as possible.*" This was not only consistent with what was contemplated in the Second Comfort Letter; it was remarkably unqualified and unrestrained, with no caveats about the need to elicit public input, let alone to advertise before the application could be considered. Far from diminishing any expectations flowing from the Second Comfort Letter, this Press Release fortified them. However, this script was gradually departed from. An initial meeting between a representative of the Commission and BCV representatives occurred after a Commission meeting on June 3, 2009. It was agreed that the Commission would request BBC to furnish information about their costs. The June 17, 2009 Commission Minutes, seemingly reported on this earlier meeting which took place without the lawyers who had been handling the matter through March being present. It was noted with reference to the proposed new tier that:

> "*TC and BCV lawyers had already agreed to this but the representatives in the meeting still did not know what was going on...TC clarified that even if their lawyer allegedly* [bound] *TC to the* [mediation] *agreement-they cannot follow it as it does not abide to the act.*"

56. The Commission's stance at this point, viewed from a comfortable distant perch affording the benefit of hindsight, gave the impression that the attempts to settle the BBC/BCV dispute culminating in the Mediation Agreement, the Exemption Order, the Second Comfort Letter, BCV changing its election on March 6, 2009 and the Commission's subsequent optimistic Press Release had never taken place. More astonishingly still, ASW on July 6, 2009 sent the Commission Chair, Mrs. Berry and Ms. Maxanne Anderson the following email which Mr. Ronald Simmons (under cross-examination) agreed was not responded to:

> "*We have had a call from Narinder Hargun in respect of the BCV application currently before the Commission. He has asked about a letter dated 5 March 2009 (attached) that was sent by ASW (Victor) to CDP in relation to the position of the Commission and the framework of any potential application. He states that the Commission has stated that they have not seen the letter.*
>
> *We recall that Ronald may have been off island on this date but that we discussed the letter with Angie. Also, we sent the letter to Ronald and others from 'our side' after the letter was sent to CDP. Please note that we would not have sent the letter without the permission of the Commission.*
>
> *We trust that this clarifies the matter for the Commission and that you are able to confirm to us your understanding of these circumstances...*"

57. BCV's counsel relied on this communication in support of the actual authority argument in relation to the Second Comfort Letter. By July, the Commission had long since ratified

Angela Berry's approval of the Second Comfort Letter; however, it now seemed that either such ratification took place without any Commission members being concerned to review the letter-which is somewhat surprising- or that the letter had since been misplaced and/or forgotten. It is impossible to refrain from observing that this administrative muddle which was evolving was due to a material extent to institutional weaknesses in the Commission's management structure. Its leading members in this matter were not retired worthies but active professionals in their prime with demanding independent careers. Based in part upon my own experience of serving on voluntary boards while in active private practice, it seems obvious that it must be extremely difficult to consistently handle such public functions with the degree of efficiency and care which they deserve while simultaneously meeting the often crushing commercial pressures of one's primary employment. Moreover, it appears that the Commission is required to share its staff with the Department of Telecommunications, whom one assumes owes overlapping (and potentially conflicting) duties to the Minister as well[4]. While this matter was not explored in argument or addressed by the evidence and these observations could be wholly misplaced, the materials before the Court suggest that the Commission has no full-time staff dedicated to meeting its needs alone.

58. It was perhaps because of these institutional weaknesses (sharpened by the fact that the Commission's clients are commercial entities with hard-nosed commercial needs), at least in part, that ASW was allowed to make the running in handling the BBC/BCV crisis, both in and out of court. Yet as soon as the BBC/BCV "patient" was taken out of the emergency department, the Commission (and perhaps BCV as well) appear to have assumed that the patient could be simply brought home without any further post-operative care. The patient's relapse did not occur quickly. Between July and October when the crucial Commission meeting took place, cost data was obtained from BBC. The meeting to consider the request to determine [x] took place on October 7, 2009. The Minute records that Angela Berry reported to the Commission that "*at a meeting March 5th at ASW a letter was sent in from CDP on behalf of BCV stating that they wanted the TC to approve a payment structure for recouping cost once the retransmission fee is sorted out. The letter also stated that the TC cannot give a binding pre-approval for any tariff under section 23 of the Act.*" This note amalgamates the contents of the two March 5, 2009 letters while only referring to the CDP letter. However, from the transcript of the meeting, it is clear that Mrs. Berry provided a clear and fulsome account of the March 5, 2009 letter which was read out at the meeting and seemingly circulated for the first time.

59. The transcript of the October 7, 2009 meeting runs to just over 51 pages. At page 28 there was what Mr. Hargun referred to as a "sea change in approach". A member suggested rejecting the concept of the new tier altogether. By the end of the meeting when it appeared that this was the consensus of the meeting, Angela Berry astutely observed: "*Not doing two separate tiers. That they're not going to be happy about, because that's what they were expecting.*"[5] The formal decision which came out of this meeting was

[4] Interestingly, the same Department staff members who according to the Minutes serve the Commission signed the Mediation Agreement on behalf of the Department with ASW signing on behalf of the Commission.
[5] Transcript, page 49.

not sent out until two months later. The December 8, 2009 letter stated in material part as follows:

> "BACKGROUND
>
> We refer to a letter dated 13th March, 2009 from Conyers Dill & Pearman, on behalf of its client Bermuda Cablevision Ltd. ("BCV"), attaching tariff filings for a proposed new tier, the 'Broadcast Tier', and for the re-pricing of BCV's existing Economy Tier, respectively. BCV requested that the Telecommunications Commission) Commission" set a price for the Broadcast Tier (stated as X) and to re-price its Economy Tier at $30.00 minus X.
>
> The Commission was made aware of a mediated agreement between the Bermuda Broadcasting Company ("BBC") and BCV dated 11th February, 2009 resolving a number of issues between the parties, including an agreement relating to this issue, i.e. the proposed value of BBC's syndicated rights to broadcast ABC and CBS networks, and its own copyright programs.
>
> The Commission requested cost data from BCV in letters dated 9th June, 2009 and 24th June, 2009 which letters were subsequent to request for information made in letters dated 22nd January and 31st March 2009.
>
> The Commission received a costing spreadsheet from BVC on 3rd July, 2009.
>
> The Commission wrote to BBC on 17th August, 2009 request cost data, a "broadcast content profile" and related viewership ratings relating to BBC's local broadcast operations and received the same on 9th September, 2009.
>
> The Commission considered the pricing of certain cable services in other jurisdictions.
>
> The Commission received information from its advisors on trends relating to the value of syndicated rights to broadcast ABC and CBS networks and on local broadcast content licensing fees for cable TV network in other jurisdictions.
>
> The Commission accepts that it is an industry standard that cable broadcasters have costs associated with the purchase of channel content.
>
> The Commission reviewed the tariff filings and, as required by the Telecommunication Act 1986, also considered the following:-

the cost to the Carrier of the service in question;

the desirability and need to subsidize other non profitable services offered by the Carrier in the public interest;

The applicant did not submit any information indicating that the Economy Tier is subsidizing any of its other tiers or service offerings.

the needs of the Carrier for adequate working capital and to establish reasonable reserves;

Based on financial data provided by BCV, it does not suffer from inadequate working capital and/or a lack of reasonable reserves.

international accounting standards where applicable and modifications thereto;

International accounting standards do not directly affect the tariff filings.

technological advances;

Technological advances have minimum on the tariff filings.

market conditions in Bermuda and overseas including the likely impact of a new service on other Carriers;

The Commission determined that an excessive rate covering the full production cost of BBC would adversely affect the local market.

regulatory changes where applicable;

There were no applicable regulatory changes that impacted the tariff fillings.

the need to afford investors a reasonable rate on return on their investment;

In the Commission's view, it is unlikely that the applicant's investors, will beyond the short term, experience a decline in their rate of return.

