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IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

**Appeal No. 9 of 2007
Grand Court No. 62 of 2007**

BETWEEN:

CABLE AND WIRELESS (CAYMAN ISLANDS) LIMITED

Appellant (Plaintiff)

AND:

**THE INFORMATION AND
COMMUNICATIONS TECHNOLOGY AUTHORITY**

Respondent (Defendant)

AND:

DIGICEL CAYMAN LIMITED

Respondent (Interested Party)

**BEFORE: Right Hon. E. Zacca, President
Hon. M.R. Taylor, Justice of Appeal
Hon. E.D. Mottley, Justice of Appeal**

Nicholas Green, Q.C. and Sarah Ford, instructed by Hector Robinson of Mourant, for the Appellant.
Graham Ritchie, Q.C. and David Collier, of Charles Adams Ritchie and Duckworth, for ICTA. Nigel
Pleming, Q.C. and Linda DaCosta, instructed by Myers & Alberga, for Digicel.

Heard: November 22, 23 & 26, 2007

Released: 27th March, 2008

JUDGMENT AND REASONS

TAYLOR, J.A.



On February 16, 2007, the Chief Justice granted the appellant Cable and Wireless leave *ex parte* to seek judicial review of the respondent Authority's refusal to entertain its

request for reduction in the "mobile termination rate" on which it had agreed two years earlier with the respondent Digicel, but on July 19, 2007, after a two-day *inter partes* hearing, the Chief Justice concluded that his order had been granted without full disclosure, set it aside and denied leave on the grounds that the application for judicial review had no realistic prospect of success and was also out of time.

Cable and Wireless appealed to this Court seeking restoration of the leave order and also that this Court grant the relief sought in the application for judicial review. Following a three-day hearing, involving reference by counsel to an immense volume of material, we were obliged to reserve our decision.

Counsel did not attempt to describe to us the make-up of the telephone market, the facilities operated by each of the participants, the terms on which services are marketed to subscribers, the manner in which fixed and variable costs are determined and allocated for regulatory purposes as between various uses of facilities, the regulation of the Cable and Wireless fixed network, or many other matters necessary to full understanding of the system. Nor has it proved possible to elicit such understanding from the voluminous material provided. The case for Cable and Wireless rests on the relatively simple, if surprising, assertion that the mutual mobile call termination rate on which it agreed with Digicel in July 2004, and the Authority accepted, was unlawful as both discriminatory and excessive. Cable and Wireless contends that it has a realistic prospect that it could obtain an order on judicial review obliging the Authority to entertain its application two years

later for a rate reduction. The significance of the issue raised lies in the fact that while each of the two telecommunications carriers charges the other the same agreed rate for call termination, Cable and Wireless has become a persistent "net purchaser" of termination services as between them, and thus has to make regular payments to Digicel to balance the running account between them.

The Authority is responsible for administering a complex regulatory scheme founded in governmental acts and legislative and regulatory provisions, whose purpose is to introduce and promote competition in the telecommunications market while preventing the imposition of excessive charges in areas of unavoidable monopoly, including the Cable and Wireless fixed line and switching operations and the mobile "termination" rates charged as between licensees, but also prevent licensees from offering below-cost rates to the public that may deter, or drive-out, competition. The industry is "regulated" or "partially regulated" as to some aspects and "unregulated" as to others. In the case of mobile termination rates paid by one carrier to another for accepting and carrying messages to the recipient carrier's subscribers, there is potential in a system such as that prevailing in the Cayman, under which calls are paid for by the calling party carrier and thereafter charged in whole or part to the caller, for the exercise of monopoly power by the terminating carrier. This is because subscribers usually have only one mobile phone and can thus be reached only through one carrier.

The regulatory regime stipulates: (i) that the mobile termination rate must be “cost-oriented”, a term whose imprecision cannot have been overlooked; (ii) that licensees must act “in good faith” in negotiating among themselves a reciprocal non-discriminatory rate meeting this requirement; (iii) that only if licensees are unable to reach such agreement will the Authority set a termination rate; (iv) that such agreements between carriers have effect only if accepted when submitted by the parties to the Authority for filing; (v) that any agreed rate will remain in force unless and until changed by the Authority; and (vi) that the Authority has an express discretion to decline to consider applications for amendment of an agreed rate, without embarking on consideration of the merits, and to require that the parties instead continue until further ordered to apply the rate specified in their agreement.

