[2015] JMCA Civ 32

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 54/2013

BEFORE: THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE McINTOSH JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**THE INDEPENDENT COMMISSION OF INVESTIGATIONS**	**APPELLANT**
AND	**DIGICEL (JAMAICA) LIMITED**	**RESPONDENT**

Terrence Williams and Miss Rhona Morgan instructed by Rhona Morgan for the appellant

Maurice Manning and Miss Michelle Phillips instructed by Nunes Scholefield DeLeon & Co for the respondent

11, 12, 13 November 2014 and 29 May 2015

DUKHARAN JA

[1] I have read, in draft the judgment of my brother Brooks JA. I agree with his reasoning and conclusion and have nothing to add.

McINTOSH JA

[2] I agree with Brooks JA's analysis of the arguments in this matter and his resulting conclusions as set out in his judgment, a draft of which I was privileged to read. I have nothing to add.

BROOKS JA

[3] The main issue for determination in this appeal is whether the Independent Commission of Investigation (INDECOM) may compel a telecommunications service provider to supply it with information which the Telecommunications Act (Telecoms Act) and the Interception of Communications Act (Intercept Act) require the provider to keep secret and confidential. Digicel (Jamaica) Limited (Digicel), one of the island's telecommunications providers, raised that question, among others, by way of a fixed date claim in the Supreme Court. Digicel contended that the provider was not compellable. INDECOM opposed that position. On 20 June 2013, Mangatal J ruled ([2013] JMSC Civ 87) that the provider was not compellable. INDECOM has appealed against the learned judge's decision.

[4] The resolution of the issue identified above requires an assessment of the relevant provisions of several statutes and their interaction. Before proceeding with that assessment, it is necessary to provide more detail about the parties and the factual background leading to the litigation.

The background facts

[5] Digicel is licenced under the Telecoms Act to provide telecommunication services, including voice and data services, to the public. In the course of its business it comes into possession of subscriber information and call traffic information generated through subscribers' use of its voice services. The information is all in digital format, and Digicel stores it.

[6] INDECOM is a commission of Parliament. It was created by the Independent Commission of Investigations Act (INDECOM Act). It is mandated, among other things, to investigate alleged misconduct by agents of the state, including police officers.

[7] In September 2011, INDECOM was investigating the killing of a man by police officers. By letter dated 27 September 2011 it issued a notice to Digicel requiring Digicel to provide it with call data and subscriber details for certain telephone numbers. The notice was said to have been issued in accordance with section 21 of the INDECOM Act. It, however, gave no reason for INDECOM's requiring the information. The relevant portion of the notice stated as follows:

> "**TAKE NOTICE** that you are required to provide the office of the Independent Commission of Investigations…with a report in the form of a **written statement** pursuant to section 21 of the Independent Commission of Investigations Act, touching and concerning particular information on the numbers below. You are required to bring along with you certified copies of all call data and subscriber details for said numbers for the period November 2009 to January [2010]…The call data **must** outline the numbers that received these calls and any SMS data available. The cell sites from which each call was transmitted must also be indicated…" (Emphasis as in original)

[8] Digicel took legal advice and thereafter informed INDECOM that, although it was not averse to providing the information, it was precluded from doing so by both the Telecoms Act and the Intercept Act. Negotiations between the parties failed to break the deadlock, and Digicel sought the assistance of the court to resolve the dispute.

The decision in the court below

[9] Mangatal J concluded her judgment with a number of declarations that accurately summarised the various conclusions to which she had come, in her very well organised reasons for judgment. She stated at paragraph 52:

