

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2013 – 02624

IN THE MATTER OF THE JUDICIAL REVIEW ACT CHAPTER 7:08

AND

IN THE MATTER OF THE FREEDOM OF INFORMATION ACT, 1999

BETWEEN

CELLULAR PLANET LIMITED

Claimant

AND

MINISTER OF PUBLIC UTILITIES

Defendant

TELECOMMUNICATIONS SERVICES OF TRINIDAD AND TOBAGO LIMITED

Interested Party

Before the Honourable Justice André des Vignes

Appearances:

Mr. C. Phelps, Mr. G. Armorer, Mr. A. Ramoutar instructed by Mrs. N. de Verteuil-Milne for the Claimants

Mr. R. Martineau S.C. leads Mr. L. Lalla and Ms. C. Hernandez instructed by Ms. A. Ramroop, Ms. E. Da Silva and Mr. E. Jones for the Defendant

Dr. C. Denbow S.C. leads Mr. D. Allahar and Mr. R. Rajkoomar instructed by Mrs. D. Denbow for the Interested Party

JUDGMENT

INTRODUCTION

1. The Claimant is a private limited company duly incorporated under the laws of Trinidad and Tobago and is involved in the business of dealing in and/or distributing mobile phones. The Defendant is the Minister of Public Utilities. On the 12th May, 2014 permission was granted to Telecommunications Services of Trinidad and Tobago (hereinafter referred to as “TSTT”) to appear and be heard in these proceedings as an Interested Party.
2. With leave of this Court, on 18th July, 2013, the Claimant applied for judicial review of the Defendant’s decision made on 18th March, 2013 that:
 - a. TSTT was the only entity that could decide whether it can accede to a request made by the Claimant under the Freedom of Information Act (hereinafter referred to as “the FOIA”) for access to its official documents; and
 - b. TSTT will not accede to the Claimant’s request for the provision of documents under the FOIA.
3. As a result the Claimant sought, *inter alia*, declaratory relief as well as orders of certiorari and mandamus and damages including aggravated and exemplary damages as against the Defendant.

THE RELIEFS SOUGHT

4. By virtue of its Amended Fixed Date Claim Form filed on 19th May, 2014, the Claimant sought the following relief:
 - a. *An Order of certiorari do forthwith issue to quash the decision bearing date 18th March, 2013 of the Defendant that the Telecommunications Services of Trinidad and Tobago Limited (“TSTT”) is the only entity that can decide whether to accede to a request under the Freedom of Information Act, 1999 (“FOIA”) and to deny the Claimant access to the information/documents requested in its request for information dated 17th August, 2012 made under the FOIA;*

- b. *A declaration that TSTT is a company incorporated under the laws of the Republic of Trinidad and Tobago which is owned or controlled by the State for the purposes of section 4 of the FOIA;*
- c. *A declaration that TSTT is a body corporate which is supported, directly or indirectly, by Government funds and over which Government is in a position to exercise control for the purposes of section 4 of the FOIA;*
- d. *A declaration that TSTT is a body corporate in relation to the function or functions which it exercises on behalf of the State;*
- e. *A declaration that TSTT is a public authority within the meaning and intent of section 4 of the FOIA;*
- f. *A declaration that the Claimant is entitled to the information/documents set out in its request for information dated 17th August 2012 made under the FOIA;*
- g. *An Order of mandamus to compel the Defendant to provide the Claimant with the information/documents requested in its request dated 17th August 2012 made under the provisions of the FOIA and/or to take all reasonable steps to assist the Claimant in its said request in compliance with Section 14 of the FOIA;*
- h. *An Order directing the Defendant to provide the Claimant with the requested information free of charge within twenty-eight (28) days of the date of any order to be made on this application;*
- i. *A declaration that the Defendant is in breach of his duty under sections 7, 8, 14, 15, 23 and 40 of the FOIA;*
- j. *A declaration that there has been unreasonable delay on the part of the Defendant in making a decision on the Claimant's request in breach of the section 15 of the FOIA;*
- k. *A declaration that the Defendant has acted in bad faith in treating with the Claimant's request under the FOIA;*
- l. *Damages pursuant to section 8(4) of the Judicial Review Act Chapter 7:08("JRA") for breach of the Claimant's legitimate and/or substantive expectation and/or for bad faith;*
- m. *Aggravated and/or exemplary damages;*
- n. *Such further and/or other relief and/or consequential orders and/or directions as the justice of the case may require; and*

- o. *Costs.*

GROUNDINGS FOR RELIEF

5. The Claimant relied on the following grounds for relief as set out in its Amended Fixed Date Claim Form filed on 19th May, 2014:
 - a. *TSTT is a company incorporated under the laws of the Republic of Trinidad and Tobago which is owned or controlled by the State and/or a body corporate which is supported, directly or indirectly, by Government funds over which the Government of Trinidad and Tobago is in a position to exercise control and/or is a body corporate in relation to the function or functions which it exercises on behalf of the State and as such is a public authority within the meaning of the FOIA;*
 - b. *The Claimant is entitled to access to information in the possession of TSTT under the FOIA;*
 - c. *By letter dated 17th August, 2012 the Claimant requested of the Defendant as the responsible Minister certain information pertaining to the policies, rules and practices of TSTT in so far as it relates to the distribution of handsets to dealers and to the tendering and award of dealer stores to distributors;*
 - d. *The said request for information was copied to TSTT by letter of the same date;*
 - e. *By letter dated 4th September, 2012, TSTT wrote to the Claimant's Attorney-at-Law informing them that TSTT is not a public body within the meaning of Section 4(1) of the FOIA as a result of which it adopted the position the FOIA was not applicable to it;*
 - f. *After several requests for extensions of time to enable him to deal with the request the Defendant by letter bearing the date 18th March, 2013 received by the Claimant on 28th March, 2013 ("the decision") informed the Claimant that TSTT is the only entity that can decide whether it can accede to a request made under the FOIA;*
 - g. *The Defendant well knew that TSTT had adopted a certain position in relation to whether it fell under the provisions of the FOIA and he nevertheless led the Claimant to believe that notwithstanding this position the Defendant had every intention (as the responsible Minister) of complying with the said request for information submitted to him;*

- h. *The decision is unauthorized or contrary to law;*
- i. *The Defendant has acted in bad faith and/or for an improper purpose and/or has taken into account irrelevant considerations;*
- j. *The decision of the Defendant conflicts with the policy of the FOIA;*
- k. *The Defendant has erred in law;*
- l. *The Defendant has breached and/or omitted to carry out his duty under Sections 7, 8, 14, 15, 23 and 40 of the FOIA as he is required by law to do;*
- m. *The Defendant has deprived the Claimant of its legitimate and/or substantive expectation that the Defendant would provide and/or assist the Claimant with the information requested given that TSTT is a public authority;*
- n. *In coming to his decision the Defendant has exercised his power in a manner that is so unreasonable that no reasonable person could have so exercised the power; and*
- o. *In arriving at his said decision the Defendant has abdicated his responsibility and his function and has not arrived at his decision independently.*

PROCEDURAL HISTORY

6. On 25th June, 2013, the Claimant filed an application for leave to apply for judicial review pursuant to Part 56.3 of the Civil Proceedings Rules 1998 (“hereinafter referred to as “the CPR”).
7. The application for leave to apply for judicial review was supported by the affidavit and supplemental affidavit of Geevan Sankersingh, Director and shareholder of the Claimant company, filed on 25th June, 2013 and 27th June, 2013 respectively.
8. By Order dated 11th July, 2013, this Court granted leave to the Claimant to apply for judicial review and further directed that the Claimant file and serve its Fixed Date Claim Form, the aforementioned affidavits and the said order on or before 18th July, 2013.
9. On 18th July, 2013 the Claimant filed and served its application for judicial review by Fixed Date Claim Form which was supported by the affidavit (hereinafter referred to as “the principal affidavit”) and supplemental affidavit (hereinafter referred to as “the first supplemental affidavit”) of Geevan Sankersingh.
10. On the first hearing of this matter on 26th July, 2013, the first Case Management Conference (CMC) was adjourned to 25th November, 2013 in order to allow parties to report on the

outcome of the appeal in TSTT v Samaroo¹ which may have had a bearing on the instant matter.

11. At the first CMC held on 25th November, 2013, this court ordered that:
 - a. *Claimant do file and serve Supplemental Affidavit on or before the 6th day of January, 2014;*
 - b. *Defendant do file and serve Affidavits in Reply on or before the 14th day of February, 2014;*
 - c. *All interlocutory applications be filed and served on or before the 7th day of March, 2014;*
 - d. *The Case Management Conference do stand adjourned to the 24th day of March, 2014 at 11.30 am in Courtroom POS04.*
12. On 6th January, 2014 the Claimant filed a further supplemental affidavit (hereinafter referred to as “the second supplemental affidavit”) in support of its application for judicial review.
13. On 14th February, 2014, an affidavit of Victor Jones was filed on behalf of the Defendant in opposition to the Claimant's application. At that time, Mr. Jones held the position of Permanent Secretary (Ag.) in the Ministry of Public Utilities.
14. On 7th March, 2014, the Claimant filed two interlocutory applications, namely:
 - a. An application for leave to file an affidavit in reply to the affidavit of Victor Jones; and
 - b. An application for several paragraphs or portions of paragraphs of the affidavit of Victor Jones to be struck out.
15. By application filed and served on 21st March, 2014, TSTT sought this Court's permission to, *inter alia*, be made a party to these proceedings. This application was supported by the affidavit of Gayle Allick Solomon. On 8th May, 2014 an affidavit in opposition was filed on behalf of the Claimant in the name of Instructing Attorney-at-Law, Nicole De Verteuil-Milne.
16. On 8th May, 2014 the Claimant also filed and served an application for an Order that the time for filing and serving of the application be shortened and further, that it be granted leave to amend its Fixed Date Claim Form filed on 18th July, 2013.