It is in respect of the exercise of this last-mentioned discretion, by the Authority’s decision not to entertain the Cable and Wireless application to vary the rate to which it had agreed with Digicel, that Cable and Wireless seeks judicial review.

(a) **The Background**

Cable and Wireless gave up its established monopoly over the provision of telecommunications services in the Cayman Islands five years ago and entered instead into a non-exclusive license agreement with the Government, dated July 10, 2003, at which time ministerial direction was given requiring that the Authority give effect to the

agreement in applying the requirements of the Information and Communications Technology Law (2002 Revision) and Regulations, as amended.

At the outset of the new regime Cable and Wireless provided the Authority with its adjusted costing model (FAC), the basis on which it contends that interconnection arrangements should be established with new entrants to the market by the setting of mobile termination rates. On January 29, 2004, it reached an interconnection agreement with Digicel, a new entrant to the mobile telephone market, on all terms except for the mobile termination rate. In this agreement the parties made provision only for an "interim" termination rate, to be applied subject to retroactive adjustment pending establishment by the Authority of the rate that would apply until creation by Cable and Wireless under instructions from the Authority, and in consultation with licensees, of a long-term "forward looking" costing model (FLLRIC). Cable and Wireless and Digicel sought a ruling by the Authority on the rate to be mutually applied in the meantime in place of the agreed interim rate. Cable and Wireless proposed a rate said to be "oriented to" its adjusted (FAC) costing model with a profit allowance; Digicel proposed a higher rate said to be "oriented to" its own view of costs plus appropriate profit. The higher the rate, the greater would be the amount paid by whichever of them became each month the "net purchaser" of termination of services from the other, as the competitive retail market developed under the new regime.

In March 2004, while their rate-setting applications were pending before the Authority, Cable and Wireless announced its new mobile telephone service charges to the public. Digicel promptly filed complaints with the Authority asserting that the Cable and Wireless charges were below cost, an unlawful impediment to development of the competitive market to which the new regime was directed.

The Cable and Wireless licence required the Authority to conduct a proceeding prior to April 1, 2004, that would deal with costing for mobile termination rates pending creation of the Authority's own long-term costing model. Cable and Wireless submitted that any rate other than that derived from its own adjusted FAC model would be inconsistent with the regulatory scheme. The April 1 deadline passed without a decision by the Authority. Six days later the Authority gave decisions finding that Cable and Wireless had acted anti-competitively in pricing its services to the public below cost, decisions which were promptly appealed by Cable and Wireless to the Grand Court. On May 19, 2004, Cable and Wireless reached agreement with TeleCayman, a licensee offering services that counsel could not confidently describe, which provided for an interim mobile call termination rate of 10.7 cents a minute, said to be based on the Cable and Wireless (FAC) costing model, this rate being subject to retroactive adjustment when the Authority determined a uniform rate for all, thus ensuring compliance with the prohibition on discrimination as between carriers.

It was in these circumstances that Cable and Wireless, Digicel and Wireless Ventures (a licensee since taken over by Digicel) resolved outstanding issues between them by the settlement agreement of July 27, 2004, which is at the centre of the current dispute. Subject to acceptance for filing by the Authority, this agreement provided for a mutual mobile termination rate of 18.45 cents a minute, a compromise between figures proposed by each, and for abandonment by Digicel of its predatory pricing case against Cable and Wireless. The agreement describes June 30, 2006, as the "earliest feasible date" for completion of the Authority's long-term cost model (FLLRIC), on which a new termination rate would be introduced over a subsequent 30-month period. The agreement would continue in effect until completion of the new model, with appropriate timing adjustments for introduction of the new termination rate should the new formula not be completed by June 30, 2006, the stated "earliest feasible date". The agreement was not to be taken to assume that the new rate ultimately so set would be lower or higher than the agreed rate, and to operate as an amendment to earlier agreements between the parties. By their original agreement of January 29, 2003, the parties stipulated that disputes as to interpretation or application be resolved either by a private arbitration process there described or by the Authority. The agreement is subject to compliance with Cayman Island law, and thus with the regulatory scheme.