The question whether in the light of the foregoing, any proposed tariff is just and reasonable and any rates and charges contained therein are applied equally to all persons in substantially circumstances and conditions;

The Commission has no evidence before it that the applicant intends to apply for rebalancing of its rates and charges

the question whether the Carrier, in respect of the application of rates and charges, the provision of services and the use of its facilities-

gives any preference or advantage to any person or to any particular description of telecommunication;

subjects any person or any particular description of telecommunication to any disadvantage;

The Commission has no evidence before it that the applicant gives any preference or advantage to any person nor subjects any person to be disadvantage by the tariff filings.

the public interest.

The Commission found that it is in the public interest to retain the "Economy Tier", as to content and pricing, as is and to leave it unchanged.

The Commission carefully examined the BCV spreadsheet and specifically reviewed the Economy Tier costs provided by BCV for 2008 and for the period ending May 2009. The Commission also examined BCV's financial result for 2008 and examined its management reports for the period ending May 2009.

The Commission considered the effect on both BCV and BBC of a "pass through" fee that would be imposed on BCV for payment to BBC for BBC's original and likened copyright provided to BCV for retransmission/diffusion ("License Fee").

The Commission considered and examined the potential effect on BCV of a License Fee to BBC that would not be recoverable from an increase in its Economy tier tariff. The Commission considered the effect on the public of a possible increase in BCV's higher tier (not Economy Tier) pricing to offset the License Fee.

The Commission reviewed the possible effect to the local market of BCV's current rates and reviewed the possible effect to the local market of either higher or lower rates than current pricing.

The Commission reviewed the local broadcast fee paid by World On Wireless Ltd. to BBC pursuant to their agreement dated 1st February 2004, renewed 15th August 2008 (such agreement was provided to the Commission as confidential information pursuant to section 61B of the Telecommunications Act 1986).

The Commission reviewed and considered cost information provided by BBC.

BBC's copyright consists of two parts, that which is original content developed and owned by BBC and that which is licensed from ABC and CBS and for which BBC has the right to sub-license.

The Commission then considered the question of what would be a reasonable rate of return on the BBC copyright content. The Bermuda "cable" market is a mature market. Therefore, a return that provided a fair premium on the "risk-free rate" is reasonable. The risk-free rate is the rate the market demands for Government-backed securities and financial instruments. Recently, the Bermuda Government backed a preferred share offering with a coupon rate of eight (8) percent per annum; local bank financing being offered between 5.5% and 8%; local 5-year deposit rates are approximately 2.5%.

REASONINGS/FINDINGS

The Commission accepts diversity of local broadcasting is in the public interest over the air and/or over BCV's cable infrastructure.

The Commission finds that BBC has a license to broadcast ABC and CBS exclusively in Bermuda. BBC also has the copyright in certain original material authored by it and delivered over ZFB and ZBM.

The Commission determined that an increase in fee of BCV's Economy Tier was not in the public interest, at this time.

The Commission determined that it is not in the public interest to have a separate tier that allows the public to elect not to receive the local channels 7 and 9. The cost of managing a separate tier and, particularly, the confusion that would be created, the cost of managing the transition and the fact that local content should be available in the basic tier were all considered important factors.

The Commissions reasons that public freedom of choice is not hindered if these channels remain in the Economy Tier as the public has a choice or not to watch them.

The Commission determined nearly all of BCV's cable subscribers watch BBC broadcast content and expressed a desire to continue to do so.

The Commission determined the License Fee can reasonably be in the range of $.31 to $.40 per subscriber per channel, per month.

The Commission determined BBC is entitled to receive its direct costs plus profit. The direct costs per subscriber per channel for local and non-locally produced copyright content are $.36 and $.31, respectively. The total, including a return of

8% would be $.72 per subscriber per channel, per month. This amount is grossed-up for the 3% government tariff. However, as there is no separate Broadcast Tier, it was determined that there would not be a need for a provision for bad debts. Hence, no gross-up was made for this amount. Therefore, the maximum tariff for inclusion in the Economy Tier relating to the BBC copyright content is $0.75 per channel.

The Commission determined such a fee can be absorbed by BCV without hindering its present operations, working capital, or long-term profitability, and need to be passed through to its subscribers.

DIRECTION

The Commission hereby directs that:

BCV continues to provide its Economy Tier, with no diminution to the current channel lineup, at $30.00 per subscriber, per month;

The price to the public for the BBC copyright content be $0.75 per channel if provided on a stand-alone basis. The $0.75 fee per channel is bundled in the $30 per month subscriber fee for the Economy Tier and, hence, there is no cause for establishing a separate BBC channel charge.

Sincerely

Ronald E. Simmons, JP, CA

60. Was the December 8, 2009 decision made in excess of jurisdiction? There is considerable force to the argument that it was not open to the Commission to validly determine a section 23(1) application unless the advertising requirements were first met. However, it is factually either artificial or erroneous to find that the Commission's decision should be treated as a final decision under section 24(1) when no notice under section 23(1) was formally before them. All that was before the Commission was a request to determine the price [x] within the framework of the new two tier system set out in the CDP March 5, 2009 letter and referenced in the subsequent CDP letter to the Commission's attorneys ASW dated March 13, 2009. It was open to the Commission, appeal and/or public law arguments aside, to either accede to that request or refuse that request leaving BCV to file and advertise a formal application. If the Commission had determined the price [x], the March 5 correspondence assumed that the Commission would approve the proposed tier system at the pricing level the Commission itself had determined unless public input raised public policy considerations the Commission itself had not been able to identify. If the Commission surprisingly declined to determine the price of [x] and rejected the two-tier system as in fact occurred, BCV would have to elect whether to either (a) file an

application on a modified basis to that contemplated by the settlement agreement, or (b) pursue an appeal or public law remedies.

