

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

SAN FERNANDO

CV 2017-00619

IN THE MATTER OF AN APPLICATION BY RAVI BALGOBIN MAHARAJ FOR AN ADMINISTRATIVE ORDER
UNDER PART 56 OF THE CIVIL PROCEEDINGS RULES, 1998 AS AMENDED

AND

IN THE MATTER OF AN APPLICATION BY RAVI BALGOBIN MAHARAJ UNDER THE FREEDOM OF
INFORMATION ACT, CHAP. 22:02

BETWEEN

RAVI BALGOBIN MAHARAJ

Claimant

AND

TELECOMMUNICATION SERVICES OF TRINIDAD AND TOBAGO

Defendant

Appearances:

Mr. Anand Ramlogan SC leads Ms. Jayanti Lutchmedial with Ms. Chelsea Stewart and instructed by Ms. Alana Rambaran **for the** Claimant

Dr. Claude Denbow SC with Mr. Jerome Rajcoomar instructed by Mrs. Donna Denbow **for the** Defendant

JUDGMENT

BACKGROUND

1. This is a Judicial Review by a citizen and resident of Trinidad and Tobago, of a decision by the Telecommunication Services of Trinidad and Tobago (TSTT), a private limited corporate entity,

to not disclose certain requested documents under the Freedom of Information Act Chap. 22:02 ("the Act" or "FOIA").

2. On 15th November 2016, the Claimant made an application to TSTT under Section 13 of the FOIA for the following documents:

A copy of the hierarchy of the organizational chart showing the positions of the executive management in the TSTT and the salaries paid in respect of each such position.

The stipend being paid to members of the Board of Directors;

An unedited copy of Original Shareholders agreement between Cable and Wireless and Telecommunications Services of Trinidad and Tobago Company; and

An unedited copy of the Deed of Adherence signed by National Enterprises Ltd.

3. The application was made by letter dated 7th November 2016 from a Law Chambers, as instructed by the Claimant, and delivered to TSTT on 15th November 2017. Items (3) and (4) have been disclosed in the course of this litigation by the Defendant.
4. On 7th December 2016, by a letter of that date from the Executive Vice President (Legal) and Corporate Secretary of TSTT, to the Claimant's attorneys, the TSTT declined to consider the Claimant's request stating:

*"Please be advised that for the purposes of the FOIA, **TSTT is not a public authority** to which the provisions of the Act are applicable. This has been established in law in the recent decision of Cellular Planet v Minister of Public Utilities CV2013-02624 by Justice Andre Des Vignes." (emphasis provided)*

5. In this application for judicial review, the Claimant contends that the Defendant, Telecommunication Services of Trinidad and Tobago Limited ("TSTT") is a public authority within the meaning of the Freedom of Information Act ('FOIA') and that the TSTT erred in refusing to consider the Claimant's FOIA request on the basis that it was not such a public authority. It is a narrow point.

6. Permission to apply for judicial review was granted by the Court of Appeal on 20th November 2017.

7. The Claimant seeks:

A declaration that the TSTT is a public authority within the meaning of the FOIA and is subject to the provisions of the FOIA;

An order of certiorari to remove into this Honourable Court and quash the decision to deny access to the documents requested by the Applicant in his FOIA application on the basis that TSTT is not a public authority within the meaning of the FOIA;

An order of mandamus to compel TSTT to consider the Applicant's request for access to official documents dated 7th November, 2016 in accordance with the provisions of the FOIA;

8. Submissions are filed in this matter on behalf of Telecommunications Services of Trinidad and Tobago Limited ("**TSTT**") in opposition to the submissions of the claimant in relation to the several reliefs claimed by the Claimant in its Fixed Date Claim Form filed on 6th November, 2017.

9. The narrow issue here is whether TSTT is a public authority as defined under the Act. Issues such as whether the particular documents requested are exempt documents under the Act, for instance, are not before this court.