The Authority complied with requests of Cable and Wireless and Digicel that it accept the July 27, 2004, settlement agreement for filing under the Authority's "negative approval" process, a prerequisite to the agreed rate coming into effect, and that their

pending rate determination requests be withdrawn. Acceptance for filing meant no more than that the Authority had made no finding of non-compliance; in accepting the agreement for filing the Authority emphasized that it would not itself be bound by the terms, including the stated "earliest feasible date" for completion of the new model, but described the stated earliest date as "not unreasonable".

After the June 30, 2006, "earliest feasible date" passed without completion of the new model, a project on which Cable and Wireless was working with the Authority and its experts, the company made the application with which these proceedings are concerned. It ceased paying Digicel the agreed rate, and Digicel commenced arbitration proceedings to enforce payment under the agreement.

(b) The ICTA Application

By its application, dated October 25, 2006, Cable and Wireless sought a determination by the Authority that the mobile termination rate of 18.45 cents established by its agreement with Digicel of July 27, 2004, never was a "cost-oriented rate", as required by the Information and Communications Technology Law, and directing that a rate of 11 cents be substituted and applied to all mobile networks.

Digicel argued for dismissal of the application both on the ground of lack of proper notice and by the Authority declining to exercise jurisdiction and permitting the parties to avail themselves instead of the arbitration clause contained in their

interconnection agreement. By a further pleading Digicel invited the Authority to apply Regulation 10(i) of its Dispute Resolution Regulations which provides:

10.0 The Authority may decline at any time to deal with a determination request if it determines that:

- (i) the subject matter of the dispute should continue to be governed by an existing contract between the referring party and respondent.

By decision of December 14, 2006, the Authority concluded that, while it had jurisdiction to consider the application, it ought to decline to exercise its jurisdiction under Regulation 10(i), giving the following reasons:

10. In the present case, as the parties are well aware, the Authority is engaged in the public process of developing its preferred costing methodology, following which a meaningful assessment of the costs of mobile termination will be made. In the interim, no meaningful evidence can be adduced to support a change in the MTR to render it more reflective of costs in Cayman.
11. In these circumstances, the Authority is of the view that there is no further relevant regulatory process that can at present be undertaken. The Authority has come to the view that this case is therefore one to which Regulation 10(i) clearly properly applies.

A consideration of the Authority's reasons in the context of the scheme, the events that had unfolded to that date and the evidence below shows that the Authority had resolved that there was no reliable costing evidence then available, and that it should not be diverted from completion of the long-term costing model by a process that could not, in its view, result in a more appropriate rate than that which would be derived from the model on which it and Cable and Wireless were then working.

Having resolved to decline to embark in the meantime on considering any departure from the agreed rate, the decision goes on to say:

12. Accordingly, the Authority has concluded that C&W should rely upon the dispute resolution provisions contained in Article 34 of the Interconnection Agreement in its efforts to seek to modify the mobile termination rate. The Authority therefore denies the Application by C&W.

It is not clear from this reference to the arbitration process provided for by agreement between Digicel and Cable and Wireless how the decision of the arbitrators could assist Cable and Wireless “in its efforts to seek to modify the mobile termination rate”. It does not seem at all obvious that the rate could, under the prevailing law, be amended without the concurrence of the Authority. That is not, however, a matter for us to decide, nor are we required to decide the extent of the jurisdiction of the arbitrators.

Paragraph 12 cannot in our view properly be regarded as a basis of the Authority’s decision not to entertain the Cable and Wireless application.

(c) **The Decision of the Chief Justice**

Having addressed various inadequacies of the submission made by Cable and Wireless on the *ex parte* application, the Chief Justice proceeds in his reasons on the *inter partes* hearing (at paragraph 54) to conclude that it was unnecessary to decide whether he had been deliberately, rather than inadvertently, misinformed – so as to render the *ex*

parte proceedings an abuse of process – because he was now satisfied his earlier decision “would have been different but for lack of full and fair disclosure”.

The Chief Justice says (at paragraphs 102 and 103) that “leave would not have been granted had I had full understanding of the factual and legal issues which I now have”, that the “foundation which C&W’s case appeared on the *ex parte* application to have it now clearly does not have”, and that this was “the proper basis for the discharge of the *ex parte* order for leave and, further, for the dismissal of C&W’s application”. It is apparent that the Chief Justice did not vacate the *ex parte* order, and decline leave, for failure of full disclosure, but for the reason which he cites from *Sharma v. Brown-Antoine and Others* [2007] 1 WLR 780 (PC) (at para. 4) that there was “no arguable ground for judicial review having a realistic prospect of success”.