61. To the extent that the Commission purported to adjudicate a section 24(1) application on October 7, 2009 and in its December 8, 2009 hearing, I find that they had no jurisdiction to do so both (a) in legal terms, and (b) in factual terms, in that no application was placed before the body for consideration. These aspects of the Commission's decision are of no legal effect. However, the only substantial question on jurisdiction which in my judgment properly arises is whether the Commission had jurisdiction to determine the price of [x] as a pre-application matter at all. It was the refusal to do this which was in substance the subject of BCV's December 23, 2009 appeal to the Minister which was refused by him on February 3, 2010.

62. This jurisdictional challenge has not been made by the Respondent in the present case in explicit terms. It would be a curious point for the Respondent to be permitted to take having encouraged the Appellant to convert what started as a judicial review application (on the hypothesis that no private law remedy was available) into an appeal. It is also difficult to see how such a jurisdictional challenge would deprive the Court of considering whether a legitimate expectation may be found to exist which was the main plank of the original appeal. Instead, the Respondent both fairly and logically invites the Court, in the alternative, to consider whether the key elements of the public law legitimate expectation contended for are so inconsistent with the statutory scheme as to fall under the sword of the reasonableness requirement. It is in this context that this more limited jurisdiction question will be addressed below.

63. The Appellant deals with the jurisdiction argument in the following way based on the Minister's position as formulated before the hearing:

> "19.*The Minister's position is that the Decisions are ultra vires given the failure by BCV to advertise the creation of the proposed BBC Tier*[6].
>
> > *'Our position is that the Commission had no jurisdiction in the narrow sense to enter upon an enquiry under section 24 of the Telecommunications Act 1986 because there had been no notice given or received pursuant to the plainly mandatory requirements of section 23(1) and (2), fulfillment of which constitute a condition precedent to the Commission's jurisdiction under the former section. As you are aware, those requirements are in so far as*

[6] MDM to CDP, 25 June 2010.

relevant here that there be a notice to the Commission containing proposed "rates and charges" (as defined) for a new service or a proposed variation in rates and charges for an existing service, as well as a notice to the public in the approved form published in the required manner setting out the required matters. There was neither. The prematurity to which you refer is therefore part of the problem. Accordingly the Commission's decision purportedly made under section 24 in response to a notice under section 23 was made without jurisdiction in the narrow sense and therefore wholly void and a nullity.'

20.Both parties accordingly agree that the Decisions should be set aside.

21.The Minister believes the Court should give guidance to assist future deliberations by the Commission and CCV agrees that it is sensible for the Court to rule on whether a legitimate expectation did or did not arise.

20.Even though it is common ground that the Decisions are void, the Court is thus asked to rule on whether the Commission's conduct did or did not give rise to a legitimate expectation."

64. These submissions appear to implicitly accept that the only basis for challenging the Commission's purported decision under section 24(1) is in reliance on the public law doctrine of legitimate expectation. To that extent, and bearing in mind that the appeal to the Minister was substantially based on these public law complaints, it is unclear to me how the consensus that no valid decision was made at all by the Commission conceptually hangs together. It is clear that no valid application was made under sections 23 and 24 so that any purported adjudication of a non-existent application must be regarded as being a nullity. However, I am not satisfied that the more limited jurisdictional question of whether the Commission could validly have either (a) determined "[x]", or (b) declined to determine "[x]" within the context of the new tier system proposed (as in fact implicitly occurred) ought to be answered in the negative.

That question is best answered in the context of considering whether an actionable legitimate expectation arose in BCV's favour to the extent that it contends or at all.

65. I decline to deal with the additional jurisdictional point which was raised by Mr. Diel shortly before the hearing of the appeal and which was fortified by Additional Submissions tendered on the third day of the appeal. This was the surprising argument, in light of the Minister's making of the Exemption Order, that BCV's purported change of election was a nullity. As the Respondent accepts that the Commission's decision cannot stand for other reasons, this additional point (difficult and interesting as it may be and which-if accepted-could potentially cause considerable inconvenience and uncertainty and result in a tremendous amount of wasted private and public costs) need not be decided in the context of the present appeal. In any event, as Mr. Hargun rightly contended, it is not properly before the Court.

Findings: is the representation relied on unambiguous, unqualified and unequivocally clear?

66. The Respondent's Skeleton Argument cited numerous authorities in support of the proposition that the representation said to found a legitimate expectation must be unambiguous, unqualified and unequivocally clear. The Appellant's Outline Submissions articulated the following interpretation of this area of the law:

> "34.*The following legal propositions will be familiar:*
>
> *a. First, assurances giving rise to legitimate expectations do not need to meet the tests in private law for estoppel or contractual promises;*
>
> *b. Second, assurances giving rise to legitimate expectations may be broken/frustrated, but the public authority needs compelling reasons to frustrate such an expectation and the burden rests upon the authority to set out the compelling reason;*
>
> *c. Third, assurances as to a public authority's future conduct are not ultra vires because they fetter or purport to fetter the public authority's ultimate discretion.*
>
> *35.As regards the first proposition, this is made clear Simon Brown LJ by R v Inland Revenue, ex parte Unilever [1996] BTC 183, at 195*
>
> *'To confine all fairness challenges rigidly within the MFK formulation – requiring in every case an unambiguous and*

unqualified representation as a starting point – would to my mind impose an unwarranted fetter upon the broader principle operating in this field: the central principle in Associated Provincial Picture Houses Ltd v Wednesbury Corp [1945] 1KB 223 that an administrative decision is unlawful if "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.' "

67. Mr. Diel rightly submitted that the *Unilever* case was an exceptional case and that ordinarily, there must be a clear and unambiguous representation to found a legitimate expectation. This argument was supported by reference to the judgment delivered by Dyson LJ on behalf of the English Court of Appeal in *R (ABCIFER)-v-Defence Secretary* [2003] 3 WLR 80 at 102-103, the following passages in which I found to be crucial:

"72.Thus it is clear that it will be only in an exceptional case that a claim that a legitimate expectation has been defeated will succeed in the absence of a clear and unequivocal representation. That is because it will only be in a rare case where, absent such a representation, it can be said that a decision-maker will have acted with conspicuous unfairness such as to amount to an abuse of power. In the Unilever case, the taxpayer had, in effect, been lulled into a false sense of security, and had regulated its tax affairs in reliance on the Revenue's course of conduct, and thereby acted to its detriment. In those circumstances, and in the light of the Revenue's acceptance of its duty to act fairly and in accordance with the highest public standards, it is not surprising that the court felt able to treat this as a wholly exceptional case.