10. For our purposes here, a Public authority is defined in the Act at s.4 of the FOIA : "*a public authority means –*

*"a company incorporated under the laws of the Republic of Trinidad and Tobago which is **owned or controlled** by the state."* (emphasis mine)

AND/OR

"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"

11. The defence contends, put shortly, that TSTT is neither “*owned*” nor “*controlled*” by the State; is not supported by “...*government funds...*”; is not a Public Authority, and therefore need not provide the claimant access to the documents requested under the Act. The defendant contends that the TSTT is owned by the National Enterprises Ltd (“NEL”), a private limited company whose shares are substantially held by the Government of Trinidad and Tobago (“GOTT”).

THE ISSUES

12. The main issue here is whether the TSTT is a Public Authority under the Act. The answer to that requires the resolution to two sub-issues, being: (i) whether the TSTT is *owned* by the State; and/or (ii) whether TSTT is *controlled* by the State. For the reasons I set out below, this court holds that they are substantially distinct concepts and in any event, concepts that require separate consideration.

LAW/REASONING

Purposive interpretation of the Act?

13. It is contended by the claimant that the court is required and empowered by the Act and learning thereto, to adopt a purposive approach to the interpretation of the provisions of this Act. The legal/judicial landscape is replete with authorities speaking to the court’s approach to determining rights under the Act, several of which are cited in the claimant’s submissions. As counsel for the claimant has pointed out and the defence have not disputed, the policy, purpose, and object of the Act are to create a general right of access to information 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.
14. The defence however have added a caveat to the proposition that the court adopt a purposive approach to the interpretation of provisions of the Act. The defence contend that there are strict judicial limits to the question of a purposive interpretation of this legislation. I agree. They note that a similar argument was raised by the Claimant in the leading case of **Cellular Planet Limited**. My Brother High Court Judge (as he then was), Justice des Vignes, had before him the same provisions in the FOIA as are being relied on in this case and having considered the relevant authorities, in particular the local case of **Ghany v Compensation Committee and**

the Attorney General of Trinidad and Tobago (“Ghany”) in the Privy Council came to the conclusion at paragraph 75 thereof, as follows:

“...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.”

15. The defence contend that in arriving at this conclusion the Judge was constrained to point out, based on the guidance from the Privy Council (in ***Ghany***) in interpreting Section 4 (i) of the FOIA, that the Court should recognize that its role is limited to interpreting the statute and that it must not overstep that limit to engage in legislating . Further, that there are limits to interpreting statutory provisions in accordance with purposive interpretation, especially where the legislation clearly provides a definition – and a comprehensive one at that – and, there is no error or drafting mistake contained therein.
16. This statement of the law is a correct statement in my view and I adopt it and apply it in this case. The defendant contends further, that in this case, in the absence of a drafting mistake there is no basis for invoking the leading edge of the purposive interpretation which is being so heavily relied on by the Claimant.
17. It appears to me further, looking at the authorities cited in this case, that the leading edge as it were, of this purposive approach, is directed at the granting of access to documents/information in the face of the exemption provisions, more so than to circumscribing or expanding the ambit of the definition of a Public authority. The legislation provides the framework for the court to ‘purposively’ exercise its judicial mind and discretion in determining what the ambit of the exempt classes is and which documents/information fall within the exempt classes. The substance of the relevant parts of the legislation for the most part speak to the processes toward public access to information from Public Authorities and is not an Act intended to refine the definition of a Public Authority outside of that which it sets out in section 4 of the Act. The legislature has gone to great pains to codify the definition of a Public Authority and does not leave much wriggle-room for an attempt at a more expansive interpretation.
18. So the authorities in support of the purposive approach relied upon by both parties in this matter for the most part address the court’s purposive approach to the core object of the Act – disclosure - and not the definition of a Public Authority that is subject to the disclosure

requests. To be clear, the purposive approach although more applicable to the 'disclosure' issues, is applicable to the definition of a 'public authority' in the peculiar circumstances of this case.

19. The object of the Act is set out in section 3; It is stated at s.3(1)-(2) as:

“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.”

20. From the objects and indeed the tenor of the whole and all the parts of the Act, once the relevant Public Authority has been first identified, then the disclosure procedures kick-in to give life to those provisions of the Act.