The decisive question before the Chief Justice was whether Cable and Wireless had a realistic prospect of establishing that the Authority acted improperly in exercising its discretion under Regulation. 10(i) not to entertain the application. After dealing with the liberalization of the Cayman telecommunications industry, with relevant provisions of the Law and Regulations and establishment of the present mobile termination rates, the Chief Justice concludes (at paragraph 121) that the Authority had “clear discretion” whether or not to deal with the application. The Chief Justice observes that “there can be no arguable case that it has an obligation, at the mere behest of a service provider, to do so”. The Chief Justice makes the closing observation that if the current mobile

termination rate is a matter of concern it would be in the interest of Cable and Wireless, and in the public interest, that the company and the Authority now concentrate their efforts on completion of the new long-term costing model.

In his discussion of the non-disclosure issue, the Chief Justice deals with matters which Cable and Wireless contends are relevant to his conclusion that there was no arguable case, and which it describes as fundamental "misconceptions".

The Chief Justice deals (at paragraphs 26 and 27) with the contention advanced, he says, by Digicel and the Authority that the Regulations demonstrate that "only in the absence of agreement would the Authority be allowed to intervene" to set mobile termination rates pending introduction of the Authority's new costing mode (FLLRIC). The Chief Justice says (at paragraph 49) that the policy of the legislation is to require licensees until then to work towards the "co-operative, productive and cost-effective use of their resources and to allow the process of competition to compel them to agree cost-oriented rates for the interconnection services", adding that "immediate recourse may be had to the Authority only when a dispute arises" during the course of such negotiations. The Chief Justice concludes that the Authority's discretion to over-ride or set rates arises only when "this primary policy objective" has failed.

The second allegation of "misconception" which Cable and Wireless makes relates to references by the Chief Justice (at paragraphs 42 to 47, 59, 62 and 82(iii)) to its case being based in part on absence of "positive acceptance" by the Authority of the Cable and

Wireless-Digicel-Wireless Ventures settlement agreement as a factor that vitiated the agreement. The third alleged misconception asserted by Cable and Wireless is the statement (at paragraph 82(vii)) that failure of the Authority to introduce its new (FLLRIC) model by June 30, 2006, was “not a matter on which C&W could reasonably rely to vitiate the Settlement Agreement”. The fourth allegation of misconception is addressed generally to the observations made by the Chief Justice that Cable and Wireless had relied on the agreed rate of 18.45 cents in subsequent dealings with the Authority and other licensees. The final alleged misconception is in relation to observations of the Chief Justice on the period of more than two years that had elapsed since introduction of the rate which the company now said it always knew to be unlawful.

In view of the decision we have reached on the correctness of the Chief Justice’s conclusion on the issue of ‘arguable case’, is not necessary for us to deal with the reasons for which the Chief Justice concluded that the application was out-of-time for the purposes of Order 53 rule 4(1) of the Grand Court Rules.

(d) The Argument on Appeal

By its grounds of appeal Cable and Wireless contends that the rate to which it agreed with Digicel offended the requirements of the regulatory regime that mobile termination rates be cost-oriented and also non-discriminatory and resulted, when Cable and Wireless emerged as the net “purchaser” of call termination from Digicel, in the

company being required to make excessively high payments that enabled its competition “to cross-subsidize the rates for other services”.

Cable and Wireless says that when it became clear that the Authority’s own costing model would not be completed within “the contemplated time frame” it invited the Authority to determine a cost-oriented mobile termination rate applicable to all providers to remain in effect until completion of the new (FLLRIC) model. It says that the Authority’s decision not to entertain its application resulted in the Authority “abdicating its statutory responsibilities and indefinitely maintaining a situation which is in conflict with the requirements of the regulatory regime”. It says that the Authority’s decision not deal with the application was wrong in law, resulted from application of irrelevant considerations and failure to take relevant considerations into account, and was “irrational in the sense of being *Wednesbury* unreasonable”.