¹ Civ App No. 180 of 2010.

17. At the hearing on 12th May, 2014, this Court gave the following directions:
- a. *Permission be granted to Telecommunications Services of Trinidad and Tobago Limited to appear and be heard in these proceedings as an Interested party;*
 - b. *Permission be granted to Telecommunication Services of Trinidad and Tobago Limited to file and serve an Affidavit upon the Claimant and the Defendant on or before the 2nd day of June, 2014;*
 - c. *Permission be granted to the Claimant and Defendant to file and serve an Affidavit in Reply, if necessary, on or before the 16th day of June, 2014;*
 - d. *Any interlocutory applications to be made by the Claimant be filed and served on or before the 7th day of July, 2014;*
 - e. *The Claimant do file and serve Written Submissions in support of Claimant's Notice of Application filed 7th March, 2014 on or before the 7th day of July, 2014;*
 - f. *The Defendant and the Interested Party do file and serve Written Submissions in Reply to the Claimant's Notice of Application filed 7th March, 2014 on or before the 28th day of July, 2014;*
 - g. *Permission be granted to the Claimant to file and serve an Amended Fixed Date Claim Form in terms of sub paragraphs (i) and (ii) of Paragraph 2 of the Notice of Application filed 8th May, 2014 upon the Defendant and the Interested Party on or before the 19th May, 2014;*
 - h. *Permission be granted to the Claimant to file and serve upon the Defendant and the Interested Party a further Supplemental Affidavit on or before the 19th day of May, 2014;and*
 - i. *Permission be granted to the Defendant and the Interested Party to file and serve an Affidavit in Reply, if necessary, on or before the 2nd day of June, 2014.*
18. On 19th May, 2014 the Claimant filed and served its Amended Fixed Date Claim Form and a further supplemental affidavit (hereinafter referred to as “the third supplemental affidavit”) of Geevan Sankersingh.
19. On 2nd June, 2014, TSTT filed and served an Affidavit in the name of Charles Carter, Executive Vice President, Legal and Regulatory/Corporate Secretary of TSTT.
20. On 4th June, 2014, the Defendant filed and served an Affidavit of Victor Jones in reply to the third supplemental affidavit of Geevan Sankersingh.

21. On 16th June, 2014, the Claimant sought, and was granted, an extension of time from 16th June, 2014 to 25th June, 2014 to file and serve its affidavit in reply to the affidavit of Charles Carter.
22. On 25th June, 2014, the Claimant filed and served an affidavit of Geevan Sankersingh, in reply to the affidavit of Charles Carter.
23. On 7th July 2014 the Claimant filed and served its written submissions in support of its application filed on 7th March, 2014 to strike out portions of the affidavit of Victor Jones filed on 14th February, 2014.
24. On 7th July 2014 the Claimant also filed and served an application to strike out portions of the affidavit of Charles Carter filed on 2nd June, 2014 and the Claimant also filed and served written submissions in support of this application.
25. On 25th July, 2014 TSTT filed and served written submission in opposition to the Claimant's application to strike out portions of the affidavit of Charles Carter.
26. On 28th July, 2014, the Defendant filed and served written submissions in response to the Claimant's evidential objections as well as in reply to the Claimant's application to have portions of the affidavit of Victor Jones struck out.
27. On 27th October, 2014, this Court gave rulings in relation to the Claimant's applications to have portions of the affidavits of Victor Jones and Charles Carter struck out.
28. By order dated 27th October, 2014, this Court directed that parties file and exchange written submissions on or before 15th December, 2014 and that parties file and exchange written submissions in reply on or before 19th January, 2015. Subsequently, the parties by joint applications filed on 15th December, 2014 and 9th January, 2015 sought and were granted extensions of time for the parties to file and exchange written submissions.
29. On 9th January, 2015, TSTT filed and served its written submissions in opposition to the Claimant's application for judicial review along with its supporting authorities.
30. On 16th January, 2015, the Claimant filed and served its written submissions in support of its application for judicial review, with the supporting authorities being filed and served on the 19th January, 2015.
31. On 16th January, 2015, the Defendant filed and served its written submission in opposition to the Claimant's application for judicial review along with its supporting authorities.

32. On 5th February, 2015, the Claimant filed and served its submissions in reply to the written submission of the Defendant and TSTT.
33. On 5th February, 2015, TSTT filed and served its submissions in reply to the written submissions of the Claimant.
34. On 5th February, 2015, the parties filed a consent application whereby they sought an extension of time until 6th February, 2015 to file and serve written submissions in reply. This Court approved this consent application by order dated 11th February, 2015. On 10th February, 2015 the Defendant requested another extension of time to on or before 23rd February, 2015 to file and serve its submission in reply. This Court approved this application by order dated 24th February, 2015, extending the time to 25th February, 2015.
35. On 11th February, 2015 the Defendant filed and served its submissions in reply to the Claimant's written submissions. The Defendant also filed supplemental submissions in reply on 25th February, 2015.
36. On 27th February, 2015 the Claimant filed a response to the Defendant's submissions in reply together with its supporting authorities.
37. On 3rd March, 2015, the Claimant filed notes to aid its oral submissions at the upcoming hearing of the matter.
38. The matter was heard on 3rd March, 2015 when Counsel for all parties made oral submissions on the substantive application for determination.

EVIDENCE

The Claimant

39. In support of its case, the Claimant relied on the following affidavit evidence:
 - a. The affidavit of Geevan Sankersingh filed on 18th July, 2013 (the principal affidavit);
 - b. The affidavit of Geevan Sankersingh filed on 18th July, 2013 (the first supplemental affidavit);
 - c. The affidavit of Geevan Sankersingh filed on 6th January, 2014 (the second supplemental affidavit);
 - d. The affidavit of Geevan Sankersingh filed on 19th May, 2014 (the third supplemental affidavit); and

- e. The affidavit of Geevan Sankersingh filed on 25th June, 2014 in reply to affidavit of Charles Carter.

40. By way of his principal affidavit, Mr. Sankersingh stated as follows:

- a. The Claimant has been an authorized TSTT dealer from in or about March 2001 and at all material times, specialized in the distribution of Bmobile handsets, activation of handsets, sale of accessories for handsets and the sale of Bmobile top up and post paid bill collections;
- b. In conducting its business, the Claimant interacted with TSTT's mobile communications division/department which was referred to interchangeably in the telecommunications industry as "Bmobile" and/or "TSTT";
- c. Bmobile's main contractual requirement from its dealers is to activate handsets for Bmobile customers and provide them with new handsets in order to facilitate handsets on the Bmobile network;
- d. TSTT appointed CT T&T as its sole agent to handle the distribution of Bmobile handsets to dealers (also referred to as "channel partners") and although most handsets are provided through CT T&T, the distribution to dealers is arbitrary;
- e. The Claimant has been experiencing difficulty obtaining sufficient handsets to meet its demand while handsets are being provided to newer dealers, particularly, CellMaster (CML), who have no track record with TSTT;
- f. Correspondence was exchanged between TSTT, its channel partners and the Claimant as follows:
 - i. In March 2009, TSTT issued letters to their channel partners seeking to address concerns that had been raised regarding conflicts of interest, possible allocation, tendering and contracts (flagship, operating, branded exclusive and non-exclusive);
 - ii. Emails were exchanged between the Claimant and TSTT over the period 18th January, 2011 to 5th June, 2012 whereby the Claimant sought unsuccessfully to arrange meetings in an effort to ventilate its concerns;
 - iii. By letter dated 7th April, 2011, the Claimant and another channel partner wrote to Mr. Ronald Walcott (Head Mobile Operations, Distribution and Prepaid Services, TSTT) requesting a meeting to discuss TSTT's financing

and apparent preferential treatment of CML and the apparent and unusually high payments on some phones to CT T&T. Subsequent to securing a meeting on 14th April, 2011 where these issues were raised, the Claimant wrote to Mr. Walcott on 19th April, 2011 confirming the discussions at the said meeting.