21. Both parties have sought to substantially rely on their interpretation of the established meanings of the two key words in the said definition; 'own' and 'control', largely in the context other non-FOIA Acts and circumstances along with the Companies Act Chap 81:01 and company law and the learning thereto . As a caveat to this however, I am reminded that the Act is a stand-alone Act and does not dictate that these two words necessary derive their meaning and application by resort to the Companies Act, the world of company law and related learning or any other Act¹. The Object and the purpose of the FOI Act is very important in setting the context for determining what *owned* and *control* respectively, mean. It is particularly relevant to the meaning of the word control in this court's view.

¹ E.g. The Constitution; The Integrity in Public Life Act Chap 22:01.

22. I refer widely to the filed written submissions of both counsel for the Claimant and of the Defendant in resolution of this matter.

23. I adopt the claimant's account of the ownership history of TSTT as set out in the claim and repeated in the written submissions filed June 1st 2018². The whole history is relevant, but I set out here only that contained in para 11 and 12 of the submissions for ease of reference:

"Prior to that merger, the Government and CWWI (together with Cable and Wireless Communications plc of which CWWI was a subsidiary) entered into a Shareholders Agreement that governed the ownership and operations of TELCO dated 20th December 1989 ("the 1989 Shareholders Agreement") and thereafter TSTT. The 1989 Shareholder agreement provided amongst other things:

The Government was the majority shareholder with 51% of the issued share capital and CWWI owning the remaining 49%.

There would be nine directors, the majority of whom (five directors) would be Government appointed and one of whom would be Chairman and CWWI appointing the remaining 4 directors: Clause 11, 1989 Shareholders Agreement.

The quorum of three directors also required a majority of two Government appointed directors: Clause 11(d) 1989 Shareholders Agreement.

In the event that CWWI's shareholding fell below 49%, CWWI had a right to give written notice to the Government requiring the Government to purchase or cause to be purchased all CWWI's shares in TSTT: Clause 2(e) 1989 Shareholders Agreement.

Part of the initial payment by CWWI for purchasing shares in TSTT was applied to repay a Government loan of TT\$31 million and interest thereon that the Government had made to TSTT: Clause 4(a)(ii) 1989 Shareholders Agreement.

The business of TSTT would be carried on pursuant to policies laid down from time to time by the Directors: Clause 8(a) (iii) 1989 Shareholders Agreement.

The Government had the right to inspect the books of TSTT at any reasonable time during business hours: Clause 8(a)(viii) 1989 Shareholders Agreement.

² The Defendant has not disputed it. In fact the defendant has added to it, with contemporary developments.

TSTT was required to deliver to the Government any additional financial or other information as maybe requested: Clause 8 (a)(viii) 1989 Shareholders Agreement.

The Government authorised TSTT by way of a licence to maintain and operate an external telecommunications network for the Republic of Trinidad and Tobago for a period of 20 years from 13th July 1989 with an option for renewal on negotiable terms.

On 27th August 1999, the Government incorporated a company National Enterprises Ltd (“NEL”) and vested ownership of three state controlled companies into that entity – namely ownership of TSTT, National Flour Mills Ltd and Trinidad Nitrogen Company Ltd. The 51% shareholding in TSTT directly owned by the Government was transferred to NEL. “

24. These pertinent historical facts set out above provide a basis for the resolution of this matter in my view³.

“Owned”

25. I agree with counsel for the claimant that the Act does not require the company to be wholly owned by the State; “Majority-owned”, would satisfy the requirement. Further, it appears that the definition of a Public Authority in the Act does not contemplates *Own* and *Control* as entirely one and the same concept. The Act specifically sets them out separately. The learning on these concepts however, particularly as they relate to corporate entities, clearly suggests that there is at the very least an overlap. It does not appear from any of the authorities cited to this court that the sole or majority shareholding of a company can amount to *ownership* without the consideration of what shareholding means in relation to the concept of control. To this extent, the notion of control in its narrower sense has to factor in when (and after) determining who *Owns* TSTT. The broader notion of “*Control*” as this court sees the second limb of the definition of what is a Public Authority under the Act, will be dealt with in my decision separately. I think it is a broader concept than the narrower notion of control that is inextricably bound up with the definition of the first limb; “own[ership]”.
26. The learning cited in the submissions and which reflect the state of the law with respect to rights attendant on share ownership, include an element of the notion of control which I

³ See the Affidavit of Charles Carter(TSTT) generally and more particularly paras 13 -22 thereof.