Cable and Wireless concedes that at the heart of its case is its submission that the 18:45 cents-a-minute termination rate that it agreed to with Digicel and asked the Authority to accept is, and always was, inconsistent with the governing legislation. Its counsel went so far in oral argument before us as to say that Cable and Wireless may be exposed to a penalty for having entered into the agreement that it now says was unlawful, or for having asked the Authority to accept it. Having been requested by Cable and Wireless two years later to reduce the agreed rate, the Authority was obliged to intervene, the company says, and the decision not to entertain the application constituted “failure to

comply with the public law obligation of the Authority". The position of Cable and Wireless is that only a rate that is 'oriented to' its own adjusted (FAC) cost model could lawfully be adopted under the regulatory regime, that this would amount to 11 cents a minute, and that it agreed to the 18.45-cent rate with Digicel in July 2004 knowing the rate not to be "cost-oriented", but rather the product of "horse-trading" in circumstances in which Digicel sought a high termination rate and Cable and Wireless sought to avoid the threat of disruption to its new retail pricing "by disputed complaints of anti-competitive conduct". The rate was discriminatory, Cable and Wireless argues, because different from that to which it had itself already agreed with TeleCayman, and because the agreement with TeleCayman provided for retroactive adjustment, so as to ensure consistency with the uniform rate ultimately established by the Authority, while the agreement that it made thereafter with Digicel did not.

Cable and Wireless contends that the rate to which it agreed with Digicel has resulted in excessive cost to subscribers, particularly those on its fixed-line network, but does not explain how this cost, if unlawfully excessive, could be allowed under the regulatory regime applied to the fixed line service. There was no representation before us on behalf of consumers of telecommunication service on the Islands nor, we were informed, has there been such representation in proceedings before the Authority. The burden of protecting users from, or compensating them for, the imposition of excessive charges by licensees thus falls solely on the Authority, and Cable and Wireless seeks to condemn the Authority for failing to perform that function.

Cable and Wireless relies on a passage from the judgment of Lord Woolf, M.R., in *Larner v. Solihull Metropolitan Borough Council* [2001] LGR 255 (C.A.) (at paragraph 9), which concludes with the statement:

Again, if the only reasonable way in which it could exercise its discretion is to act in a particular way the body becomes under a duty to act in that manner. In these situations there can be a duty to act at common law as well as under the statute.

Applying this to the present facts, Cable and Wireless contends that the Authority was obliged to exercise its discretion in favour of entertaining the Cable and Wireless application. It submits that in declining to do so the Authority failed to take into account:

(i) the unsatisfactory state of the telecommunications market; (ii) the reason why Cable and Wireless entered into the settlement agreement when unable to negotiate a rate compliant with the law; (iii) the delay in producing the new (FLLRIC) model; (iv) the need for a new rate oriented to the Cable and Wireless (FAC) model to apply to all licensees in the meantime; (v) that the problems complained of had been previously drawn to its attention; and (vi) that it had been requested to remedy the situation. Cable and Wireless says the Authority took into account an irrelevant consideration by treating the matter as a dispute between private parties, and misdirected itself in concluding that no meaningful evidence could be adduced “to support a change in the MTR to make it more reflective of costs” when the Cable and Wireless (FAC) model was available, and had been used by the Authority in concluding in the predatory pricing proceedings that Cable and Wireless was pricing its services below its own costs. The Authority’s failure

to mention in its decision the detrimental impact of the present situation on competition and the interest of consumers showed, it says, that the Authority neglected, although having full submissions before it, to consider such factors. No reasonable regulator, it argues, would have declined to embark on the requested review.

The appellant's argument goes on to deal with the earlier-mentioned alleged misconceptions to be found in the decision of the Chief Justice.

(e) The Law

The test for granting leave to seek judicial review is authoritatively summarized in opinion of Lords Bingham and Walker in *Sharma v. Carla Brown-Antoine and Others* (above) (at paragraph 14), in a passage adopted by all members of the Board.