- iv. The Claimant then wrote to Lisa Agard, Executive Vice President, TSTT on 20th April, 2011 enclosing the aforementioned correspondence and seeking a resolution to the issues raised therein.
- v. By letter dated 27th April, 2011, Ms. Agard responded to the Claimant indicating that the commercial arrangements between TSTT and CML were confidential and could not be disclosed to third parties. She also stated that the constitutional provisions cited by the Claimant in relation to inequality of treatment were not applicable to TSTT as it was a private company engaging in commercial activity and not a public body, notwithstanding the 51% indirect shareholding of the Government; and
- vi. By letters dated 10th May, 2011, 18th May, 2011, 23rd May, 2011, 16th June, 2011, 17th August, 2011, 11th September, 2011, 14th October, 2011, 22nd February, 2012 and 28th February, 2012, the Claimant continued to write to several representatives of TSTT raising, *inter alia*, the aforementioned issues as well as contending that TSTT was a State Enterprise and thus subject to the FOIA and, if not, the Board should, as a matter of public policy, consider its request for certain information.
- g. TSTT has refused to provide any or any proper response to the Claimant's concerns and has persisted in adopting the position that it is not a public body imbued with public law obligations, notwithstanding its knowledge of the decision of Best J. in **Samaroo v TSTT**² wherein TSTT was declared to be a public authority. Based on TSTT's refusal, the Claimant, through its Attorneys-at-Law, Messrs. de Verteuil-Milne & Associates, wrote to the Defendant as well as to TSTT on 17th August, 2012, enclosing a Request for Access to official documents pursuant to **Section 13 of the FOIA** and requested, *inter alia*, information relating to the build out of TSTT's dealer

² CV2006-00817

stores as well as TSTT's tendering procedures, practices and policies for the award of contracts to distributors and the distribution of handsets;

- h. Correspondence between TSTT and the Claimant's Attorneys-at-Law followed these requests. By letter dated 4th September, 2012, TSTT advised the Claimant's Attorneys-at-Law that the FOIA was not applicable to TSTT by virtue of the transfer of the shareholding of the Corporation Sole to National Enterprises Limited (hereinafter referred to as "NEL"). This position was reiterated by TSTT in correspondence to the Claimant's Attorneys-at-Law dated 6th December, 2012, in response to another letter from the Claimant's Attorneys-at-Law dated 23rd November, 2012;
- i. The Defendant requested an extension of time to respond to the Claimant's request by letters dated 18th September, 2012, 9th October, 2012, 22nd November, 2012, 6th December, 2012, 17th January, 2013, 13th February, 2013 and 4th March, 2013. These letters stated, *inter alia*, that the requested information was being actively pursued.
- j. By letter dated 18th March, 2013, the Defendant responded to the Claimant's request as follows:

"The Telecommunications Services of Trinidad and Tobago (TSTT) which is incorporated under the Companies Act, Chap. 81:01 is the only entity that can decide whether it can accede to a request made under the FOIA Act for access to its official documents.

Accordingly, you are advised that TSTT has taken the decision not to accede to the request made by your client Cellular Planet Limited for the provision of documents under FOIA"
- k. By letter dated 5th April, 2013, the Claimant sought the intervention of the Ombudsman and requested her to examine the correspondence passing between the parties and make recommendations. In response, by letter dated 14th June, 2013, the Ombudsman advised the Claimant's Attorneys-at-Law that, in her opinion, TSTT was a public authority for the purposes of the FOIA; and
- l. A pre-action protocol letter was sent by the Claimant's instructing Attorney-at-Law to the Defendant, which was copied to the Solicitor General as well as TSTT, but there was no response forthcoming.

41. In support of its contention that TSTT is a public authority to which the FOIA applies, the Claimant relied on, *inter alia*, the following:

- a. TSTT's Memorandum and Articles of Incorporation which states that TSTT was incorporated for the principal purpose of purchasing and operating the telephone system acquired and operated by the Government;
- b. On 27th August, 1999 NEL was incorporated with the Corporation Sole owning over 66% of the issued shares for the purpose of holding the Government's 51% shareholding in several State Companies including TSTT. By virtue of NEL's prospectus, the purpose of the offer was to incorporate a publicly quoted company to facilitate the divestment of its interest in selected State Enterprises, including TSTT;
- c. On 19th September, 2000, NEL acquired 51% of the issued shareholding in TSTT. While NEL has been specifically exempted from the FOIA by virtue of the Freedom of Information (Exemption) Order No. 21 of 2003, TSTT is not so exempt;
- d. As at 2011, the Government's Freedom of Information Unit website published a list of public authorities under the FOIA with the responsible Ministry for each and the Ministry of Public Utilities is listed as the Ministry responsible for TSTT;
- e. The Ministry of Finance website indicates that the Investment Division Company Listing as at 12th April, 2012 includes TSTT under the heading "INDIRECTLY OWNED (MAJOR SUBSIDIARIES)";
- f. The Regulated Industries Commission (RIC) website indicates that they no longer possess regulatory authority over TSTT and telephone services and that TSTT now falls under the purview of Telecommunications Authority of Trinidad and Tobago (hereinafter referred to as "TATT");
- g. As at 2006, TSTT was listed as a public authority in the FOIA Annual Report; and
- h. TSTT's website states that in its formation incarnation as TEXTEL it was "*the legally constituted body charged with the responsibility for telecommunication links between the country and the rest of the world.*"

42. By his first supplemental affidavit Mr. Sankersingh stated, *inter alia*, as follows:

- a. NEL's Prospectus states that the Government's policy is to retain its 51% shareholding in NEL to prevent control of the underlying investment changing hands

- but NEL has no business operations of its own and its only assets are the three investments; and
- b. The Chairman's Annual Report for the period ending March 2006, stated that although NEL was the majority shareholder in TSTT, shareholder agreements with the minority shareholders establish joint control.
43. By way of his second supplemental affidavit, Mr. Sankersingh stated, *inter alia*, that on the website of the Auditor General's Department, Trinidad and Tobago Telecommunications is listed under the heading "Current Transfers to Statutory Boards and Similar Bodies" in the Public Accounts of the Republic of Trinidad and Tobago for the financial year 2011.
44. By way of his third supplemental affidavit, Mr. Sankersingh amplified paragraph 67 of his principal affidavit which dealt with the grounds upon which this application for judicial review was being sought.
45. In his affidavit in reply to the affidavit of Charles Carter, Mr. Sankersingh stated that, *inter alia*, notwithstanding the recent competition in the telecommunications industry, TSTT continues to carry out certain crucial functions on behalf of the Government.

The Defendant

46. The Defendant relied on the following affidavit evidence in opposition to the Claimant's claim:
- a. The affidavit of Victor Jones filed on 14th February 2014, (hereinafter referred to as "the February Affidavit"), in reply to the principal and first and second supplemental affidavits of Geevan Sankersingh; and
 - b. The affidavit of Victor Jones filed on the 4th June 2014, (hereinafter referred to as "the June Affidavit"), in reply to the third supplemental affidavit of Geevan Sankersingh.
47. By the February Affidavit, Mr. Jones stated as follows:
- a. According to Volume 51 of the Trinidad and Tobago Gazette published on 6th July, 2012, TSTT was classified as an entity which is a 'majority owned enterprise' for which the Ministry was responsible;
 - b. The relationship that the Government through the Ministry has with each of the entities it is responsible for, varies significantly depending on the manner in which that entity was established. TSTT is a unique entity as it is the only limited liability

- company for which the Ministry is assigned responsibility. As such, its relationship with the Ministry differs from that which other entities have with the Ministry;
- c. Budget estimates of the Government's development programmes for the period 2009-2012 and budget estimates of recurrent expenditure for the period 2009-2013 reveal that TSTT is one of two entities that received no Government funding;
 - d. TSTT has been continued under the Companies Act and by virtue of by-law No. 12, its management and control is vested in its Directors;
 - e. In or around 1968, the Government purchased Trinidad Consolidated Telephones Ltd, a British owned company responsible for providing telephone services in Trinidad and Tobago. This company became the Trinidad and Tobago Telephone Company (TELCO) which was incorporated under the Companies Ordinance on 19th May, 1968. TELCO was solely responsible for the provision of domestic telephone services. A separate entity, Trinidad and Tobago External Telecommunications Company Limited (TEXTEL), was responsible for the development of external telephone communications in Trinidad and Tobago;
 - f. Between 1968 and 1989, all of the shares in TELCO and TEXTEL were held by the Government through the Minister of Finance as Corporation Sole and the Government exercised full control over the shape and direction of the telecommunications sector through those companies;
 - g. On or around 20th December, 1989, the Government entered into a Shareholders' Agreement with TELCO, Cable and Wireless (West Indies) Ltd (hereinafter referred to as "C&W") and Cable and Wireless plc. Under the terms of that Agreement, it was agreed that (i) TELCO and TEXTEL would be merged by 1st January 1991; (ii) C&W would purchase 49% of the shares in TELCO and TEXTEL at a cost of US\$85 million; and (iii) C&W became a significant minority shareholder in TSTT, holding 49% of the shares in TSTT and provided a significant injection of funds needed to develop TSTT and the telecommunications sector as a whole;
 - h. The Government divested its 51% shareholding in TSTT into NEL and thereby ceased to own any shares in TSTT. In addition, with the incorporation of NEL, the Government no longer nominates members to the TSTT Board. TSTT keeps the Ministry informed of its initiatives and progress made in achieving them. However,

- the Ministry has no role in dictating the implementation of TSTT's Strategic Plan. Further, the Minister did not and could not exercise control over Board decisions or intervene in the day- to-day management of TSTT;
- i. The Minister has been assigned responsibility for TSTT since, for many years, TSTT was the only telecommunications service provider in Trinidad and Tobago and, as such, enjoyed monopoly status. As a result, the Government had a responsibility to ensure that the quality of service provided to the nation was acceptable;
 - j. The Minister does not make decisions as to whether to grant or deny requests made of entities under its purview pursuant to the FOIA. Upon receipt of the Claimant's request for information under the FOIA, the Ministry forwarded it to TSTT, which was in accordance with the Ministry's adopted procedure for treating with requests under the FOIA;
 - k. Since there was no in-house Counsel at the Ministry when the Claimant's request was received, the Ministry sought legal advice from the Solicitor General on 22nd October, 2012, as to whether TSTT had to consider the request, given the lack of consensus as to the status of TSTT in relation to the FOIA. By reason of its inability to respond within the stipulated timeframe, the Ministry sought an extension of time from the Claimant by way of letter dated 18th September, 2012.
 - l. Other correspondence related to the Claimant's request included the following:
 - i. By letter dated 20th September, 2012, the Ministry wrote to TSTT requesting that they provide a response to the Claimant's request by 26th September, 2012;
 - ii. By letter dated 25th September, 2012, TSTT responded to the Ministry indicating that private persons were not entitled to request the production of documents and information from TSTT pursuant to the FOIA;
 - iii. By letter dated 18th March, 2013, the Ministry responded to the Claimant's request indicating that the Claimant was not entitled to the information sought and that TSTT was the only entity that could decide whether or not to accede to a request made under the FOIA for access to its official documents;
 - iv. The Ministry received the Claimant's pre-action letter dated 28th May 2013 addressed to the Defendant but the Defendant was not in the country at the

time and it was only upon his return to office in June 2013 that it came to his attention;