73. We fully accept that, as Sir Thomas Bingham MR put it, the categories of unfairness are not closed and precedent should act as a guide, and not as a cage. But the facts of the present case are very far removed from those in Unilever. In our view, there is no warrant for treating this case as so exceptional that the need for a clear and unequivocal representation to found a legitimate expectation can be dispensed with. Moreover, for the reasons mentioned previously, ABCIFER were not misled by the announcement of 7 November. They did not act to their detriment in reliance on what was said by Dr Moonie. Even if they had been misled, this is not a case of such conspicuous unfairness as to amount to an abuse of power. Despite the fact that, unwisely, Dr Moonie said that the review had been completed, it was apparent that the details still had to be worked out. It is unfortunate that he

did not articulate in his announcement what had been finally determined and what still remained to be worked out. There was, therefore, scope for misunderstanding. But in our view, it went no further than that. The facts fall far short of what would be required to mount a case of conspicuous unfairness and abuse of power."

68. This case usefully illustrates what type of statement may lack sufficient clarity. A statement was made by the Under-Secretary of State to Parliament about compensation to be paid to former prisoners of war which did not particularize definitively the eligibility criteria. It was later clarified that only British subjects or those with patrial ties to the United Kingdom would be eligible. Not only was the initial statement unclear; any persons who might have subsequently discovered they were excluded from the scheme did not act to their detriment. In the present case, BCV appealed to the Minister against the Commission's December 8, 2009 decision on the following principal grounds:

> "*31. The letter dated 4th[sic] March 2009 contained a clear and unequivocal representation that the commission supported the creation of the Broadcast Tier. The Commission knew BCV would be relying on the assurance. Indeed, the purpose of the letter of 4th [sic]March was to persuade BCV to make the statutory election and proceed with the Retransmission Agreement.*"

69. The Minister's Decision stated as follows:

"Introduction

This is an appeal to the Minister responsible for Telecommunications of the Decision of the Telecommunications Commission ("the Commission") contained in a letter dated 23 December 2009 from Conyers Dill & Pearman ("the Appeal"). The Decision directed Bermuda Cablevision Limited ("the Applicant") as follows:

"The Commission hereby directs that:

1) BCV continues to provide its Economy Tier, with no diminution to the current channel lineup, at $30.00 per subscriber per month;

2) The price to the public for the BBC copyright content be $0.75 per channel if provided on a stand-alone basis. The $0.75 fee per channel is bundled in the $30 per month subscriber fee for the Economy Tier and, hence, there is no cause for establishing a separate BBC channel charge."

1. The directive was signed by the Chairman of the Commission and set out the following: the Background; the determinative process of the Commission; the factors the Commission took into account in the matter {as per its statutory requirement}; and the Reasoning and Findings of the Commission.
2. The Appeal is twofold: firstly, the Applicant submits that the Decision ignores previous assurances by the Commission and, by doing so breaches the Applicant's legitimate expectation and/or constitutes an abuse of power; secondly. The Applicant

submits that the Decision fails to give proper weight or take into account relevant factors. Those factors cited were: (i) the commercial agreement reached between BCV and BBC, which the Applicants say was instigated, encouraged and approved by the Commission; and (ii) the commercial impact on BCV and BBC and the legal uncertainty caused by the Decision.

Legitimate Expectation

3. Central to this appeal is the alleged assurance which the Applicant says forms the basis of the legitimate expectation of the Applicant. This was in the form of a letter to the Applicant dated 5 March 2009 [annexed for ease of reference]. The important words of this letter are in the opening caveat which are as follows: "As we have already advised you, the Commission cannot give binding or formal pre-approval of any tariff or tariff structure of which Cablevision may give notice to the Commission under s 23(1) of the Telecommunications Act 1987 ("the Act"); then these words in the next paragraph "*However, the Commission has instructed us to say that, having regard to the proposed tariff structure and tariff set out in your letter of today's date,* ***on the information currently available*** *and as present advised by Attride-Stirling & Woloneicki, the Commission would be minded to accept the principles of the proposed tariff structure and tariff there set out having regard (as they must) to the matters set out in s 24 (2) of the Act, in particular the principles that:…[emphasis added]"* and the author of the letter set out essentially the "*anticipated structure"* as set out in the Applicant's letter of 5 March 2009 [annexed for ease of reference along with the Retransmission Agreement which was made on 6 March 2009 between the parties].

4. I am bound when assessing if the letter, or any of its contents, amounted to an undertaking by a decision maker, in this instance the Commission, to take account of decided case law. In Bermuda case of *Marshall v Marshall of Labour, Home Affairs & Public Safety* [2006] Bda L.R. 15, Justice Bell in his judgment said that "*In [R v North East Devon Health Authority ex parte Coughlan [2001] QB 213], Lord Woolf said that the starting point, where a member of the public, as a result of a promise or other conduct, has a legitimate expectation that he will be treated in one way and the public body wishes to treat him or her in a different way, is to ask what in the circumstances the member of the public could legitimately expect. This, said Lord Woolf, could involve a detailed examination of the precise terms of the promise or representation made, the circumstances in which the promise was made and the nature of the statutory or other discretion."*

5. Following judicial guidance I turn to examining the circumstances in which the promise was made. Counsel for the Commission and Counsel for the Applicant had a without prejudice meeting at the offices of Attride-Stirling and Woloneicki ("ASW") on 5 March 2009 to discuss the anticipated structure following an election of transmission consent which was due 6 March 2009. The Applicants in their March 2009 letter asked for an indication from the Commission that the anticipated structure

would be acceptable to the Commission. ASW composed a letter in reply but before the letter was sent to CDP, one member of the Commission was asked to read and approve of its contents. The Commissioner signed off on the letter's contents after ensuring that the letter made clear that any consideration by the Commission to accept the proposed principles of the anticipated structure would have to be made after a review by the full Commission which would have to consider the tariff structure and tariff proposed having regards to section 24(2) of the Act. What is of importance to my decision is that the Applicant's attorney was present at the bilateral attorneys meeting and had knowledge of the conditions and caveats flowing from their discussions and later reflected in the specific words of the 5 March 2009 Letter. The Applicants Appeal clearly disclose the caveats and conditionally set out in the letter but reach a wholly unreasonable interpretation of the words in the letter. As a matter of pure interpretation there is a world of difference between "accept *the principles of the proposed tariff structure and tariff"* and " accept the tariff structure and tariff principle". Further, any such consideration was stated to be "*on the information currently available´* and present to the Commission and on that date the parties had not yet entered into an agreement.

6. In addition, throughout the body of the Appeal the Applicant submits that the Commission: "cajoled" the parties into reaching a commercial settlement; involved itself in/instigated the negotiations; secured all negotiations; secured the necessary ministerial exemption for the Retransmission Agreement; attended all negotiations as a participant; and was intimately involved in the Retransmission agreement. The facts, which were within the knowledge of the Applicant and their attorney, are that it was at all times representatives of the Department and ASW who were talking and taking an active role in the exchange process not the Commission since the Commission wanted to stay neutral and "out of it" so that when it was time to deliberate they were not conflicted in any way, This is another non-disclosure by the Applicant that is relevant to my Decision. Further; the Appeal omits a very important fact which is that everyone present during the negotiations was required to keep the discussions and agreements confidential. This meant that representatives from the Department and ASW did not disclose the contents of the negotiations or agreement to Commission members. A failure to disclose material facts is relevant to my decision in this Appeal.