Firstly, leave is to be refused unless the court is satisfied "there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy". *Secondly*, this test is flexible in its application and to be applied with proper regard to the nature and gravity of the issue raised. *Thirdly*, the jurisdiction to set aside leave granted *ex parte*, while exercised sparingly, will be exercised where it is apparent on subsequent *inter partes* application that leave "plainly should not have been granted". More recently, in *Chan v. Cheung and Fong*, FAVC No. 10 of 2007, the Chief Justice of the Court of Final Appeal for Hong Kong observed, in applying the *Sharma* test, that this test requires more than merely

“potential arguability”, and describes (at paragraph 14) the purpose of the rule of court by which such leave is required:

Its purpose is to prevent public authorities from being unduly vexed with unarguable challenges. Whilst in a society governed by the rule of law it is of fundamental importance for citizens to have access to the courts to challenge decisions made by public authorities on judicial review, the public interest in good public administration requires that public authorities should not have to face uncertainty as to the validity of their decisions as a result of unarguable claims. Nor should third parties affected by their decisions face such uncertainty.

Adoption of the *Sharma* test, the Court there observes, may result in more time having today to be devoted in some cases to determining whether leave should be granted, that a “quick perusal” of the material may not suffice, and that a judge may in appropriate cases require an *inter partes* hearing for this purpose.

In the earlier case of *Mass Energy Limited v. Birmingham City Council* [1993] Env. LR 298, the Court of Appeal, in denying a renewed application for judicial review of rejection by the council of a tender for municipal waste disposal, took into consideration the public inconvenience that would result were leave to be granted for an eventually-unsuccessful judicial review application. Noting that the matter had now been argued in depth *inter partes* with reference to extensive documentary evidence, Lord Justice Glidewell observes (at pp. 307-8) that the Court should in such circumstances grant leave only if satisfied that the applicant’s case was “not merely arguable but is strong; that is to say, is likely to succeed”.

While the “likely to succeed” test is not the test that we would apply in the present case, the observations found in the decisions in *Chang* and *Mass Energy* seem relevant in the present circumstances. The public interest would certainly not be served by protracting the uncertainties created by continuation of these judicial review proceedings unless Cable and Wireless has clearly satisfied the onus that lies on it to demonstrate that it has a “realistic prospect of success” in establishing that the Authority ought to be required to entertain its rate review application prior to the completion of the long-term costing model on which both were then engaged.

That relatively simple point has now been argued at length *inter partes* before both the Chief Justice and this Court.

(f) Conclusion

The Authority is responsible for overseeing a relatively small market in which sophisticated international telecommunications carriers have been negotiating and competing with each other during a period of transition from monopoly service to a largely competitive system under a complex legislative regime.

These are the circumstances in which the Authority has been afforded discretion by Dispute Resolution Regulation 10 to decline to entertain rate determination requests. There are 11 listed grounds on which the Authority may so decline, one being that stated in s. 10(i) – that the request is for revision of a rate that has been arrived at by agreement.

It is a curious aspect of the case that Cable and Wireless, although required by Regulation 6(a) of the Interconnection Regulations to “treat requests to negotiate interconnection and infrastructure agreements and to provide interconnection and infrastructure sharing services in good faith”, should assert that it agreed for extraneous reasons to a rate that it knew to be discriminatory and in excess of that permitted by law, and also to allege that in declining to consider amending that rate two years later, so soon as asked by it to do so, the Authority is guilty of dereliction in its duty.

On this application we need not decide whether the regulatory scheme requires the Authority to rely in setting termination rates on the Cable and Wireless adjusted (FAC) cost model pending completion of its new (FLLRIC) model. The fact that Cable and Wireless is itself required to use its own model for the purpose of demonstrating that its pricing to the public is not below its own cost, and that the Authority used it for that purpose, would not mean that rates oriented to cost as demonstrated by that model will compensate other licensees fairly for call termination purposes. But if Cable and Wireless has an arguable case on the point, something that could be decided only in the context of a full understanding of the regulatory regime which we have not been afforded, that would not put the present application in a class apart from other rate review applications. An applicant for rate review will necessarily assert that the existing rate conflicts with the law – that it is discriminatory, at odds with a specific legislative requirement, or simply unlawfully high or low. Regulation 10 gives the Authority discretion to decline to embark on consideration of an application brought by a party

which has agreed to the rate in question, and require that the agreed rate continue for the time being in effect. The discretion to decline to embark on investigation of the merits is, of course, to be exercised in a rational manner, and not arbitrarily. The question for the Authority was whether the interests involved, and particularly the public interest, would in balance best be served by embarking on the requested inquiry at a time when it was engaged with Cable and Wireless in completing its own cost model, a process involving consultation with other licensees and its own experts.