- v. By letter dated 17th June, 2013, the Claimant wrote to the Ministry indicating that it had complained to the Ombudsman and enclosed the recommendations of the Ombudsman. The Ministry was given a 48 hour deadline to respond and through Ms. Anika Farmer, Director, Legal Services Division of the Ministry, the Ministry requested an extension of time, which was denied.
- m. The Ministry does not exercise any form of control over the commercial affairs of TSTT. As such, the Ministry cannot comment on the Claimant's commercial relationship with TSTT. Further, the Ministry is a stranger to the Claimant's interactions with TSTT in relation to the Claimant's request for information and documentation regarding one of TSTT's competitors. Such information relates to TSTT's daily operations and would not come to the attention of the Ministry;
- n. The Ministry denied the Claimant's contention that emails were exchanged between the Claimant and the Ministry, as the senders and recipients of the emails referred to by the Claimant are not employees of the Ministry. In relation to the correspondence exchanged between the Claimant and TSTT, such information did not come to the attention of the Ministry. As such, the Ministry cannot comment on same; and
- o. The Ministry sought and received several extensions of time as stated by the Claimant, to ensure that it took every reasonable step to assist the Claimant. The Ministry had no intention of deceiving the Claimant into thinking that the Ministry could provide the information.
- p. With respect to the document referred to as "Public Accounts of the Republic of Trinidad and Tobago for the Financial Year 2011 Volume 3-Appropriation Accounts, Statements of receipts and disbursements and funds, financial statements of Ministries and Departments" annexed to the second supplemental affidavit of Mr. Sankersingh, this document was compiled by the Auditor General from the budget submissions of various Ministries, Government Departments, Statutory Boards and similar bodies for the 2011 financial year and captures revenue and expenditure. Insofar as that document referred to "Trinidad and Tobago Telecommunications" under the sub-head "Statutory Boards and Similar Bodies", based on information

received from a Mr. Gay, this was a reference to TATT. Based on this information, the Public Accounts document does not reveal that any Government funding was disbursed to TSTT for the financial period in question.

48. By the June Affidavit, Mr. Jones stated that TSTT was a commercial enterprise that was financially independent and did not rely on Government funding nor did it exercise or perform functions on behalf of the State. Further, Mr. Jones stated that other bodies, like Digicel and Flow, provide telecommunications services in Trinidad and Tobago and to a large extent telecommunications functions were the responsibility of TATT.

The Interested Party - TSTT

49. TSTT relied on the affidavit of Charles Carter filed on 2nd June, 2014, in opposition to the Claimant's claim.

50. Mr. Carter stated as follows:

- a. TSTT was a limited liability company incorporated under the former Companies Ordinance, Chapter 31 No. 1 as TELCO and was duly continued under the Companies Act, Chapter 81:01;
- b. TELCO was wholly owned by the Government, with its issued share capital being held by the Minister of Finance as Corporation Sole. As a result, it was described as a State Enterprise or State Controlled Company;
- c. TEXTEL was incorporated as a joint venture between the Government and C&W with the Government holding 51% of its issued share capital and C&W holding the remaining 49% of the shares;
- d. Up to 1991, TELCO and TEXTEL were the two entities providing telecommunications services in Trinidad and Tobago. With effect from 1st January, 1991, the operations of TELCO and TEXTEL were merged and, on 2nd January 1991, TELCO changed its name to TSTT.
- e. Prior to the said merger, TSTT's ownership structure changed pursuant to a Shareholders Agreement entered into on 20th December, 1989 between the Government and C&W. The terms of this Shareholder Agreement governed the relationship between the parties as well as the conduct of the affairs of TSTT. By the Shareholders' Agreement it was provided that the Government held 51% of the issued share capital and C&W held the remaining 49%. There were to be 9 directors, with

- the Government having the right to appoint 5 directors, one of whom would be the Chairman, and C&W having the right to appoint the remaining 4 directors;
- f. Following the incorporation of NEL by Government as a publicly traded company on 27th August, 1999, ownership of the Government's 51% shareholding in TSTT (together with the Government's shareholding in National Flour Mills Limited, and Trinidad Nitrogen Company Limited) were vested in NEL. Shares in NEL held by the Government were then sold on the Trinidad and Tobago Stock Exchange to allow participation by nationals in successful and mature State Enterprises.
- g. The shareholding of NEL is divided as follows:
- The Government holds 66% of the issued share capital through the Minister of Finance in his capacity as Corporation Sole;
 - The National Gas Company of Trinidad and Tobago Limited, a company wholly owned by the Government, holds 17% of the issued share capital;
 - The remaining shares are held by various individuals and institutional investors from Trinidad and Tobago and abroad.
- h. By Deed of Adherence dated 22nd August 2000, NEL undertook and agreed to comply with the Government's obligations in the Shareholders' Agreement.
- i. The management of TSTT is led by its Chief Executive Officer and 12 Executives who head a number of Lines of Business and Cost Centers within the company. TSTT is a purely commercial entity that offers a range of domestic and international telecommunications services for residential and business customers;
- j. In 2006, two other mobile service providers were granted concessions by TATT to provide telecommunication services in Trinidad and Tobago, namely, LaqTel and Digicel. Further, TSTT has a number of competitors in relation to the various services it offers;
- k. Despite the competition it faces, TSTT is a commercial success and a profitable business and does not require funding or financial support from the Government. It has never received any monies from the Government and its funds are generated entirely and exclusively from its commercial business; and
- l. While the Defendant is referred to as TSTT's line Minister, in practice TSTT provides the Defendant with an overview on the status of its ongoing projects and

initiatives on a monthly basis and keeps the Defendant updated on the status of critical items affecting the Company.

ISSUES

51. The following issues arise for determination in this matter:

- a. Is TSTT a public authority for the purposes of Section 4(i) of the FOIA, by virtue of it being a company incorporated under the laws of the Republic of Trinidad and Tobago which is owned or controlled by the State?
- b. Is TSTT a public authority for the purposes of Section 4(k)(i) of the FOIA, by virtue of it being a body corporate or unincorporated entity in relation to any function which it exercises on behalf of the State?
- c. Is TSTT a public authority for the purposes of Section 4(k)(iii) of the FOIA, by virtue of it being a body corporate or unincorporated entity which is supported, directly or indirectly, by Government funds and over which Government is in a position to exercise control?
- d. If TSTT is a public authority for the purpose of the FOIA:
 - i. Was the Defendant's decision illegal and/or procedurally improper and/or irrational and/or in bad faith and/or on the instructions of an unauthorised person and/or in conflict with the policy of the FOIA and/or an error of law and/or a breach or omission to perform a duty and/or a deprivation of a legitimate expectation and/or substantive expectation and/or was exercised in a manner that is so unreasonable that no reasonable person could have so exercised the power and/or was an abdication of his responsibility and/or function and/or was not arrived at independently?
 - ii. Was the Defendant in breach of his statutory duties under the FOIA?
 - iii. Has the Defendant been guilty of unreasonable delay?
 - iv. Has the Defendant acted in bad faith and/or without *bona fides*?
- e. If so, is the Claimant entitled to the reliefs sought?

Issue A: Is TSTT a public authority for the purposes of Section 4(i) of the FOIA, by virtue of it being a company incorporated under the laws of the Republic of Trinidad and Tobago which is owned or controlled by the State?

Submissions of the Claimant

52. Counsel for the Claimant submitted as follows:

- a. The relief sought by the Claimant should be examined in consideration of the purpose and objective of the FOIA, which is to extend the right of members of the public to access to information in the possession of public authorities. The FOIA offers protection to a public authority under Part IV in respect of certain types of information, As such, if TSTT is held to be a public authority, it will not be prejudiced as it will be afforded the full protection of the FOIA in terms of non-applications and exemptions contained therein: **Section 3(1) of the FOIA** and **Sharma v The Integrity Commission;**³
- b. The FOIA must be interpreted so as to further the object of the FOIA and any discretion conferred must be exercised to facilitate and promote the disclosure of information. All the provisions of the FOIA lean in favour of an interpretation that gives the public a general entitlement to information and the onus is on the persons possessing power or control of the information to provide reasons for any refusal to disclose: **Section 3(2) of the FOIA;**
- c. Since Section 4(i) of the FOIA defines a public authority as a company incorporated under the laws of Trinidad and Tobago which is “*owned or controlled*” by the State, the Claimant need only prove ownership or control;
- d. The Constitution and the FOIA should be interpreted in a permissive, generous, liberal and purposive manner rather than restrictively. Section 4 of the FOIA is crafted to accommodate appropriate interpretations of “public authority” to further the legislative purpose and intention of contextually different types of legislation which the Court may have to interpret from time to time. [eg. The Integrity Act is penal legislation carrying a narrow interpretation while the FOIA is permissive legislation

³ HCA No. CV. S 2005 of 2004 at page 5 – 6.

carrying a liberal and purposive construction.] As such, the test of control for the PAEC as outlined in Section 119(9)(a) of the Constitution [*ie. "...directly or indirectly..."*] is the same when interpreting Section 4 of the FOIA by reason of the provisions of Section 3(1) and (2) of the FOIA and Sections 116(3), 119(8) and (9) of the Constitution. It does not matter that Section 4 of the FOIA does not specifically express the test of control being "direct or indirect" or that it does not refer to Section 119(9) of the Constitution;

- e. By virtue of Sections 3(1) and (2) of the FOIA, the words "*owned or controlled*" in Section 4(i) should be interpreted purposively, and ought to be read as "*owned directly or indirectly or controlled directly or indirectly*" by the State. TSTT focuses solely on direct ownership and does not address the Claimant's submissions that, upon a true construction of Section 4(i) of the FOIA, indirect ownership by the State makes TSTT a public authority;

The test of direct and indirect control rather than the *de jure* or legal control test would be appropriate in interpreting the provisions of the FOIA, having regard to the purpose and intent of the Act. The *de jure* test is appropriate in dealing with penal provisions as in the Integrity in Public Life Act (the "Integrity Act"). The FOIA is contextually opposite to the Integrity Act: **TSTT v The Integrity Commission & The Attorney General**.⁴ Therein, Smith JA. identifies that "exceptional circumstances" can exist where the *de jure* test is being used to evade the statute and, in such circumstances, the *de facto* test can be applied. The instant case falls squarely within the category of exceptional circumstances;

- f. The three conditions required for the Court to apply a purposive construction have been satisfied, namely:⁵

- i. The Court must be satisfied of the intended purpose of the provision –

⁴ CV No. 30 of 2008 at paras 14, 26-27, 30.