7. A detailed examination of the precise terms of the promise or representation is also required and advisable. The words under the microscope are as follows: "…*the Commission would be minded to accept the principles of the proposed tariff structure and tariff there set out having regard(as they must)to the matters set out in s 24(2) of the Act…"* Accept of the principle of the Applicant's proposal is a sine qua non of the Commission's deliberative process and their statutory duty then arises to apply the statutory considerations to the proposal (which sets out the principle submitted for consideration). In short acceptance of the principles of the proposed tariff structure and tariff is not the same as approval of the tariff structure and tariff.

8. The 5 March 2009 letter on behalf of the Commissioners was subject to a number of relevant or important caveats. Firstly, there was an opening caveat that the Commission cannot give a binding or formal pre-approval of any matter of which it becomes seized under section 23. Secondly, there was the caveat that the Commission must have regard to the statutory principles contained in section 24(2) notwithstanding acceptance of the principles of the Applicant's tariff structure and tariff. Finally, though not as important, the letter was headed 'Without Prejudice'. These caveats are clear conditions which when taken together with a careful assessment of the words of the letter and the circumstance in which the words were made prevented any purported undertaking given in the letter rising to the level of a promise by a decision maker bearing a meaning as has been contended for by the Applicants and/or giving the Applicants the basis for having a legitimate expectation as that term is understood in law.

9. Justice Bell in his judgment in the Bermuda case of *Marshall v Minister of Labour, Home Affairs & Public Safety* [2006] Bda L.R. 15, quoted a passage used in the Plaintiffs' submissions which was taken from the case of *AG of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629. In this passage the Plaintiffs submit how the application of legitimate expectation is properly applied and quotes the following from page 638: "*the justification for it is primarily that, when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and implement its promise, as long as implementation does not interfere with its statutory duty"* I find this passage helpful to me and of direct application to this Appeal for it gives guidance on matters of procedure present in this case. The Applicant had been advised that the Commission when following its procedure would accept the principle of the Applicant's tariff structure and tariff but would also as it was bound to do have regard to the statutory matters contained in section 24(2). In my view the letter as composed was quite incapable of giving a reasonable applicant a legitimate expectation of a promise of pre-approval of its tariff structure or tariff. Any other interpretation as contended for by the Applicant results in a direct and clear interference with the Commissioners' statutory duty in the sense that what the Applicant contends amounts to wholesale undermining of the Commissioners' duty to take the section 24(2) matters into account. And for the above reasons, I find that no promise or undertaking was made by the Commission that rose to the level of a legitimate expectation. I find that no abuse of the Commissioners' powers occurred on the present facts. I find that the Commision applied the statutory matters of section 24(2) to the Applicant's notice under section 23 of the Act in a fair and deliberative way which they where bound to do. Lastly, I find that the Applicants, who were expecting equitable principles to be applied in their favour, did not disclose relevant facts relating to the circumstances of how the letter on the Commissioners' behalf and any purported promise was made; and the non-disclosure of material facts within the context of the appeal suggest and/or reveals a weakness in the Applicant's contention for the presence of a legitimate expectation and therefore in their Appeal.

There is a more fundamental point and it is this, for the Applicant to contend for a result that a legitimate expectation is to be made out in these particular circumstances where its existence depends on a public body or decision maker relinquishing its statutory duty to sustain its existence is unreasonable and not sound in principle or law.

Uncertainty

10. The Applicant also argues that the Decision of the Commission has produced uncertainty in the market. It is further suggested that the Commission 's Decision to set the fees was ultra vires because: the parties did reach commercial terms; neither party made a Regulation 12(7) reference to the Commission; and so the Commission had no jurisdiction to set fees. I do not accept that any aspect of the Decision was ultra vires or beyond the Commission's jurisdiction. The Applicant plainly submitted to the jurisdiction of the Commission of its duties, including the Commission's jurisdiction for the approval or disallowing or changing of new services and the rates and charges in respect of any section 23 notice matter which was well within the Commission's statutory remit under section 24(1) and (2). I accordingly find that no uncertainty was introduced to the market by the Decision.

Abuse of Power

11. The Applicant also submits in their Appeal that the Commission has abused its position and acted in an unprincipled manner and contrary to law; because I have found, and am not persuaded, that the 5 March 2009 letter rose to the level of promise to pre-approve the Applicant's tariff structure and tariff, the Applicant's arguments submitted fall away and have no merit.

Decision

12. For the reasons set out above, the Appeal is accordingly refused.

Sincerely,

Michael Scott"

70. In my judgment the Second Comfort Letter, against the background of the February 17, 2009 correspondence between the Commission and both BCV and the Minister combined with the making of the Exemption Order, is an entirely different proposition. In my judgment the following unambiguous, unqualified and unequivocally clear representations were made in the March 5, 2009 ASW letter sent on behalf of the Commission to CDP on behalf of BCV:

    (a) the Commission was "*minded to accept the principles of the proposed tariff structure*" set out in CDP's March 5, 2009 letter (i) "on the

information currently available" and (ii) "*having regard…to the matters set out in s 24(2) of the Act*";

(b) in particular, the Commission accepted the following principles:

"*(1)Channels 7 & 9 should be in an optional tier outside the basic tier, subscribed to in addition to the basic tier and open to be selected as an option with any other tier selected;*

(2)the price of the tier of the elements relating to channels 7 & 9 should in principle not exceed the value reasonably placed upon that service by Bermuda Broadcasting Corporation (i.e. currently $3 for the two channels per subscriber);

(3)The price of the basic tier should be lowered by the cost of the extra tier containing channels 7 & 9, so that those at the lower end of the economic spectrum will receive the basic tier plus channels 7 & 9 (if they opt for them) at the same $30 price as now;

(4)Cablevision can recoup the money lost on the reduction in price on the basic tier by raising the prices of the current tiers beyond the basic tier;

(5)There will need to be a migration period in which customers may elect to take the extra tier with channels 7 & 9 or not, following which period channels 7 & 9 will be dropped from the basic tier and carried as part of the special tier";

(c) (by necessary implication)the Commission would determine X as proposed in CDP's March 5 letter based on the principles set out in (b);

(d) (by necessary implication)the Commission could not legally preclude itself from taking into account any additional and compelling policy considerations of which it was presently unaware but which might come to light as a result of advertisement of the final BCV application pursuant to section 23(1).