referred to as part of defining *ownership* as opposed to the respective second and broader limb of the Act's definition of a Public Authority - "Control". Ownership will usually be patent and self-evident. Notwithstanding this, I acknowledge that in some instances the difference between the two "controls" may be unclear or simply indistinguishable. This is not the case in the instant matter. So the control of a company by virtue of the ownership of its shares which I refer to hereonin as *de jure control* (as opposed to *de facto*), resides in the voting power of its shareholders; the right to vote at a general meeting and carry a resolution there⁴. The test of control by virtue of shareholding *Ownership(de jure)* and also the second test of the broader notion of "Control" as set out in the definition in the Act (*de facto*), upon which the defendant relies is captured best, perhaps in the Canadian case cited by the defence as having *refined the law*, i.e. ***Duha Printers (Western) Ltd*** 1 RSC 795 at paras 35 – 50 of the Judgment of Mr Justice Iacobucci that:

'It has been well recognized that, under the Income Tax Act, "control" of a corporation normally refers to de jure control and not de facto control ...de jure control has emerged as the Canadian standard, with the test for control generally accepted to be whether the controlling party enjoys, by virtue of its shareholdings, the ability to elect the majority of the board of directors..... it is clear that the general test for de jure control remains the majority voting control over the corporation, as manifested by the ability to elect the directors of the corporation...'

27. It is this court's view that "Control", as it appears in the second limb of the definition of a public authority in the Act, refers to '*de facto*' control and is discernibly distinct from 'control' (*de jure*) as it flows from share ownership. The word *control* in the definition in the FOIA is intended to broaden the parameters of what constitutes a public authority beyond the strict *de jure* control. The defence suggests that this distinction is too uncertain and relies upon a Court of Appeal decision in relation to the interpretation of, amongst other things, "direct and indirect control" under the Integrity in Public Life Act (Supra). The defence do not specifically identify the case. All the same, the defence submissions set out sufficient of the statutory and other considerations in that case, so as to bring thus court to the conclusion that it is not on all fours with the instant case.

⁴ IRC v Bibby and Sons Limited(1945) 1 ALL ER; see also the written submissions of the defendant on this point.

28. Ownership. Ownership under the Act appears to conjure up the classic understanding of ownership of a company – TSTT. Both parties agree that shareholders do not own the company assets or undertakings. If that is not agreed, then the court so finds. Palmers Company Law 24th Ed at para 34.01 provides a workable concise exposition of the law on the meaning of shareholding:

“A share in a company is the expression of a proprietary relationship: the shareholder is the proportionate owner of the company but he does not own the company’s assets which belong to the company as a separate legal entity.”

29. I accept also that it is a fundamental principal of company law (and conventional knowledge) that the shareholders are the *owners* of the company – TSTT and by virtue of that shareholding, usually determine the appointment of the directors and the carrying of resolutions at a general meeting of the company. In our case, NEL is the majority shareholder and owner of the defendant company – TSTT. The Government as the majority shareholder of NEL is similarly the *owner* of NEL. The shareholders not having an ownership interest in the assets/undertakings of the company, then NEL’s assets which include its shareholding in TSTT, are not owned by Government of Trinidad and Tobago. This I think would be the classic/orthodox application of the law and learning on corporate entities and the definition intended by the framers of the FOI Act. As I noted earlier, the Act is a stand-alone Act and does not necessarily rely on the meaning of ‘ownership’ of a company ascribed by the company Act or any other, and the learning thereto. But in this circumstance, there is nothing that suggests that the Act intended or could reasonably have intended anything else but this orthodox and ‘*de jure*’ interpretation of corporate share ownership.

30. The claimant posits in its submissions, relying on the authorities of; ***Short v Treasury Comrs*** [1948] IKB 116 (122) citing ***Inland Revenue Comrs v Laird Group PLC*** [2003] UKHL 54; [2003] 1 WLR 2476 (“***Laird Group***”); that the ownership of shares in a company – TSTT, “...*is not a share in the company’s undertakings, for the company owns its property beneficially and not in trust for its members...shareholders are not, in the eyes of the law, part owners of the undertaking*” (emphasis mine). So, if I understand the claimant’s argument on this point; then, the application of this legal truth - that the shareholders are not the owners of the company’s assets/undertakings - results in the shareholders not being *owners* of the company. Conversely, failure to hold shares in a company does not necessarily exclude one as an owner of the company. The claimant contends therefore, that reliance on the existence of a GOTT

shareholding in TSTT as constituting the only proof/evidence of 'ownership' of the company – TSTT - can be inappropriate or plainly wrong.