> "1. Digicel is restricted from providing subscriber information regarding the use of its services by third parties to INDECOM pursuant to sub-section 47 (1) of the Telecommunications Act.
>
> 2. INDECOM is not an authorized officer or a designated person within the meaning of section 16 of the Interception of Communications Act.
>
> 3. Digicel is not compellable under section 21(1) of the Independent Commission of Investigations Act to provide customer/subscriber information and/or traffic data to INDECOM.
>
> 4. Digicel is not compellable under section 21 (4) of the Independent Commission of Investigations Act to produce customer/subscriber information and/or traffic data to INDECOM.
>
> 5. The Independent Commission of Investigations Act is a law which contains provisions which would require the disclosure of the subscriber information for the purpose of investigating a criminal offence.
>
> 6. Whilst INDECOM is not entitled to the subscriber information, as Digicel has a discretion pursuant to sub-section 47(2)(b)(i) in respect of disclosure , in appropriate circumstances, such as if the Notice had properly specified the purpose for which the Notice was issued, which purpose was the investigating of a criminal offence, Digicel could have exercised its discretion in favour of INDECOM's request."

The appeal

[10] Learned counsel for INDECOM, Mr Williams, quite helpfully reduced the numerous grounds of appeal filed on behalf of INDECOM, into four categories. In these grounds, INDECOM contends that:

a. The INDECOM Act is aimed at ensuring the compliance with the constitutional obligations surrounding the right to life, and has given all the powers of a constable to INDECOM in pursuance of that objective. The INDECOM Act should, therefore, have been purposively interpreted to allow INDECOM to conduct an effective and independent investigation, as a constable would have been able to do. This, the learned judge failed to do. (The constable issue)

b. "No criminal offence is committed by disclosing telephone subscriber and call data. Such disclosure is not privileged", despite the learned judge's finding. (The privilege/offence issue)

c. Contrary to the finding of the learned judge, "[n]o person [would] suffer civil liability on account of information given to [INDECOM]." (The privilege/ discretion issue)

d. Contrary to the finding of the learned judge, INDECOM, in accordance with the powers of a judge given to it by the INDECOM Act, "can order the disclosure of secret and

confidential information" and nothing in the Telecoms Act or the Intercept Act ousts the jurisdiction of a judge to order such disclosure. (The judge issue)

The portions in quotes are from paragraph 30 of Mr Williams' written submissions. The constable issue and the judge issue, based on the submissions, speak to the question of compellability by virtue of the general provisions of the law, as they affect the INDECOM Act and the telecommunications industry. These two issues shall, therefore, be addressed before the privilege issues, which focus more specifically on the INDECOM, Telecoms and Intercept Acts. The four issues will be individually assessed after an outline of the relevant portions of those Acts.

The relevant legislation

[11] Section 21 of the INDECOM Act, on which INDECOM primarily relies, allows INDECOM to require information from any person in pursuance of its investigations under the Act. The section states:

> "21. - (1) Subject to subsection (5), the Commission may at any time require any member of the Security Forces, a specified official **or any other person who**, in its opinion, is able to give assistance in relation to an investigation under this Act, to furnish a statement of such information and produce any document or thing in connection with the investigation that may be in the possession or under the control of that member, official or other person.
>
> (2) The statements referred to in subsection (1) shall be signed before a Justice of the Peace.
>
> (3) Subject to subsection (4), the Commission may summon before it and examine on oath-
>
> (a) any complainant; or

(b) any member of the Security Forces, any specified official **or any other person** who, in the opinion of the Commission, is able to furnish information relating to the investigation.

(4) For the purposes of an investigation under this Act, **the Commission shall have the same powers as a Judge of the Supreme Court** in respect of the attendance and examination of witnesses and the production of documents.

(5) **A person shall not, for the purpose of an investigation, be compelled to give any evidence or produce any document or thing which he could not be compelled to give or produce in proceedings in any court of law**.

(6) Section 4 of the Perjury Act shall apply to proceedings under this section in relation to an investigation as it applies to judicial proceedings under that section." (Emphasis supplied)

The term "specified official", as used in the section refers to correctional officers and certain other officials possessing the powers and privileges of a member of the constabulary. The term is not relevant for these purposes.