71. In the absence of authority on this interesting and important point I find that the doctrine of legitimate expectation cannot be excluded simply by stating that "*the Commission cannot give a binding or formal preapproval or any tariff or tariff structure of which Cablevision may give notice the Commission*", inserting "without prejudice" at the top of the letter or otherwise including similar wording amounting in substance to a reservation of rights. I reject the Respondent's submissions to this effect: Skeleton Argument, paragraphs 29-43. If such contentions were sound, public authorities would have long since evolved protocols for including such qualifying words in policy statements to oust the application of the doctrine. The reason why a mere reference to the statutory position cannot oust the public law remedy the appellant contends for is that the raison d'etre of the public law remedy is to hold public authorities to promises they cannot be held to as a matter of private law. In this regard, Mr. Hargun aptly cited the following passages from this Court's Judgment in *Junos-v- Minister of Tourism and Transport* [2009] Bda LR 26:

> "*71. The applicable law has been summarised by Mance LJ in the English Court of Appeal as follows:*
>
> > *'The public law doctrine of legitimate expectation exists as a common law control on the exercise of powers by a public body. If a public body, by words and conduct, creates or encourages a legitimate expectation, the expectation may, according to the circumstances, be viewed as procedural or substantive: see R v North and East Devon HA, ex p. Coughlan [2001] QB 213 , (decided July 1999) para. 57. Lord Woolf CJ there identified as the relevant question:*
> >
> > *"But what was their legitimate expectation?". His answer was that it might merely be (1) to oblige the public authority to "bear in mind the previous policy or other representation, giving it the weight it thinks right, before deciding whether to change course" (in which case he suggested that the court would be confined to reviewing the decision on Wednesbury grounds); or it might be (2) to give persons affected by the potential change to be consulted before any decision was taken; or it might be (3) to entitle persons affected to a substantive benefit and, in a proper case, to entitle them to object that any change would be so unfair that it would be an abuse of process for the authority to change course.'*
>
> ....
>
> *74. The purpose of the public law doctrine of legitimate expectation is to prevent public authorities from departing from promises they have*

> *made (and which in private law may be non-binding) in circumstances where such departure would be so unfair as to constitute an abuse of the interests of good administration. A judicial review applicant for relief based on the doctrine of legitimate expectation has quite a high evidential and legal threshold to meet.*"

72. The appellant has met the requisite factual and legal threshold for finding that a legitimate expectation based on a representation or promise exists. However, if I am wrong in this primary conclusion, I would find in the alternative that this was an exceptional case where BCV "*had, in effect, been lulled into a false sense of security, and had regulated its…affairs in reliance on the* [Commission]*'s course of conduct, and thereby acted to its detriment": R (ABCIFER)-v-Defence Secretary* [2003] 3 WLR 80 at 102G. The Commission's course of conduct, it cannot be repeated too often, included: (a) the facilitation of the Mediation Agreement[7] which led to the settlement of the BBC/BCV dispute; (b) the First Comfort Letter; (c) the request to the Minister which resulted in the Exemption Order; and (d) the Second Comfort Letter. This resulted in BCV electing to re-broadcast channels it had previously declined to carry because it felt it had negotiated acceptable terms for so doing.

Does the alleged legitimate expectation yield to the statutory context?

73. Messrs. Diel and Myers' Skeleton Argument contends as follows:

> "*44.It is uncontroversial that the Courts will only give effect to a legitimate expectation in the statutory context in which it has arisen; that any expectation must yield to the terms of the statute under which the decision-maker acts; and that, accordingly, where a public authority makes a representation that is has no power to honour or which would lead to a conflict with its statutory duty, that representation will not generate a legitimate expectation that is enforceable against the decision maker.*
>
> *45. One important aspect of these principles of particular relevance to this case is that where the statute provides for the participation of the public in the statutory decision making process, the matter is not simply one for agreement between the particular functionary and a particular person – the public at large is entitled to be involved. If the statutory procedure entitles the public to be involved in the decision making process therefore it would be a very rare case where a legitimate expectation could arise in relation to the making of a particular decision (for example, where it is clear that there is no third party interest or public interest in the matter).*

[7] This conclusion is not affected by the fact that the Mediation Agreement itself was heavily qualified, the Minister's counsel's contrary submissions notwithstanding: Skeleton Argument, paragraphs 25-28.

……

50. In sum, a public body cannot be held to a legitimate expectation if to give effect to it would involve the public body in doing something which in some way conflicts with the parameters of its powers and functions under its enabling statute. No legitimate expectation can prevent a public body from performing its duty under its enabling statute. It also cannot be held to a legitimate expectation where the statutory process involves or engages the public and the public is entitled to participate in the decision making process in that way, other than in the rarest of circumstances. A legitimate expectation must yield to the terms of the statute under which the decision-maker acts."

74. I accept these submissions as accurate statements of the relevant principles. The Respondent's counsel go on, after setting out sections 14, 23 and 24 of the Act, to make the following substantive submissions:

"*58.It is submitted as follows. Firstly, the public is entitled to participate in accordance with these sections. Provisions such as these for public notice, consultation and participation are usually held to be mandatory. Secondly, notice must be given of proposed rates and charges or a proposed variation in rates and charges and the amount thereof. A notice not specifying rates and charges in this sense would not be a subsection (1) notice. This is confirmed by the nature of the directions the Commission can give under section 24, set out above. Each paragraph presupposes that a proposed rate and charge will be submitted. That can only mean an amount. This is also confirmed by the public nature of the notice. What the public wants to know, and is entitled to know, clearly, is what the monopoly intends to charge it for its services. Thirdly, the Commission's jurisdiction to enter upon an enquiry and generally to act under section 24 is circumscribed by the introductory words of the section, which refer to receipt of a subsection (1) notice. Receipt of something else therefore would not trigger the Commission's jurisdiction under section 24. Receipt of a subsection (1) notice is a condition precedent to such jurisdiction.*

59.In short, the Commission cannot act under section 24 without the participation of the public, whose interest it is expressly required to consider under the section, and cannot act except in relation to a notice specifying rates and charges of a particular amount.

60. If the Commission does act under section 24 in relation to a proper subsection (1) notice, then it is mandatorily required to have regard to certain things, which are listed in section 24 (2), as follows:

(i) the cost to the Carrier of the service in question;

(ii) the desirability and need to subsidize other non-profitable services offered by the Carrier in the public interest;

(iii) the needs of the Carrier for adequate working capital and to establish reasonable reserves;

(iv) international accounting standards where applicable and modifications thereto;

(v) technological advances;

(vi) market conditions in Bermuda and overseas including the likely impact of a new service on other Carriers;

(vii) regulatory changes where applicable;

(viii) the need to afford investors a reasonable rate of return on their investment;

(ix) the question whether in the light of the foregoing, any proposed tariff is just and reasonable and any rates and charges contained therein are applied equally to all persons in substantially similar circumstances and conditions;

(x) the question whether the Carrier, in respect of the application of rates and charges, the provision of services and the use of its facilities--

(a) gives any preference or advantage to any person or to any particular description of telecommunication;

(b) subjects any person or any particular description of telecommunication to any disadvantage;

(xi) the public interest.