31. I do not entirely agree. First, the statement of the law in **Short** as set out above is in fact correct. Secondly, that statement merely restates the law in **Palmer** as set out above, which makes it clear that shareholders own the company and not its assets/undertakings. As counsel for the defence in essence submits, the 'undertakings' referred to in **Short** are one and the same as the 'assets' of the company and do not refer to the shareholding or shareholder ownership of the company. In addition to the open logic of the defence submission on this point, the defence cited in support of this submission the case of the **Laird group** upon which the claimant primarily relies for another point; at para 39, Lord Millet put it thus:

*"The juridical nature of a share is not easy to describe. It is not a share in the company's **undertaking**, for the company owns its property beneficially and not in trust for its members."*(emphasis provided)

32. Counsel for the Defence, correctly I think, pointed out that Lord Millet's reference in the above quote at para 39, to the "company's undertaking" was a reference to its property/assets/business and demonstrated that there is a distinction between the shareholder owning shares in the company as opposed to owning its undertaking/assets/property. Stated again, the shareholder does not own the company's assets or undertaking.

33. A key right attendant on the share ownership of the company is the right to vote in the general meeting including the right by that means to appoint directors.

34. The Act defines a Public Authority, for our purposes here, in two limbs. The first limb requiring that the State "own" the defendant company – TSTT. Ownership in this instance – of TSTT - is reflected in the Companies Act and learning thereto. The *de jure* control, also associated with shareholding ownership is in no small part also defined in the said Companies Act and learning thereto.

35. In light of the reasons above, the court is of the view that the State does not own the company – TSTT. Parliament is always at liberty to amend the law and, whether in the Companies Act,

the FOI Act or any other, to expand the meaning of “Ownership” of a corporate entity beyond that which presently exists.

“Control”

36. The part of the definition under the Act that concerns us in this matter has as its second limb, the notion of *Control*. I repeat here, that this Act is a stand-alone Act and this notion of Control is not necessarily limited to the notion of control as set out in the Companies Act or any other Act and learning thereto⁵. A good starting point on this distinction and issue, is to be found in the words of Justice Mann in ***Citibank N.A. Oceanwood Opportunities Master Fund*** [2018] EWHC 448(CH) (“***Citibank***”): “The word “control” is a nuanced word capable of meaning different things in different contexts. If it matters to describe it as “ambiguous” it is ambiguous, though I do not think that that description particularly assists the debate. In the present context it must be given a businessman’s interpretation, in accordance with New York law principles”. And indeed it is a nuanced word made even more so with the various statutes, agreement; corporate entities and conduct of the GOTT in relation to all of the above. In the ***Citibank*** case, control, was attributed a meaning in the context of the circumstances of that matter – a New York ‘businessman’s interpretation’. Likewise ‘Control’ over TSTT has to be viewed in a context; having regard to the general tenor of the whole of the definition section(s4) of the FOIA; the objects of the said Act, the interests of the public that the act seeks to enhance or protect and all the other myriad circumstances referred to in this decision.
37. The defence has cited several authorities prescribing the meaning of control of a corporate entity. However, this court, in determining the *Ownership* of the company – TSTT, the concomitant *de jure* control has already been considered and factored-in⁶. What other ‘control’ can be intended by the Act? In my view it appears to be *de facto* control. This control goes beyond that which is inextricably bound up with the narrower and orthodox notion of ownership(*de jure*) as it relates to shareholding. This involves a fact finding process and includes; consideration of statutory provisions that go to the notion of the State’s control of entities, and practice and the course of conduct in relation to matters of the State involvement in entities external to the traditional public service including private limited companies, in which the State has an interest and statutory corporations.

⁵ See also The Integrity in Public Life Act(*Supra*).

⁶ As defined in Company law and Act(and learning thereto).