[12] Digicel contended that two specific provisions prevent its complying with INDECOM's notice. The first is section 47 of the Telecoms Act. That section specifically requires customers' information to be kept secret. It states as follows:

"47.-(1) Every carrier and service provider shall, subject to subsection (2), **regard and deal with as secret and confidential, all information regarding the type, location, use, destination, quantity and technical configuration of services used by their customers**.

(2) A carrier or service provider-

(a) shall disclose the information referred to in subsection (1) to-

(i) the Commissioner of Police;

(ii) the officer of the Jamaica Constabulary Force in charge of-

(A) internal security; or

(B) the National Firearm and Drug Intelligence Centre or any organization replacing the same; or

(iii) the Chief of Staff, or head of the Military Intelligence Unit of the Jamaica Defence Force, upon being requested to do so by the person referred to in sub-paragraph (i), (ii) or (iii), as the case may require, for the purposes of investigating or prosecuting a criminal offence;

(b) may disclose such information-

(i) to the Office or pursuant to the provisions of any law for the time being in force which requires such disclosure for the purpose of the investigation or prosecution of a criminal offence;

(ii) with the written consent of the customer;

(iii) where the disclosure is necessary in defence of the carrier or service provider in any proceedings brought against the carrier or service provider.

(3) A service provider or carrier shall not be liable to any action or suit for any injury, loss or damage resulting from a disclosure of information made pursuant to subsection (2)." (Emphasis supplied)

The "Office", referred to in subsection (2)(b), is the Office of Utilities Regulation.

[13] The second statutory provision, upon which Digicel mainly relies, is section 16 of the Intercept Act. The section identifies, in part, the persons who may request information, which is in the possession of telecommunication providers. It also states the penalties which may be imposed on providers for disclosing the existence of such requests. The relevant portions state:

> "(1)…
>
> "**designated person**" means the Minister or any person prescribed for the purposes of this section by the Minister by order subject to affirmative resolution;
>
> …
>
> (2) Where it appears to the designated person that a person providing a telecommunications service is or may be in possession of, or capable of obtaining, any communications data, **the designated person** may, by notice in writing, require the provider-
>
> (a) to disclose to an **authorized officer** all of the data in his possession or subsequently obtained by him; or
>
> (b) if the provider is not already in possession of the data, to obtain the data and so disclose it.
>
> …
>
> (6) The provisions of sections 9 and 10 shall apply, with the necessary modifications, to the disclosure of data pursuant to a notice issued under this section.
>
> (7) Subject to subsection (8), a provider of a telecommunications service, to whom a notice is issued under this section, shall not disclose to any person the existence or operation of the notice, or any information from which such existence or operation could reasonably be inferred.
>
> (8) The disclosure referred to in subsection (7) may be made to-

(a) an officer or agent of the service provider, for the purposes of ensuring that the notice is complied with;

(b) an attorney-at-law for the purpose of obtaining legal advice or representation in relation to the notice,

And a person referred to in paragraph (a) or (b) shall not disclose the existence or operation of the notice, except to the authorized officer specified in the notice or for the purpose of-

(i) ensuring that the notice is complied with, or obtaining legal advice or representation in relation to the notice, in the case of an officer or agent of the service provider; or

(ii) giving legal advice or making representations in relation to the notice, in the case of an attorney-at-law.

(9) An authorized officer shall not disclose any communications data obtained under this Act, except-

(a) as permitted by the notice;

(b) in connection with the performance of his duties; or

(c) if the Minister responsible for national security directs such disclosure to a foreign government or agency of such government where there exists between Jamaica and such foreign government an agreement for the mutual exchange of that kind of information and the Minister considers it in the public interest that such disclosure be made.

(10) A person who contravenes subsection (7), (8) or (9) commits an offence and is liable on summary conviction in a Resident Magistrate's Court to a fine not exceeding five million dollars or to imprisonment for a term not exceeding five years or to both such fine and imprisonment."

There is no dispute that INDECOM had not been prescribed as a “designated person” for the purposes of the Intercept Act. Sections 9 and 10, to which section 16 refers, are not relevant to these circumstances. Section 9 provides protection for authorised officers. Section 10 speaks to compliance by persons, including telecommunications service providers, with interception warrants directing the providing of information and assistance. Section 10(3) provides protection from court action for any person who complies with the directions of such warrants.