61. The Commission therefore cannot make a decision under that section without proper consideration being given to all of the listed factors.

……

The application of the principle that legitimate expectation must yield to the statutory context in this case

63. The legitimate expectation alleged here is the expectation that the Commission would approve the Tariff Application, which did not present any rate or charge to the Commission or any variation in any rate or charge, but rather asked the Commission to create a rate, to apply that rate to a new Broadcast Tier and to re-calculate the rate for the current Economy Tier by subtracting from it the amount of the created rate for the new Tier, on the basis that the channels which were going into the new Tier were coming out of the current Economy Tier. In addition, as the covering letter shows, the notice that was given to the Commission was not published in the newspapers as required by section 23. This, as was explained in the letter, was because "it seems premature to advertise given that the prices are yet to be determined by the Commission".

64. Moreover, the Tariff Application contained very little or no supporting information regarding cost or any of the other factors set out in section 24. As the evidence shows, some information was later provided, after various meetings and much delay. That information, to which the Commission was required to have regard under section 24, was therefore not available to the Commission when the legitimate expectation is said to have arisen, namely, at the very latest, when the letter of 5th March, 2009 was sent.

65. Therefore the promise to approve the Tariff said to have been made as at 5th March, at the latest, was a promise to approve a tariff without regard to the matters the Commission was required to have regard to under section 24; a tariff which did not and could not, given the nature of the scheme, name a proposed rate and charge, as required by section 23 and which therefore could not be approved under section 24, as none of the listed directions the Commission was capable of making could apply to it; and a tariff which required the participation of the public for its effective approval. In light of the nature of the statutory scheme, already referred to, and to paraphrase the language of the authorities cited, this was a promise the Commission had no power to make, an expectation which it had no power to honour, in a public context where the approval was not simply a matter for bilateral agreement between itself and a Carrier. It is therefore submitted that on settled authority the legitimate expectation here said to have been created and here sought to be enforced could not have been created and cannot be so enforced."

75. This argument attacks head on the legitimate expectation which BCV apparently contends for; namely a substantive expectation that the two tier system would be approved without regard to public input following advertisement. However, in my judgment such an expectation would not be a reasonable one having regard to the statutory scheme. Indeed, when the scope of the expectation contended for in the context of the present appeal is carefully analysed, BCV does not contend that no advertisement should take place at all. Nevertheless, the precise boundaries of the expectation are neither fully explored nor precisely articulated. In Messrs Hargun and Adamson's Outline Submissions, the position is formulated as follows:

> "46. *It is correct that the creation of the BBC tier ultimately needs to be advertised. This was understood by all parties. Indeed the reasons why BCV were waiting for [X] to be decided first was explained to the Commission at the March 11 meeting by ASW, with ASW stating that they also thought it sensible to wait [B135, line 29 onwards]. Equally as ASW explained the public was and is expected to broadly approve of the solution…*
>
> ……

48. BCV clearly had an expectation that the BBC Tier would be approved. Ms Berry acknowledged this when she told the Commission at the October meeting that BCV is 'not going to be happy about [that], because that's what they were expecting' [192, line 7]. The issue before the Court is whether BCV's expectation was legitimate. It is submitted that there is nothing so reasonable or legitimate as a regulated commercial entity believing in its regulator. "

76. As noted above when considering whether the representation relied on was sufficiently unambiguous, unqualified and unequivocally clear, in my judgment the only legitimate expectation which potentially arose from the conduct of the Commission relied upon by the Appellant was as follows:

> "(a) the Commission was "*minded to accept the principles of the proposed tariff structure*" set out in CDP's March 5, 2009 letter (i) "on the information currently available" and (ii) "*having regard…to the matters set out in s 24(2) of the Act*";
>
> (c) in particular, the Commission accepted the following principles:
>
> "*(1)Channels 7 & 9 should be in an optional tier outside the basic tier, subscribed to in addition to the basic tier and open to be selected as an option with any other tier selected;*
>
> *(2)the price of the tier of the elements relating to channels 7 & 9 should in principle not exceed the value reasonably placed upon that service by Bermuda Broadcasting Corporation (i.e. currently $3 for the two channels per subscriber);*
>
> *(3)The price of the basic tier should be lowered by the cost of the extra tier containing channels 7 & 9, so that those at the lower end of the economic spectrum will receive the basic tier plus channels 7 & 9 (if they opt for them) at the same $30 price as now;*

(4)Cablevision can recoup the money lost on the reduction in price on the basic tier by raising the prices of the current tiers beyond the basic tier;

(5)There will need to be a migration period in which customers may elect to take the extra tier with channels 7 & 9 or not, following which period channels 7 & 9 will be dropped from the basic tier and carried as part of the special tier";

(c)(by necessary implication)the Commission would determine X as proposed in CDP's March 5 letter based on the principles set out in (b);

(d)(by necessary implication)the Commission could not legally preclude itself from taking into account any additional and compelling policy considerations of which it was presently unaware but which might come to light as a result of advertisement of the final BCV application pursuant to section 23(1)."

77. This precluded the Commission as a matter of public law from departing from its representations, which embodied the implication that the public policy analysis carried out in the October 7, 2009 meeting had already been undertaken and completed, unless compelled to do by an entirely new view of the applicable public policy considerations in the post-advertisement phase. It is because of the firm way in which the Commission set forth its policy position in the Second Comfort Letter (and indeed the Press Release issued after the conclusion for the Court of Appeal proceedings) that an additional jurisdictional question arises. Obviously the Commission could not adjudicate a section 24 application until it was received. But could it validly, as a matter of private law, consider an application in principle before it was filed? Or, alternatively, would such consideration be so inconsistent with the statutory scheme that a legitimate expectation could not arise?

78. This more limited jurisdictional point was not taken by the Respondent. Perhaps it is (or ought to be) obvious that a regulatory body such as the Commission must have the implied power to facilitate the resolution of disputes between regulated service providers in the public interest. And public bodies frequently issue non-binding policy statements to allow persons likely to make statutory applications to have some idea as to how a statutory discretion may be exercised in particular cases. The obvious public interest at play in the present case (arising out of regulation 12 of the 1987 Cable Television Service Regulations) was the freedom of the viewing public who subscribed to BCV and did not have aerial access to BBC's channels to access those channels and the local programming they supplied. Although those involved may not have consciously averted to this

somewhat elevated legal abstraction, this right of access engaged the right to freely receive information and ideas under section 10 of the Bermuda Constitution.