⁵ *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586; *Ghany v The Compensation Committee and The Attorney General of Trinidad and Tobago* - Civ. App. No. 197 of 2008.

- The intended purpose of the Section 4(i) of the FOIA is clear and to apply a narrow *de jure* test would be antithetical to its stated purpose and objective;
 - Notwithstanding linguistic dissimilarities between Sections 4(i) and 4(k) of the FOIA, it should be read in the wider context of the scheme and purpose of the Act, and to further the legislative intention of Parliament, that is, to extend the right of access rather than restrict it.
- ii. By inadvertence, the draftsman and Parliament failed to give effect to that purpose –
- The provisions of Section 3(1) and (2) of the FOIA make it clear and unambiguous that the provisions of the Act shall be interpreted to further the object in sub-section (1) and the Court’s discretion should be exercised to facilitate disclosure;
 - The draftsman must have fallen into error when he omitted the words “*directly or indirectly*”
- iii. The Court must feel sure of the substance of the provision Parliament would have made, had the error in the Bill been noticed.
- g. In **Moonan v The DPP and The Commissioner of Police**,⁶ a narrow interpretation was given to the expression “public authority” as the statute under review carried penal consequences. Therefore, as it relates to the Defendant’s reliance thereon, the principles were misapplied in that case and those propositions of law were rejected in **All Trinidad Sugar and General Workers Trade Union v The Minister of Planning and Mobilization and The Minister of Finance**;⁷
- h. All property transferred and vested in the Minister pursuant to the Minister of Finance (Incorporation) Act or otherwise acquired are held on trust for the State. Therefore, the shares in NEL that are vested in the Minister of Finance are being held in trust for

⁶ Civ. App. No. 132 of 1988 at p. 44.

⁷ HCA 437 of 1990.

- the State and the State through Cabinet is able to control NEL and through NEL to control TSTT;
- i. TSTT accepts that the majority shareholder has control over NEL. The Shareholders' Agreement has numerous provisions which give NEL more control over TSTT than C&W has. Further, it is inaccurate for the Defendant to say that the Government ceded important aspects of control over TSTT to C&W;
 - j. The shares of TSTT, although held by NEL directly, are nevertheless held in the name of the Minister of Finance in trust for the State. As such TSTT is indirectly owned and controlled by the State. The Articles and By-laws of TSTT allow for trustee shareholders. Therefore, since the Government owns the majority shares in NEL and NEL owns the majority shares in TSTT, the Minister of Finance as Corporation Sole is a trustee shareholder in TSTT;
 - k. The issue raised by TSTT in its submissions in relation to whether the "Line Minister" enjoys a definition by statute or by judicial interpretation and whether "State Enterprises" can be incorporated and governed under the Companies Act and whether the method of incorporation of a State Enterprise gives rise to an important distinction with respect to the powers of a "Line Minister" is not an issue before the Court. The live issue is whether or not TSTT is a public authority pursuant to the FOIA;
 - l. Upon a liberal and purposive construction, Sections 79 and 85 of the Constitution, taken together with Section 4 of the FOIA, override and render irrelevant legislative instances where express statutory power may be conferred on a Minister to issue directives; and
 - m. The Defendant, under and by virtue of his assigned constitutional responsibility for TSTT, is entitled to and has the prerogative under the Constitution to give directions and directives to TSTT in carrying out his executive functions as a Cabinet Minister.

Submissions of the Defendant

53. Senior Counsel for the Defendant submitted that it is not permissible for the Court to use Section 119(9) of the Constitution to interpret Section 4 of the FOIA since if Parliament had

so intended, it would have been expressly stated. Further, given the manner of TSTT's ownership, funding and the competitive business sector in which it operates, it would be unfair to TSTT to use THE broad definition in Section 119(9) of the term "controlled by the State" in interpreting the use of that phrase in Section 4 of the FOIA: **TSTT v The Integrity Commission and The Attorney General (supra)**.

54. Further, Senior Counsel submitted that TSTT was not owned or controlled by the State for the following reasons:

- a. In 1989, the State sold a significant block of its shares in TSTT to C&W and, by virtue of the Shareholders' Agreement made between the parties, significant aspects of control over TSTT were ceded to C&W. As such, TSTT could no longer be said to be owned or controlled by the State, although the State maintained an ownership interest;
- b. In 1999, the State transferred its shares in TSTT to NEL and by virtue of a Deed of Adherence, NEL agreed to be bound by the Shareholders' Agreement, thereby preserving C&W's control over the governance of TSTT. In the circumstances of TSTT's present ownership and governance arrangements, it cannot be said to be owned or controlled by the State;
- c. Pursuant to the Shareholders' Agreement, decisions in relation to TSTT's financial and corporate governance affairs required the participation and consent of C&W;
- d. The Claimant's evidence does not prove that TSTT is owned or controlled by the State. The Claimant's reliance on:
 - i. the Freedom of Information website where TSTT is listed as under the responsibility of the Ministry;
 - ii. the Ombudsman's opinion that TSTT was a public authority; and
 - iii. the newspaper report of statements made by the former Minister that he was the repository of disciplinary authority over TSTT's employees,

cannot detract from the purport and effect of the Shareholders' Agreement or the meaning of Section 4 of the FOIA.

55. Senior Counsel also submitted that the decision in **Samaroo v TSTT (supra)** should not be followed by this Court as:

- a. The trial judge, in considering the issue of control over TSTT, placed too much emphasis on the fact that TSTT was listed in the Gazette as a Government enterprise and that responsibility for TSTT had been assigned to a Government Minister, without considering the true effect of the terms of the Shareholders' Agreement;
- b. The trial judge found Government control of TSTT based on the fact that the relevant Minister referred TSTT's financial statements to the Public Accounts (Enterprises) Committee (PAEC), without appreciating that a wider test of State control is used by the governing legislation for the PAEC than Section 4 of the FOIA. Therefore, the trial judge erred in equating the PAEC's jurisdiction over TSTT with the jurisdiction over a public authority intended by the FOIA; and
- c. The trial judge also did not give reasons for his conclusions.

56. The assignment of responsibility for TSTT to a Minister does not mean that such a Minister or the State has any direct control over TSTT. Such a view would be too simplistic: **Moonan (supra)**.

57. TSTT is certainly not a public authority if the wholly owned State enterprise TELCO was not given the definition of public authority in the Act.

Submissions of TSTT

58. Senior Counsel for TSTT argued as follows:

- a. The case of **TSTT v The Integrity Commission and The Attorney General (supra)** is instructive regarding the special status of TSTT as a corporate body. Therein, it was found that, pursuant to the Shareholders' Agreement, the Government did not enjoy a free hand in the business of TSTT and had to manage in sync with the directives of C&W. It was also found that NEL, and not the Government, was the holder of the 51% shareholding in TSTT, with NEL operating under the Shareholders' Agreement with C&W;
- b. It is trite law that ownership of a company is evidenced by the shares held in that company. The uncontroverted evidence in this case is that TSTT's shares are owned

- by NEL and C&W. As such, in law, the State cannot be said to own TSTT. Further, by virtue of the Minister of Finance (Incorporation) Act [Sections 3(1), (2) and 8(2)], the only way that the State can own shares is through the Minister of Finance in his capacity as Corporation Sole;
- c. At common law, control over a corporation resides in a person who owns 51% or more of the issued capital which carries with it the voting power to control the governance of the corporate body. In order to establish that a person has control of a corporate body it must be shown that such person holds a majority of the issued shares in that body: **IRC v Bibby and Sons Ltd**⁸ and **Duha Printers (Western) Ltd v R**;⁹
- d. Section 4 of the Companies Act outlines the test for *de jure* control and it is submitted that the proper test for control is the common law test of *de jure* control. As a matter of law, TSTT is not under the control of the State;
- e. The Ombudsman has no jurisdiction under Section 38A(1) of the FOIA to determine which entity is a public authority. Instead, the Ombudsman possesses a limited function to make recommendations when a complaint arises in respect of an entity which is a public authority;
- f. By virtue of Section 3(1) and (2) of the FOIA, members of the public are entitled to have access to information which should be in the public domain as to the policies and practices of an entity which has been established to promote a purpose of public interest and the conduct of whose affairs is a matter of concern which affects members of the public. This was the context in which the decision in **Sharma v The Integrity Commission (supra)** arose. However, the facts of the instant case are far removed from that case. TSTT functions and carries on business in a competitive commercial environment where its competitors vie for business with a view to acquiring a greater market share. In such a scenario, TSTT cannot be said to be performing a public function or having in its possession public information to which the public should have the right of access;