[14] The term “authorized officer” is defined in section 2 of the Intercept Act. The persons who are authorised officers are almost identical to those specified in section 47 of the Telecoms Act. The relevant portion of the section states:

> “2.-(1) In this Act, unless the context otherwise requires-
>
> "authorized officer" means-
>
> (a) the Commissioner of Police;
>
> (b) the officer of the Jamaica Constabulary Force in charge of-
>
> (i) internal security; or
>
> (ii) the National Firearm and Drug Intelligence Centre or any 'organization replacing the same; or
>
> (c) the Chief of Staff, or the head of the Military Intelligence Unit, of the Jamaica Defence Force;
>
> …”

The issues raised on appeal will now be discussed.

The constable issue

[15] The provision, upon which INDECOM hangs its argument that, with the powers of a constable, it is entitled to demand and receive the communication data, is section 20 of the INDECOM Act. The section states:

> "20. For the purpose of giving effect to sections 4, 13 and 14, the Commissioner and the investigative staff of the Commission shall, in the exercise of their duty under this Act **have the like powers, authorities and privileges as are given by law to a constable**." (Emphasis supplied)

[16] Section 4, referred to in section 20, provides a wide range of powers to INDECOM. It states, in part, that INDECOM is entitled to request information of any person. The relevant provisions state:

> "4. - (1) Subject to the provisions of this Act, the functions of the Commission shall be to-
>
> (a) conduct investigations, for the purposes of this Act;
> (b) ...
> (c) ...
>
> (2) In the exercise of its functions under subsection (1) the Commission shall be entitled to-
>
> (a) have access to all reports, documents or other information regarding all incidents and all other evidence relating thereto, including any weapons, photographs and forensic data;
> (b) ...
> (c) ...
> (d) ...
>
> (3) **For the purpose of the discharge of its functions under this Act, the Commission shall, subject to the provisions of this Act, be entitled**-
>
> (a) upon the authority of a warrant issued in that behalf by a Justice of the Peace-

(i) **to have access to all records, documents or other information relevant to any complaint or other matter being investigated under this Act**;

(ii) …

(iii)…

(b) ...

(4) **For the purposes of subsection (3), the Commission shall have power to require any person to furnish in the manner and at such times as may be specified by the Commission, information which, in the opinion of the Commission, is relevant to any matter being investigated under this Act.**" (Emphasis supplied)

[17] Section 13, referred to in section 20, provides that INDECOM may conduct investigations on its own initiative. Section 14 stipulates how INDECOM is allowed to conduct those investigations. It is unnecessary, for these purposes, to set out those provisions.

[18] Mr Williams stressed the need for an independent investigator, and the constitutional underpinnings of that need. Those factors, he argued, required statutory interpretation which favours and conforms to the enforcement of fundamental human rights, particularly the right to life, "recognised in the Constitution and by public international law" (paragraph 58 of INDECOM's written submissions).

[19] Using those "underpinnings" as his springboard, learned counsel argued that, with the powers of a constable, INDECOM should be regarded as having been granted

all the powers and authority of the persons listed in section 47(2)(a) of the Telecoms Act and section 2 of the Intercept Act. He reasoned the point in paragraph 68 of his written submissions:

> "...It is a matter of construction whether section 20 grants the powers, authorities and privileges shared by all constables ("the limited interpretation") or whether in addition, section 20 also grants the powers, authorities and privileges granted to constables even where the powers, authorities and privileges are not shared by all constables ("the wider interpretation")."

Learned counsel advocated for the wider interpretation.

[20] It should be noted that all members of the constabulary force are constables (section 3 of the Interpretation Act), and that, regardless of their rank, all are endowed with all the powers of a constable. Section 3(5) of the Constabulary Force Act stipulates the latter position. It states:

> "Every member of the Force shall have, in every parish of this Island, all powers which may lawfully be exercised by a Constable, whether such powers are conferred by this Act or otherwise."