38. The ownership of the company – TSTT, is substantially determined by the shareholding, but that does not necessarily explain who otherwise controls the company. In the Canadian case of *Duha Printers*, at para 36 thereof the court recognized that:

“...although the directors generally have, by operation of the corporate law statute governing the corporation, the formal right to direct the management of the corporation, the majority shareholder enjoys the indirect exercise of this control through his or her ability to elect the board of directors. Thus, it is in reality the majority shareholder, not the directors per se, who is in effective control of the corporation... .The general approach to the determination of control, as I have already noted, has been to examine the share register of the corporation to ascertain which shareholder, if any, possesses the ability to elect a majority of the Board of Directors and, therefore, has the type of power contemplated by the Buckerfield’s test, supra. The case law seems to point only to limited circumstances in which other documents may be examined, and then only to a narrow range of documents which may be considered”.(emphasis added)

39. To the extent that this learning also represents the law in Trinidad and Tobago, it is clear that the essence of the shareholding as a *control* factor; is actually the indirect exercise of control over the governance of the company as exercised by the directors. But what is the position if this ability to exercise control over the governance of the company by electing the directors – of TSTT - is circumvented by a subsisting 1989 “shareholders agreement” that includes the provisions: **(a)** for the Government to directly appoint the majority of the Directors, **(b)** for the government to exercise certain rights attributable to ownership, such as: Inspect the books of TSTT(see clause 8(a)(viii) of the shareholders agreement); to require delivery of additional financial information that may be requested from TSTT; for the directors from time to time lay down the policies of the business of TSTT pursuant to cl 8(a)(iii) of the 1989 Shareholders agreement;(c) for the CEO of TSTT to produce annually a 5-year business plan which has to be approved by at least one director appointed by GOTT and one of Cable and Wireless(the other big player and party to the agreement); to preside over the renewal(and its terms and conditions) of the subsisting 20yr licence agreement for the provision of external telecommunications network?

40. The bottom line of the agreement left the GOTT with a 51% shareholding and the other big player, Cable and Wireless with 49% of TSTT. It is this 51% that the GOTT subsequently transferred to NEL. It is not disputed that NEL is owned by the GOTT and in the court’s view,

under the *de jure* control of the GOTT. NEL is a publicly traded private limited company of which the GOTT owns 83% of the shares, with one of its stated purposes when put up for its initial public offering as being “...to prevent control of underlying investments changing hands and to ...”.⁷ The government amongst other things no doubt, sought to protect the share ownership of the shares held by NEL in several companies, including TSTT.

41. Further, NEL, now the majority shareholder in TSTT entered into a Deed of Adherence, dated the 22nd August 2000, requiring it to comply with the Governments obligations under the 1989 shareholders agreement⁸. Relying on the learning in the **Doha** case above, the shareholders have the effective control of the company – NEL - by virtue of their voting power. Perhaps the most significant element of that voting power is the ability to vote in directors, but it doesn't stop there. The shareholders only, can carry any of a variety of resolutions at the general meeting. The Government of Trinidad and Tobago however, notwithstanding their right to appoint the majority directors of TSTT pursuant to the 1989 shareholder agreement, cannot otherwise directly participate and carry any shareholder resolution unless provided for in the said agreement. The GOTT direct control over TSTT is clearly not absolute, but constrained by the limits of the agreement; the structure of the corporate entities and the law governing the operations of corporate entities the exercise of various functions and powers within the entity. The point cannot be overstated however; the GOTT does not own TSTT.
42. Who exercises the effective control over TSTT that Justice Iacobucci referred to in the **Duha Printers** case? Is it not true that the State has the effective shareholding and controlling interest in NEL by virtue of its capacity to vote at the general meeting; carry a resolution, and then to appoint the directors and control the governance of that company – NEL ? What then would be the difference in relation to the Government's, *de facto* controlling interest(as opposed to a shareholding control – *de jure*) in TSTT defined by virtue of its control over the, albeit limited governance of TSTT, through the appointment of the majority of the directors under the said 1989 agreement? The agreement includes the myriad other rights including the CEO requirement to produce and deliver to the GOTT a 5 year business plan every year, and the GOTT's veto right with respect to the said TSTT's 5- year business plans. On the basis of the indicators reflected in the legal frame work and relationship between the two corporate entities, NEL and TSTT addressed above, along with the import of the 1989 shareholder

⁷ See para 14 of the Claimant's written submissions filed June 1st 2018

⁸ TSTT has not sought to dispute this fact.

agreement, the ‘Control’ referred to in what I refer to as the second limb of the definition of a public authority under the Act has in my view been satisfied.