⁸ (1945) 1 All ER 667

⁹ (1998) 39 BLR (2d) 1

- g. There is no public interest in determining whether a private company is to be regarded as a public authority. The Claimant is seeking to protect its private interests and therefore the claim is not to be regarded as public interest litigation.
- h. There is no evidence of any ruse or trick that would give rise to an exceptional case allowing for the de facto test of control to be applied, as referred to by Smith JA. in **TSTT v The Integrity Commission and The Attorney General (supra)**. As such, the Court ought not to read into the interpretation of Section 4(i) of the FOIA the word “*indirectly*”;
- i. There is no basis for the Court to adopt an incautious approach by venturing into unexplored territory of inserting words into a statute which do not advance its underlying intention or purpose. Judicial restraint should be exercised as, without it, TSTT’s main competitors would have a right of access to its confidential business information and thereby TSTT would be placed at a severe commercial disadvantage;
- j. It is inaccurate to state that TSTT is the same entity as TELCO and that the Government has the right to appoint 5 directors and the Chairman of the Board of TSTT;
- k. The decision in **Samaroo v TSTT (supra)** is irrelevant as it was set aside by consent after Counsel for Samaroo in the appeal conceded that the appeal was bound to succeed in light of the decision of the Court of Appeal in **TSTT v The Integrity Commission and The Attorney General (supra)**; and
- l. There was no factual foundation to support the Claimant's submission that that the Articles and By-laws of TSTT allow for trustee shareholders, since the Articles and the By-laws do not recognise same.

Analysis and Findings

59. Having carefully considered the submissions of the parties and the evidence adduced by all the parties, I agree with the Defendant and TSTT and find that TSTT is not a public authority by virtue of Section 4(i) of the FOIA.

60. **Section 4 (i) of the FOIA** provides as follows:

"In this Act --

"public authority" means-

.....

(i) a company incorporated under the laws of the Republic of Trinidad and Tobago which is owned or controlled by the State;"

61. The primary submission of Claimant is that the Court should adopt a purposive construction of the FOIA and Section 4(i) and not a strict, narrow interpretation afforded by the *de jure* or legal control test. Accordingly, the Court should interpret the words "*owned or controlled*" in Section 4(i) to mean "*owned directly or indirectly or controlled directly or indirectly.*"
62. Counsel for the Claimant sought to distinguish the decision in **TSTT v. The Integrity Commission (supra)** where the Court of Appeal adopted the narrower *de jure* test or legal control in deciding that TSTT was not a State Enterprise for the purposes of the Integrity in Public Life Act (the Integrity Act). He argued that there was a significant contextual difference between the Integrity Act which imposed onerous personal duties and severe penal consequences and the FOIA, having regard to its stated purpose and objective set out in Section 3(1) and (2).
63. Accordingly, he submitted that the Court should apply a purposive construction to Section 4(i) since the three conditions set out in **Ghany v. The Compensation Committee and the Attorney General of Trinidad and Tobago**¹⁰ have been satisfied. Therein, the Appellant suffered an injury in the course of his employment in the Police Service and applied for compensation under the **Protective Services (Compensation) Act, 1996 (PSCA)**. However, the PSCA did not include the provision corresponding to **Section 5(1)(c)(ii) of the Workmen's Compensation Act 1960 (WCA)** which made provision for the amount of compensation payable in cases of permanent partial disablement resulting from an injury not specified in the Second Schedule. The Compensation Committee of Trinidad and Tobago refused to award him compensation on the grounds that his injury did not qualify under the PSCA. The Court of Appeal upheld the decision of the Committee and found that the Committee had no jurisdiction under the PSCA to award compensation.
64. On appeal to the Privy Council,¹¹ the question arose whether this omission was an error, and, if so, whether it was open to the court to correct the error. It was the Appellant's case that

¹⁰ Civ App. No. 30 of 2008.

¹¹ (2015) UKPC 12.

there had been an obvious error in the process of enacting the PSCA in that no provision had been made for those injuries resulting in permanent disablement which are not included in the Second Schedule to the WCA. Further, it was submitted that, had the error been noticed, it is clear that Parliament would have incorporated into the PSCA, a provision equivalent to Section 5(1)(c)(ii) of the WCA. On behalf of the Respondents, it was submitted that effect should be given to the literal meaning of the provisions of the PSCA. The injury suffered by the appellant did not appear in the Second Schedule to the WCA and accordingly, the Committee correctly concluded that it had no jurisdiction to make an order for the award of compensation.

65. The Privy Council allowed the appeal and found that there was an obvious and particular error which had occurred and it was permissible and necessary to insert into the PSCA a provision equivalent to section 5(1)(c)(ii) of the WCA. Sir David Lloyd Jones, expressing the opinion of the Board, stated as follows:¹²

*"14. The circumstances in which it is open to the courts in interpreting legislation to correct obvious drafting errors are strictly confined, not least because the role of the courts must be limited to interpreting the statute and must not trespass into legislating. Nevertheless, in appropriate circumstances it is open to the courts to read words into a statute in order to correct an error. The applicable principles were stated by Lord Nicholls in *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 as follows:*

*"It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words. Some notable instances are given in Professor Sir Rupert Cross's admirable opusculum, *Statutory Interpretation*, 3rd ed (1995), pp 93–105. He comments, at p 103:*

'In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intentions of the drafter or the legislature, but is simply making as much sense as he can of the text of the statutory provision read in its appropriate context and within the limits of the judicial role.'

This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting

¹² Ibid at paras. 14 - 15.

or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation: see Lord Diplock in Jones v Wrotham Park Settled Estates [1980] AC 74, 105-106.” (at p 592 E-H)

15. In following this approach the court will not simply mechanically apply these principles. Often the nature of the mistake, the extent of rewriting which would be required and other considerations relating to the particular context will have an important bearing on whether such a process of rectification by interpretation is legitimate. Lord Nicholls expressed this as follows:

“Sometimes, even when these conditions are met, the court may find itself inhibited from interpreting the statutory provision in accordance with what it is satisfied was the underlying intention of Parliament. The alteration in language may be too far-reaching. In Western Bank Ltd v Schindler [1977] Ch 1, 18, Scarman LJ observed that the insertion must not be too big, or too much at variance with the language used by the legislature. Or the subject matter may call for a strict interpretation of the statutory language, as in penal legislation.” (at pp 592 H – 593A).” [emphasis mine].

66. Therefore, the starting point for this Court in interpreting Section 4(i) is to recognise that its role is limited to interpreting the statute and that it must not overstep that limit to engage in legislating. However, the Court is empowered to add, omit or substitute words in circumstances where there has been a plain case of a drafting mistake. In the exercise of that power, the court must be extremely cautious and must be "abundantly sure" of the three matters referred to **Inco (supra)** and approved by the Privy Council in **Ghany (supra)**.

67. The first matter to be considered, therefore, is the intended purpose of the FOIA or Section 4(i) thereof.

68. **Section 3 of the FOIA** sets out the object of the Act:

"3. (1) The object of this Act is to extend the right of members of the public to access to information in the possession of public authorities by—

(a) making available to the public information about the operations of public authorities and, in particular, ensuring that the authorisations, policies, rules and practices affecting members of the public in their dealings with public authorities are readily available to persons affected by those authorisations, policies, rules and practices; and

(b) creating a general right of access to information in documentary form in the possession of public authorities limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by public authorities.

(2) The provisions of this Act shall be interpreted so as to further the object set out in subsection (1) and any discretion conferred by this Act shall be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information."

69. Therefore, having regard to Section 3(1) and (2), the purpose of the FOIA is to extend the right of members of the public to access to information in the possession of public authorities and Section 4 defines what is meant by a public authority.

70. The second matter to be considered is whether or not I am "abundantly sure" that, by inadvertence, the draftsman and Parliament failed to give effect to that purpose in Section 4(i) by omitting the words "*directly or indirectly*."

71. Section 4 sets out an extensive definition of what is meant by "public authority" and demonstrates that the draftsman and Parliament had in their contemplation a wide range of entities that would become subject to the FOIA. Subsection (i) is one of eleven entities that would be affected by this Act and the defining feature thereof is that the State either owns or controls a company incorporated in Trinidad and Tobago. However, Section 4(k)(iii) of the FOIA also includes in the definition of public authority, "*a body corporate or unincorporated entity which is supported, directly or indirectly, by Government funds and over which the Government is in a position to exercise control.*" The use of the phrase "directly or indirectly" in that subsection makes it clear that the draftsman and Parliament had in their contemplation the phrase "directly and indirectly" in the formulation of the

definition of "public authority" and this contradicts the Claimant's contention that there was an inadvertent mistake or omission by the draftsman or Parliament of the words "directly or indirectly" in subsection (i).