[21] Despite those provisions, however, the position advocated for by Mr Williams cannot withstand close scrutiny. It contradicts the primary principle in statutory interpretation which stipulates that provisions must be given their ordinary and natural meaning. Parliament, in its wisdom, has restricted the specific officers that it trusts to be able to have access to information that impinges on the constitutionally guaranteed right to privacy of communication (section 13(3)(j)(iii) of the Constitution of Jamaica).

It has named those individuals in section 47 of the Telecoms Act and section 2 of the Intercept Act.

[22] It would fly in the face of that specific identification, to contemplate that any person who has the powers of a constable, given by section 20 of the INDECOM Act, is entitled to the authority allowed by section 47 of the Telecoms Act. The reference to section 16(2) of the Intercept Act is also misguided, as the persons named in section 2 of that Act, quoted above, would only be authorised to receive the information which a designated person has directed a telecommunications provider to disclose. INDECOM is not a designated person and there is no indication that any designated person has directed any provider to furnish INDECOM with the information that it requested.

[23] Mr Williams' alternative submission was that "the court could interpret section 47(2)(a) of the Telecommunications Act and section 2 of the [Intercept Act] to bring it [sic] into conformity with the Constitution by inserting the Commissioner of INDECOM as an authorised person". That submission should also fail. There is no basis for inserting words into a statute which is clear in its terms. In **Baker and Another v R** (1975) 13 JLR 169, Lord Diplock said, at page 174C:

> "Where the meaning of the actual words used in a provision of a Jamaican statute is clear and free from ambiguity, the case for reading into it words which are not there and which, if there, would alter the effect of the words actually used can only be based on some assumption as to the policy of the Jamaican legislature to which the statute was intended to give effect. If, without the added words, the provision would be clearly inconsistent with other provisions of the statute it falls within the ordinary function of a court of construction to resolve the inconsistency and, if this be necessary, to construe the provision as including by

> implication the added words. **But in the absence of such inconsistency it is a strong thing for a court to hold that the legislature cannot have really intended what is clearly said but must have intended something different.** In doing this a court is passing out of the strict field of construction altogether and giving effect to concepts of what is right and what is wrong which it believes to be so generally accepted that the legislature too may be presumed not to have intended to act contrary to them...." (Emphasis supplied)

[24] Lord Diplock made a similar point in **Duport Steels Ltd and Others v Sirs and Others** [1980] 1 WLR 142, at page 157 C-F:

> "...**Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient**, or even unjust or immoral....
>
> A statute passed to remedy what is perceived by Parliament to be a defect in the existing law may in actual operation turn out to have injurious consequences that Parliament did not anticipate at the time the statute was passed... But if this be the case it is for Parliament, not for the judiciary, to decide whether any changes should be made to the law..." (Emphasis supplied)

[25] The grounds related to the constable issue cannot succeed.

The judge issue

[26] Mr Williams submitted that two main consequences flow from the fact that INDECOM has been given all the powers of a judge. The first is that INDECOM is entitled to require any person to provide the information it requires. The second is that

any person who provides information to INDECOM has immunity from any claim or action arising from the testimony or information given.

[27] Allied to those common law principles, Mr Williams argued, is the absolute privilege given by section 27(2) of the INDECOM Act to all persons who provide information to INDECOM. Learned counsel submitted that section 27(2) bars any civil action concerning the supply of information within the scope contemplated by section 21 of the INDECOM Act. Learned counsel cited, in support of these submissions, **Crawford Adjusters and Others v Sagicor General Insurance (Cayman) Limited and Another** [2013] UKPC 17; [2014] 4 AC 366 and **Marrinan v Vibart and Another** [1963] 1 QB 528.