That model might demonstrate any rate arrived at in the interim on the proposed Cable and Wireless application to be wrong. It might show the present prevailing rate set by the Cable and Wireless agreement with Digicel to be too high, too low, or even perhaps correct, as is, indeed, recognized by a term of the agreement itself.

The question for the Chief Justice was not whether Cable and Wireless had an arguable case on its application to the Authority for a reduction in the agreed rate. The question was whether it had an argument with a realistic prospect of success on its case that the Authority misapplied its discretion under Regulation 10(i) in declining to embark on the requested investigation before completing the new costing model. The question was whether there was a realistic possibility that the court would, on a judicial review application, either order the Authority to proceed with the rate review requested by Cable and Wireless, without first completing the new costing model, or order that the Authority reconsider the exercise of its discretion not to do so.

There is, in our view, no basis in the record for the contention that the Authority misapplied the law, took into account improper considerations, or failed to take proper considerations into account in the exercise of this discretion. Nor has Cable and Wireless established, in the words of Lord Woolf in the *Larner* case (above), on which it relies, that “the only reasonable way” in which the Authority could have exercised its discretion was by embarking at that time on the requested review.

The possibilities that the agreed rate was discriminatory, because unlike that agreed to by Cable and Wireless with TeleCayman it had no provision for retroactive adjustment, or that it might not be ‘cost-oriented’, were factors to be weighed by the Authority against the disadvantages of proceeding with the requested review while engaged in an independent process to produce reliable up-to-date evidence of costs fairly attributable to mobile termination in the Cayman Islands. It cannot be said that, having had submissions from the parties on all these matters, the Authority must be taken to have overlooked those not specifically mentioned in the Authority’s brief reasons. It must be recognized also that the Authority was dealing with a matter involving its view of the reliability of available evidence in a technical area within its special expertise, a matter on which it is entitled to deference. The Authority’s recognition of the reality that the issues raised involved a private dispute, as well as one within the Authority’s jurisdiction, cannot be said to involve abdication of its responsibility.

None of the “misconceptions” attributed to the Chief Justice can be said in our view to demonstrate that Cable and Wireless has met the ‘arguability’ test.

The Chief Justice’s statement that the Authority may only intervene, override and set interconnection rates when the parties are unable to reach agreement is to be read in the context of the whole decision. It is clear from the words of Regulation 10(i) itself, which the Chief Justice cites, that the Authority has a discretionary jurisdiction to review rates arrived at by agreement. The observations of the Chief Justice that only in the absence of agreement would the Authority “be *allowed* to intervene” – rather than “*obliged* to intervene” – pending completion of the new (FLLRIC) model, must be read in conjunction with his later observation (in paragraph 35) that a general discretionary power to regulate rates is provided by s. 9(4) of the Law, and his conclusion (at paragraph 82(viii)) that the Authority declined to entertain the application in the exercise of its discretion under Regulation 10(i).

Insofar as the Chief Justice suggests that “the process of competition” is intended to bring about agreement between licensees on termination rates, Cable and Wireless contends that he fell into error for the reason that each terminating carrier, as earlier mentioned, has a form of ‘monopoly’ over access to its own subscribers. The influence of competition to which the Chief Justice refers could not be felt through competitive efforts to reach each particular cell-phone subscriber. No doubt there are other ways in which the operation of the competitive system might influence termination rate

negotiations between carriers, including the possibility that either may be driven into the position in which Cable and Wireless now finds itself, as a chronic “net purchaser” of such services. It may be that the most important influence on rate negotiations is intended to be the obligation imposed on licensees by s. 6(a) of the Regulations to negotiate “*in good faith*” towards a lawful rate that fairly compensates them.

The other asserted “misconceptions” of the Chief Justice have no bearing on whether the application for judicial review could succeed.

(g) **Disposition**

The Chief Justice’s conclusion that the appellant did not have a case with a realistic prospect of success on judicial review of the exercise of the Authority’s discretion under Regulation 10(i) is in our view correct, and necessarily determinative.

The appeal is therefore dismissed, denial of leave to move for judicial review affirmed, and the respondents entitled to their costs, to be taxed if not agreed.

M.R. Taylor, J.A.

I agree.

E. Zacca, P.

I agree.

E.D. Mottley, J.A.