43. However, added to the indicators of de facto effective *Control* referred to in the paras above, are several other factors that make up the contextual fabric tending to the proof of the existence of an effective, *de facto*, control of TSTT by the GOTT. These are set out in paras 47-54 of the claimants written submissions⁹. These include the GOTT statements and conduct in relation to TSTT. This would include the GOTT creation of a Freedom of Information Unit which lists TSTT as one of the public authorities and also the enquiry and findings of the “Joint Select Committee” appointed pursuant to s.66A of the Constitution¹⁰. To be clear, the fact that the State treated and regarded the TSTT as akin to a State enterprise or Public authority is not of itself determinative of the issue before this court. That the telecoms industry is critical to the existence and development of any contemporary civilization is clear. Not every act on the part of the GOTT necessarily represents an act of “control” over, or for, the individual benefit of TSTT as opposed to an act for the benefit of the industry as a whole. According to Charles Carter (of TSTT), TSTT has at least 10 competitors in the industry¹¹. There is an industry subject to protection and/or regulation.

44. I also find it helpful to refer to the classes and the nature of the documents referred to in the exempt sections of the Act in determining; what is the mischief that the Act seeks to quell. Then, if the documents that TSTT refuses disclosure of, are documents that are provided for and potentially fall to be contested under the exempt sections which in turn seek the protection of the *public interest*, then this fact along with the others referred to in this suit and judgment, may well point to the TSTT falling within the ambit of the definition of a ‘public authority’ under the Act¹².

45. It is the further contention of the claimant that the TSTT is a ‘Public Authority’; it falling within the “Control”(as in the definition) of the State by virtue of its financial dependency as described in the definition section at section 4.(k)(iii) of the Act; that a public authority means:

(k) a body corporate or unincorporated entity

⁹ The claimant has relied on these factors for a ground other than what I refer to it for.

¹⁰ The Court has considered the Defendant’s response to this submission by the claimant.

¹¹ See para 30 of the Carter affidavit.

¹² E.g. sections 31(2)(d); s. 33(1)(a); 33(2)(a).

...(iii) which is supported directly or indirectly by Government funds and over which the Government is in a position to exercise control”

46. The claimant contends that TSTT is a body corporate and that the financial relationship between TSTT and the Government, the GOTT is in a position to exercise control over TSTT and in fact does so¹³. It was submitted that TSTT is directly or indirectly supported by Government funds and supported as follows:

“TSTT was funded by a Government loan. “... part of the initial payment by CWWI for purchasing shares in TSTT was applied to repay a Government loan of TT\$31 million and interest thereon that the Government had made to TSTT: Clause 4(a)(ii) 1989 Shareholders Agreement. The Claimant does not know whether in fact that loan was repaid, whether it was repaid in full and if so when precisely that took place. The fact remains that TSTT was substantially funded by a Government Loan.”

47. Counsel for the claimant submits that under the terms of the 1989 Shareholders Agreement, in the event that CWWI’s shareholding falls below 49%, CWWI has a right to give written notice to the Government requiring the Government to purchase or cause to be purchased all CWWI’s shares in TSTT (Clause 2(e)). Counsel submits further, that the Government is under an obligation to purchase shares in this circumstance and therefore as long as that provision remains in force TSTT should be regarded as being indirectly supported by Government Funds. This the claimant contends, is further evidence of the control exercised by the State. It is this court’s view, that by itself, this would not suffice as control. As part of the circumstantial fabric of the relationship between TSTT , NEL and the State it is relevant, albeit not central. ¹⁴

48. So I do not accept the argument that TSTT meets the definition of a Public Authority under section 4(k)(iii) of the Act. The fact that it borrowed money from the State (and paid it back in full) does not suggest that it is supported in anyway by Government funds as envisaged in the section¹⁵. The answer to the question as to whether TSTT is supported directly or indirectly

¹³ See the definition and powers of the “corporation Sole”.