79. More prosaically, however, the Commission had the following power under regulation 12(7) of the 1987 Regulations:

> "*(7) Where "retransmission consent" is elected under paragraph (5) and a licensee chooses to carry the television programmes on a "retransmission consent" basis and the parties are not able to reach a commercial agreement within sixty days, then either party may refer the matter to the Commission for determination.* "

80. If the Commission has a positive duty to resolve commercial disputes such as that which arose between BBC and BCV, when such disputes are referred to it, it surely has the power to encourage the parties to have recourse to alternative means of dispute resolution. Bearing in mind that the Commission may determine its own procedure, the statutory body must by necessary implication have the power to facilitate such a settlement before a formal reference under regulation 12 (7) has occurred. Of course, care would have to be exercised not to adopt any positions on the merits of such a dispute which might prejudice its ability to fairly adjudicate a subsequent or resumed reference if the alternative dispute resolution procedures broke down without a settlement being reached.

81. Once a settlement was consummated in relation to such a commercial dispute which contemplated a consequential section 23 (1) application, the latter would be (as between the parties to the initial commercial dispute) a purely administrative matter. The Commission's discretion must be exercised with regard to the section 24 (2) criteria, irrespective of whether public representations are or are not made. So as regards this essentially administrative and policy decision, it is difficult to see why the Commission should not be empowered, by necessary implication, to indicate before an application is advertised, what view it takes of a proposed new tier system or tariff. Public bodies charged with granting discretionary licenses or taxation, it seems to me, make such representations all the time. There may be circumstances where to do so would be wrong in principle or unfair, but the approach contemplated by the Second Comfort Letter on the Commission's part was designed to achieve fairness to BCV and serve the wider public interest in continuing public access to local channels.

82. The statutory scheme admittedly only explicitly contemplates the Commission considering applications actually made under sections 23 and 24. But I find nothing which would exclude the necessary implication of a power for the Commission to either (a) facilitate the resolution of the BBC/BVC dispute with a view to protecting public access to local programming supplied by BBC which BCV had elected to cease retransmitting (including determining [X]), or (b) indicate its support in principle, subject and having regard to the applicable statutory regime, for an application proposed to be

made pursuant to a commercial settlement. After all, the normal time period for determining section 24 applications is 30 days (section 24(4)). If the Commission, which is free to determine its own procedure (Schedule, paragraph 14), could never apply its mind to the wide-ranging statutory policy considerations listed in section 24(2) with respect to prospective applications, it would likely mean that Ministerial consent for an extension of the 30-day post-application adjudication period would routinely be required. The statutory provision which most cogently supports the implication of such powers is section 20A of the Act, which provides as follows:

> "*20A (1) The Minister or the Commission may make any decision under this Act on an interim basis and may make the final decision effective from the day the interim decision came into effect.*
>
> *(2) The Minister or the Commission may make an ex parte decision whenever the Minister or the Commission, as the case may be, considers that the urgency of a particular case justifies such ex parte decision, so, however, that within fourteen days or such longer period as the Minister or the Commission may determine, after an ex parte decision is made under this subsection the Minister or the Commission, as the case may be, shall hold an inter partes enquiry for the purpose of making an interim or final decision.*"

83. So if the Commission has the express power to grant an application on an interim or ex parte basis under section 24 before the public have had an opportunity to be heard (on urgency grounds), it can hardly be incompatible with the statutory scheme for BCV to rely on the representations that the Commission made in the present case as to how it would adjudicate its section 24 application before such application was formally made. And, those representations were explicitly made, in the words of the Second Comfort Letter, "*having regard…to the matters set out in s 24(2) of the Act*". As already noted above, the implication of such a power may not be justified in certain circumstances. One such case might be if one party to a commercial dispute which had been or might be referred to the Commission under regulation 12(7) sought to gain an advantage in that dispute by seeking approval in principle of its section 24(1) application from the Commission. This type of concern did not exist in the present case once the BBC/BCV dispute was settled.

Findings: would it be so unfair as to amount to an abuse of power to permit the Commission to change course in a manner not contemplated by its representations?

84. The Outline Submissions of BCV summarizes the case on unfairness as follows:

> "45. *As explained in the evidence, there was a bitter commercial dispute between the BBC and BCV which was concerning the public and the Commission. The only solution to the Gordian knot of the commercial*

dispute between BCV and the BBC was the creation of the BBC tier. This required the approval by the Commission of that tier. BCV would not move without assurances that the Commission was in favour of the tier. The Commission, while mindful of the relevant statutory approval process, assured BCV that it was in favour. BCV then made an irrevocable election, trusting the Commission to adhere to its assurances. There was no reason to believe that subsequent events, such as the inevitable public advertising, could or would force the Commission to do so. It did not expect a public authority, in the words of Mr Lyon, to 'betray cablevision's trust completely once Cablevision have elected to carry the channels' [30]. No one would or should expect such behaviour in any circumstances."

85. I accept this submission. Having regard to the time and expense incurred by the Commission and BCV in resolving the dispute and the nature of detrimental reliance that BCV placed on the representations made by the Commission, in my judgment it would be not only unfair but also an abuse of power to permit the Commission to change course altogether at its own whim as if the events leading up to March 6, 2009 had never occurred.

86. There is, of course, no suggestion that the Commission consciously appreciated the unfairness of its change of position at its October 7, 2009 meeting. Not only is it a voluntary body, with the Chairman and member most intimately involved in this matter in their professional prime. The Act (Second Schedule, paragraph 18) contemplates that the staff of the Department will serve as the staff of the Commission. Yet by virtue of section 6 of the Act, such staff members are primarily responsible to the Minister.

87. The Commission's lawyers alone had been intimately involved on behalf of the Commission in resolving the highly complex, contentious and non-routine BBC/BCV dispute in conjunction with the Minister and BCV's lawyers through the deployment of considerable diplomacy and legal skill. They were best positioned to guide the statutory body through the application process, as well as to explain the likely public law consequences of their actions on their client's behalf in February and March of that year. The Commission became somewhat like a ship sailing on a dark night through strange waters strewn with reefs: without its sole navigator; it understandably went off course.

Conclusion

88. For the above reasons the appeal is allowed and the decisions of both the Commission (December 8, 2009) and the Minister (February 3, 2010) are quashed. The Respondent conceded that the Commission's decision ought to be set aside on the grounds that the

purported decision to adjudicate an application under section 24 of the Act was made in excess of jurisdiction.

89. The Appellant has a legitimate expectation in public law, based on representations made by the Commission and principally evidenced by the Second Comfort Letter sent by its attorneys ASW on March 5, 2009 to CDP on behalf of BCV, that its application for a new two tier service will be approved on the contemplated terms. However, the application must be advertised and the Commission retains a residual discretion to depart from its promises if new and compelling public policy considerations emerge which both (a) could not have been reasonably contemplated in March, 2009, and (b) justify any contemplated change of position.

90. I will hear counsel as to the form of the Order required to give effect to this Judgment and as to costs.

Dated this 17th day of September, 2010

KAWALEY J