72. Further, I am of the view that the purpose of the FOIA has not been defeated since, without the inclusion of the words "directly or indirectly" in that definition, a member of the public is still entitled to exercise the right to access to information from a company that is owned or controlled by the State. For example, where the State owns the majority shares in a company or controls the management of the company, there is no doubt that a member of the public who wishes to access information about the operations of such a company would be entitled to invoke the provisions of the FOIA to compel disclosure of such information in documentary form.
73. Accordingly, I am not satisfied that there was an obvious drafting error or that the draftsman or Parliament inadvertently failed to give effect to the purpose of the FOIA by omitting those words from section 4(i).
74. The third matter of which the Court must be abundantly sure before adopting a purposive approach to the interpretation of Section 4(i) is the substance of the provision Parliament would have made had the error in the Bill been noticed. In my opinion, having already found against the Claimant that there was any "drafting mistake" or "inadvertent error or omission" by the draftsman or Parliament, I am not required to give this matter any further consideration.
75. In the circumstances, I find that there is no basis for adopting a purposive approach to the interpretation of section 4(i) and that the Court should not insert the words "directly or indirectly" into that subsection.
76. Counsel for the Claimant also argued that by virtue of the ownership of the majority of the shares in NEL by Minister of Finance as the Corporation Sole and the **Minister of Finance (Incorporation) Act**¹³, the Minister of Finance is a trustee shareholder in TSTT, holding those shares on trust for the State and the State through Cabinet is able to control NEL and through NEL control TSTT. I do not accept the Claimant's argument that TSTT is owned by the State. The undisputed evidence is that NEL is a publicly traded company in which the

¹³ Chap. 69:03

Government holds 66% of the issued share capital through the Corporation Sole, the NGC holds 17% and various individuals and institutional investors hold the remaining shares. On 19th September, 2000, NEL acquired 51% shareholding in TSTT (formerly held by the Minister of Finance as Corporation Sole) and as a consequence the Corporation Sole ceased to own any shares in TSTT from that date. Accordingly, the shares in TSTT are owned by NEL and C&W, and not by the Corporation Sole. Therefore, it cannot be said that the State owns TSTT and/or is a trustee shareholder in TSTT, because the Corporation Sole owns 66% of the shares in NEL.

77. I accept the submissions of TSTT that, as a matter of law, ownership of a company is evidenced by the shares held in that company and the undisputed evidence is that the shares in TSTT are owned by NEL and C&W. Therefore, the evidence does not establish that TSTT is owned by the State.
78. With respect to the issue of control of TSTT, the Claimant submitted that the Court should not apply the "*de jure*" or legal control test in the interpretation of Section 4(i) but should apply the test of *de facto* or factual control. In this regard, the Claimant sought to distinguish the decision of the Court of Appeal in **TSTT v. The Integrity Commission (supra)** and argued that the instant matter was an exceptional circumstance which warranted the application of the *de facto* test of control since TSTT and the Defendant were seeking to rely on the *de jure* test to defeat the purpose of the FOIA.
79. In that case, the Court of Appeal was called upon to determine, *inter alia*, whether the Board of TSTT was subject to the jurisdiction of the Integrity Commission by virtue of the phrase "*Members of the Boards of all Statutory Bodies and State Enterprises including those bodies in which the State has a controlling interest*" which appeared in the Integrity in Public Life Act. The trial judge had ruled that for the purposes of that Act, a State Enterprise was, *inter alia*, a company controlled by or on behalf of the State and that Section 119(9) of the Constitution had to be applied to determine such control. Section 119(9) of the Constitution stated that "*a company shall be taken to be controlled by the State if the State either exercises or is entitled to exercise control directly or indirectly over its affairs...*"

80. In delivering the judgment of the Court of Appeal Smith JA. stated as follows:¹⁴

“4. ... We find that the test of direct and indirect control was not an appropriate one to be applied to the Integrity Act and sections 138 and 139 of the Constitution (jointly referred to as the Integrity Provisions). We adopt firstly the test of de jure or legal control to all cases and in exceptional cases, resort may be had to the de facto or factual test of control.

In the present matter, on an application of the de jure test, TSTT is not a State Enterprise to which the Integrity Act applies. Further, on the evidence before us there are no exceptional circumstances to pray in aid the de facto test of control so as to have TSTT declared a State Enterprise. The members of its Board are not subject to the jurisdiction of the Commission.”[emphasis mine].

81. In giving his reasons for rejecting the *de facto* test in favour of the *de jure* test, Smith JA. stated that the context of both provisions (i.e. Section 119(9) of the Constitution and the term ‘State Enterprises’ in the Integrity Act) were different and the same test ought not to be blindly applied. Further, he stated that the *de facto* test was vague and too uncertain to apply to cases where onerous penalties could be imposed on individuals. He was of the view that if it were the intention of Parliament that Section 119(9) of the Constitution should apply to the term ‘State Enterprises’ in the Integrity Act, they could and should have done so.¹⁵ He concluded as follows in this regard:

“30. ... the Commission need only examine the legal sources that determine control such as articles of incorporation, the share register and any relevant and legal shareholders agreements. However, in exceptional circumstances, as mentioned in paragraph 23 above, the Commission can resort to the de facto or factual test of control. To repeat, if for example there is a good likelihood that the legal sources cover up a naked attempt to evade the Integrity Provisions, the Commission may resort to the de facto or factual test of control.

31. With respect to TSTT, an examination of the legal sources of control, namely the shareholding and the Shareholders’ Agreement reveals that NEL and C&W

¹⁴ Civ App No. 30 of 2008 at para. 4.

¹⁵ Ibid at paras. 25 – 28.

have control of TSTT, not the Government. As such, TSTT is (prima facie) not a State Enterprise. Further, given the uncontested evidence, there are no exceptional circumstances here which call for the application of the de facto or factual test of control to be applied. There is no suggestion that the Government's divestment of its 51% shareholding in TSTT to NEL was anything other than a bona fide divestment of its 'control' over TSTT. TSTT is not a State Enterprise and the Integrity Provisions do not apply to the members of the Board of TSTT."

82. In my opinion, the reasoning in this decision applies equally to the facts in this case. The Claimant relies on the penal nature of the Integrity Act to differentiate it from the FOIA. However, in my opinion, that does not affect the applicability of the *de jure* or legal control test which must first be applied, save and except in exceptional circumstances. The FOIA, though not penal in nature, can also be said to impose onerous duties upon a public authority to disclose to the public information in relation to its operations. In addition, the context of section 119(9) of the Constitution is significantly different from the context of the FOIA. Further, I am not satisfied that the Claimant has adduced any evidence of exceptional circumstances which call for the application of the *de facto* test of control. Accordingly, I am of the opinion that the *de jure* or legal test of control is to be applied to the interpretation of the word "control" in Section 4(i) of the FOIA.

83. TSTT is a body corporate continued under the **Companies Act, Chap. 81:01** which defines control in the follow terms:

"control", in relation to a body corporate, means the power of a person to secure by means of --

(a) the holding of shares or the possession of voting power in relation to that body corporate; or

(b) any other power conferred by the articles of incorporation or other document regulating the body corporate,

that the business and affairs of the body corporate are conducted in accordance with the wishes of that person.

84. The undisputed evidence is that TELCO was wholly owned by the Government with its issued share capital being held by the Minister of Finance as Corporation Sole. TEXTEL was incorporated as a joint venture between the Government and C&W with the Government holding 51% of its issued share capital and C&W holding the remaining 49% of the shares. On 20th December 1989, the Government, TELCO and C&W (West Indies) and C&W plc entered into a Shareholders' Agreement. By this Agreement, C&W agreed to subscribe to 126,331,977 ordinary shares in the reorganized share capital of TELCO. Further, the Shareholders' Agreement provided that TEXTEL was required to merge with TELCO no later than 1st January 1991. From the date of the Shareholders' Agreement, there were to be 9 directors of TELCO and the Government had the right to appoint 5 directors, one of whom was to be the Chairman, and C&W had the right to appoint the remaining 4 directors. Pursuant to the Shareholders' Agreement, the business of TELCO was to be carried on pursuant to policies laid down by the Board and its business and affairs were to be conducted in a proper and efficient manner in accordance with the Business Plan. After consultation between C&W and the Board, the Board was required to approve the persons nominated by C&W for the positions of Chief Executive Officer and Financial Controller and the Chief Executive Officer was responsible for the preparation annually of the Company's Business Plan which was to be approved by the Board. Further, with effect from 1st January, 1991, the operations of TELCO and TEXTEL were merged and on 2nd January 1991 TELCO changed its name to TSTT.
85. On 9th September 1999, NEL acquired the Government's 51% shareholding in TSTT and on the 22nd August 2000, NEL entered into a Deed of Adherence whereby it agreed to comply with the Shareholders' Agreement.
86. Applying the *de jure* or legal control test to the evidence, therefore, I am of the opinion that TSTT is not controlled by the State as control is vested in the Board of Directors of TSTT which is appointed by NEL and C&W, pursuant to the Shareholders' Agreement and the Deed of Adherence.
87. In the circumstances, the Claimant has failed to prove that TSTT is a public authority for the purposes of Section 4(i) of the FOIA by virtue of it being owned or controlled by the State.

Issue B: Is TSTT a public authority for the purposes of the FOIA (section 4(k)(i), by virtue of it being a body corporate or unincorporated entity in relation to any function which it exercises on behalf of the State?

Submissions of the Claimant

88. Counsel for the Claimant, in support of his contention that TSTT was a body corporate in relation to the functions it exercised on behalf of the State, submitted as follows:

- a. Interference with the public telecommunication network is a criminal offence (Sections 69,73 and 74 of the Telecommunications Act, Chapter 47:31);
- b. Pursuant to Section 8 of the Telephone System Acquisition Act (No. 39 of 1960), the Government has the authority to provide and maintain telephone services for the public, a fortiori, international telecommunication services, which is a function of the State and is necessary to maintain internal and international security;
- c. TSTT carries out crucial functions on behalf of the Government and owns the majority of the infrastructure used to provide telecommunications service. The Affidavit filed on behalf of the Defendant avers that any problems that affect TSTT's operations have the potential to impact the entire nation and TSTT's development has a significant impact on national development;
- d. TSTT was listed under the responsibility of the Ministry of Public Utilities up to 2011;
- e. The telephone system was acquired by the State for the benefit of the people of Trinidad and Tobago and this was in the interest of the public; and
- f. TEXTEL was formed to carry out public functions and TSTT is an amalgamation of TEXTEL and TELCO.