¹⁴ See also the circumstances referred to in paras 46 -52 of the claimants written submissions. This court finds that these contribute to the fabric of circumstances, relationships, and a course of conduct, that tend to reflect the *de facto* control of the State over the TSTT.

¹⁵ The GOTT subsidies fuel for all residents of Trinidad and Tobago including Companies. What is the significance of this support?

by government funds, is in my view answered in whole by the defendant's submissions at para 47 of the written submissions; that is, TSTT is wholly self-funded and that TSTT has always been a commercially successful and profitable business venture. The defendant referred to the affidavit of one, Charles Carter, the 'Executive Vice President of legal, Regulatory and Carrier Services/Corporate Secretary' of TSTT, at para 32-33 thereof, that concludes in the end, the financial dependence of the TSTT from the GOTT funding or subsidy is exemplified by the fact, amongst other things, that in 2017, TSTT was able to go on the capital market in Trinidad and raise \$TT1.9 Billion from local financial institutions¹⁶.

49. No sufficient evidence has been led in my view to suggest that the TSTT is financially dependent on the State as being suggested by the claimant, so as to render it, by virtue of that alleged 'dependence', a public authority under the Act.

"LIGITIMATE JUDICIAL CONCERNS"

50. The defendant in its written submissions filed before the court raised several issues under the above caption, for the court's consideration. The issues raised are in the court's view wholly answered in the claimant's submissions in Reply.
51. Suffice it to say; the purpose of the request for information is generally of no concern of the Public Authority. In this case the purpose of the request is in any event unknown to TSTT. The inference drawn from the applicant's history of political activism is not sufficient. No doubt one can envisage purposes in matters generally, that would not likely be countenanced by the court or any reasonable person, e.g. to surreptitiously diminish the competitiveness of TSTT; or to effect an act of terrorism or indeed any other criminal act. There is no evidence of this in the instant case. I am not aware however, that even "*political mischief*" (undefined as that concept is) would breach the criminal law, affect the competitiveness of TSTT, or in any event render the request for information invalid. To be clear, in this case it is not an impediment to disclosure.
52. I accept the importance to the national good, of the telecoms industry and the importance of a well-run and even regulated industry. However, the commercially competitive nature of the telecoms industry is not a relevant or weighty consideration for determining whether or not

¹⁶ The role and extent of the GOTT ownership in Republic Bank is not lost on the court.

TSTT is a Public Authority. Neither is the potential for the erosion of TSTT's competitiveness by virtue of revealing certain commercially 'industry-sensitive' information a basis for making the determination as to whether TSTT is a Public Authority.

53. It appears however that issues such as those that tread upon the sensitive commercial and competitive considerations may be canvassed under the comprehensive exemption sections of the Act for the Courts to ascertain whether TSTT's non-disclosure satisfies a basis for the exemption which has been laid down by parliament.

DISPOSAL

54. Given the definition of a Public Authority in the Act and having regard to the object of the Act, the law, the symbiotic relationship between the TSTT, NEL and the GOTT, the various considerations canvassed above and in the end the reality of GOTT's de facto control of the affairs of TSTT; it would render TSTT a *public authority* under the FOI Act and subject it to the provisions therein.

55. For the reasons provided above, **IT IS HEREBY ORDERED AS FOLLOWS:**

- i. Judgment for the Claimant;
- ii. A declaration that the TSTT is a Public Authority within the meaning of the FOI Act and is subject to the provisions of the FOI Act;
- iii. An order of certiorari is granted to remove into this Honourable Court and quash the decision to deny access to the documents requested by the Applicant in his FOI Act application on the basis; that TSTT is not a public authority within the meaning of the FOI Act;
- iv. An order of mandamus is granted to compel the Defendant, TSTT, to reconsider the Applicant's request for access to the official documents that were requested, dated 7th November, 2016 in accordance with the provisions of the FOI Act;
- v. Costs to the Claimant, to be assessed if not agreed between the parties.

DAVID C HARRIS
HIGH COURT JUDGE
DECEMBER 4, 2018