Submissions of the Defendant

89. Senior Counsel for the Defendant submitted that TSTT was not a body corporate performing any function on behalf of the State. He argued that:

- a. The Claimant's reliance on TSTT's former incarnation as TEXTEL to support its contention that TSTT is a body corporate performing a function on behalf of the State

- was irrelevant to the present role of TSTT as a player in the national telecommunications industry;
- b. TSTT is one of several players in a highly competitive industry and the telecommunications industry is now populated with several companies operating in a free enterprise market; and
 - c. The Claimant failed to provide any evidence to prove that TSTT performs any functions on behalf of the State.

Submissions of TSTT

90. Senior Counsel for TSTT submitted that TSTT does not exercise any functions on behalf of the State. He submitted as follows:

- a. The Claimant has not provided any evidence that TSTT performs any function which is inherent in or normally required to be performed by the State.
- b. TSTT provides telecommunications services to members of the public and to Governmental departments in a highly competitive environment. These services are purely commercial services which are not normally provided by the State; and
- c. The provision of telecommunications services is not a function of the State, **Perch v The Attorney General**.¹⁶ If the provision of telecommunication services were a State function, it would mean that all TSTT's competitors would be public authorities for the purposes of the FOIA and that conclusion would be absurd.

Analysis and Findings

91. Having considered the submissions of the parties and the evidence adduced, I agree with the submissions of the Defendant and TSTT and find that TSTT is not a body corporate in relation to any function which it exercises on behalf of the State pursuant to Section 4(k)(i) of the FOIA for the following reasons:

- a. The Claimant has failed to adduce any evidence in support of its contention that TSTT performs any function on behalf of the State. The Government's acquisition of telephone services in the 1960's, the formation of TELCO, the merger of TELCO with TEXTEL and the incarnation of TSTT are all part of the historical background.

¹⁶ (2003) 62 WIR 461

However, the present arrangements do not support the contention that TSTT is conducting its business operations or performing any of its functions on behalf of the State;

- b. The undisputed evidence before me is that TSTT provides telecommunications services in a highly competitive commercial environment together with several other telecommunications companies. As such, I am not satisfied that TSTT exercises a function on behalf of the State because it provides these services to the State or owns telecommunications infrastructure;
- c. The Claimant's reliance on the fact that criminal sanctions apply where there is interference with the public telecommunication network provides no basis to support the contention that TSTT is providing telecommunications services on behalf of the State;
- d. The fact that the Defendant is the line Minister for TSTT does not prove that TSTT is performing any functions on behalf of the State.

Issue C: Is TSTT a public authority for the purposes of section 4(k)(III) of the FOIA, by virtue of it being a body corporate or unincorporated entity which is supported, directly or indirectly, by Government funds and over which Government is in a position to exercise control?

Submissions of the Claimant

92. Counsel for the Claimant, in support of the contention that TSTT was a body corporate which is supported, directly or indirectly by Government funds and over which the Government is in a position to exercise control, submitted as follows:

- a. The court ought to adopt a wide interpretation and hold that the words “in a position to exercise control” appearing in Section 4(k)(iii) of the FOIA should be interpreted to include “indirect control” by reason of Section 3(2) of the FOIA;
- b. Once money was allocated to TSTT by an Appropriation Act that money is deemed to be money provided by Parliament (Section 13(c) of the Exchequer and Audit Act, Chapter 69:01);

- c. 51% of shares in TSTT are held by NEL which is majority-owned by the State. By Deed of Adherence, NEL adopted the Bye-laws of TSTT and the Shareholders' Agreement, which govern TSTT's ownership and operations. By virtue thereof, the Government can appoint 5 of the 9 Directors on the TSTT Board;
- d. TSTT is the same entity as TELCO, with the latter being vested with an "undertaking" pursuant to the now-repealed, Trinidad and Tobago Telephone Act (TTTA). The TTTA referred to "undertaking" as the telephone system of the Government carried on under the authority of the Telephone System Acquisition Act, which further stated that "undertaking of the Company" meant, the "lands, works and plant of the Company". Accordingly, TSTT has the support of the Government by virtue of having the lands, works and plant which the Government owned and transferred to it; and
- e. The Court must determine what weight, if any, is to be placed on the hearsay evidence of Mr. Jones as against the public accounts document in respect of the \$1,806,570 allocation to TSTT for 2011.

Submissions of the Defendant

93. Senior Counsel for the Defendant argued that TSTT was not supported directly or indirectly by Government funds and the Government was not in a position to exercise control. He argued that:
- a. The Claimant has failed to prove that TSTT is supported by Government funding. The Claimant's reliance on the Public Accounts document where it states under Statutory Boards an allocation for "Trinidad and Tobago Telecommunications", is not evidence of such support as TSTT is not a Statutory Board as well as the fact that the correct recipient of the allocation should read "TATT"; and
 - b. The Claimant could not show that Government is in a position to exercise control over any funds allocated to TSTT, having regard to TSTT management being ceded to C&W and the Government's 51% shareholding in TSTT being vested in NEL.

Submissions of TSTT

94. Senior Counsel for TSTT submitted that TSTT is not supported, directly or indirectly by Government funds and over which the Government is in a position to exercise control. He submitted as follows:

- a. The Public Accounts document upon which the Claimant relies to prove that TSTT is financially supported by the Government refers to transfers to statutory boards and similar bodies and mentions Trinidad and Tobago Telecommunications. This is not a reference to TSTT and, in any event, TSTT is not a statutory board but a company continued under the Companies Act. Further, the Public Accounts document relied on by the Claimant is hearsay and cannot be relied upon for the truth of its contents; and
- b. The uncontroverted evidence is that TSTT generates its own funds entirely and exclusively from its commercial business.

Analysis and Findings

95. Having considered the submissions of the parties and the evidence adduced, I agree with the Defendant and TSTT and find that TSTT is not a body corporate or unincorporated entity which is supported, directly or indirectly, by Government funds and over which Government is in a position to exercise control pursuant to Section 4(k)(iii) of the FOIA for the following reasons:

- a. The evidence upon which the Claimant relies to support its contention that TSTT is supported by Government funding (i.e. the Public Accounts document) does not prove to my satisfaction that TSTT is the recipient of Government funding. In the first instance, the document is hearsay and secondly, in any event, I am not satisfied that the reference therein to "Trinidad and Tobago Telecommunications" is a reference to TSTT, since the document refers to allocations to Statutory Boards and TSTT is not a Statutory Board;
- b. In the absence of any other evidence from the Claimant to contradict the evidence of TSTT that it does not receive any financial support from the Government, I accept the evidence adduced by TSTT that its funds are generated entirely and exclusively from its commercial business;

- c. Based on my earlier analysis of the evidence and my findings in relation to the issue of control of TSTT, I also find that the Claimant has not proved to my satisfaction that the Government is in a position to exercise control over TSTT; and
- d. I disagree with the Claimant's contention that TSTT is the same entity as TELCO. The evidence demonstrates that after the merger of TELCO and TEXTEL, TELCO changed its name to TSTT. However, by virtue of the divestment of the Government's 51% shareholding in TSTT to NEL, TSTT is now jointly owned by NEL and C&W and managed by a Board of Directors appointed in accordance with the Shareholders' Agreement.

ISSUE D: If TSTT is a public authority for the purposes of the FOIA:

- i. **Was the Defendant's decision illegal and/or procedurally improper and/or irrational and/or in bad faith and/or on the instructions of an unauthorised person and/or in conflict with the policy of the FOIA and/or an error of law and/or a breach or omission to perform a duty and/or a deprivation of a legitimate expectation and/or substantive expectation and/or was exercised in a manner that is so unreasonable that no reasonable person could have so exercised the power and/or was an abdication of his responsibility and/or function and/or was not arrived at independently?**
- ii. **Was the Defendant in breach of his statutory duties under the FOIA?**
- iii. **Has the Defendant been guilty of unreasonable delay?**
- iv. **Has the Defendant acted in bad faith and/or without bona fides?**

ISSUE E: If so, is the Claimant entitled to the reliefs sought?

96. In the light of my earlier findings that TSTT is not a public authority for the purposes of Sections 4(i), 4 (k)(i) or 4(k)(iii) of the FOIA, I am not required to consider Issues D and E since the submissions made thereon were premised on the Court finding that TSTT was a public authority.

SUMMARY AND CONCLUSION

97. Based on the evidence and the submissions, I am of the opinion, and so find that:

- a. TSTT is not a public authority for the purposes of Section 4(i) of the FOIA by virtue of it being a company incorporated under the laws of the Republic of Trinidad and Tobago which is owned or controlled by the State;
- b. TSTT is not a public authority for the purposes of Section 4(k)(i) of the FOIA, by virtue of it being a body corporate or unincorporated entity in relation to any function which it exercises on behalf of the State; and
- c. TSTT is not a public authority for the purposes of Section 4(k)(iii) of the FOIA, by virtue of it being a body corporate or unincorporated entity which is supported, directly or indirectly, by Government funds and over which Government is in a position to exercise control.

98. Based on these findings, the Claimant is not entitled to the reliefs sought and its claim against the Defendant is dismissed.

99. I now invite the parties to address me on the appropriate order to be made with respect to the costs of this action in the light of my decision.

Dated this 16th day of February, 2016

.....
André des Vignes
Judge