[28] Mr Manning, for Digicel, submitted that the judicial power does not, by itself, override every obligation to keep information confidential. That is especially so, he argued, if the duty of confidentiality is created by statute. Learned counsel argued that the immunity granted to proceedings in court should not be treated as a charter to breach statutory provisions as to confidentiality. He submitted that Parliament recognised the existence of statutory bars to disclosure. He stressed the difference between a statutory imposition of confidentiality and any other claimed obligation to confidentiality.

[29] It was that recognition, he argued, that prompted the specific stipulation in the Contractor-General Act, namely section 18(4), that requirements of confidentiality did not apply where information was required by the Contractor-General for the purposes

of an investigation. Learned counsel pointed out that, in addition to section 18(4) of the Contractor-General Act, there were two other statutes which contained provisions similar to section 18(4). He identified section 17(8) of the Financial Investigations Division Act and section 17(4) of the Public Defender (Interim) Act as being those provisions. He submitted that, the Contractor General Act, passed in 1983, the Public Defender (Interim) Act, passed in 2000, and the Financial Investigations Division Act, passed 2010, illustrated "the clear, unequivocal approach Parliament adopts when it is addressing the issue of relaxing or removing restrictions on secrecy and confidentiality" (paragraph 79 of his written submissions).

[30] He relied on **Norwich Pharmacal Co and Others v Customs and Excise Commissioners** [1972] 2 WLR 864 (the House of Lords' decision is reported at [1973] 2 All ER 943) and **Rowell v Pratt** [1938] AC 101 in support of his submission that the court recognises and respects statutory bars to disclosure. He also stressed the fact that section 21(5) of the INDECOM Act recognised that there are exceptions to the court's entitlement to compel disclosure.

[31] Section 21(4) endows INDECOM with all the powers possessed by a judge of the Supreme Court in respect of the attendance and examination of witnesses and the production of documents. Those powers are inherent to a judge of the Supreme Court in executing the duty of the administration of justice. One of the inherent powers of the judge, through the court, is to compel individuals to appear and give evidence or produce items or information deemed relevant to the proceedings (see **Amey v Long** (1808) 9 East 473; [1803-13] All ER Rep 321).

[32] There is no dispute in this appeal that Digicel is subject to the powers afforded INDECOM by virtue of section 21(4). There is a dispute, as mentioned in the introduction, as to whether INDECOM can compel disclosure by Digicel and whether Digicel would be immune from criminal sanction or civil liability if it were to provide some of the information that INDECOM requires.

[33] The court exercises its power of compulsion by way of a *subpoena ad testificandum* (attend and give evidence) and a *subpoena duces tecum* (attend and bring documents). The court's power to compel such appearance and testimony is, however, restricted to the provision of evidence that is relevant and admissible.

[34] The court's compulsive power in this regard, is also restricted by the Constitution, by statutory provisions and by the common law. A person may, therefore, be excused from providing information sought if he is able to satisfy the court, by virtue of one of these authorities, that he has a lawful or reasonable excuse for objecting or refusing to give the evidence the court has requested.

[35] The major reasons for properly objecting or refusing to provide evidence to a court are the protection against self-incrimination, attorney/client privilege, without prejudice communications and public interest immunity. None of these apply to the present circumstances and it is unnecessary to further dilate on them. There is, however, the matter of statutory prohibition. That is the issue joined between the parties to this case.

[36] Mangatal J made reference to the statutory prohibition against disclosure. Her reasoning on this point is concisely set out in paragraph [39] of her judgment:

> "[39] In my judgment, in so far as INDECOM'S Notice does seek to obtain communication and traffic data, [counsel for Digicel] Mr. Manning is correct in his submission that it is significant, and it does make a difference, that Digicel is actually required under a Statute, the Telecoms Act, to keep and deal with the subject data and information as secret and confidential. Further, that Parliament has passed specific legislation that deals with the very limited circumstances and the very select group of persons to whom the information must be provided and disclosed. I am of the view that the reasoning in [**Rowell**] **v. Pratt**, which was described in **Norwich Pharmacal** as a statutory prohibition against the disclosure, is also conclusive in this case with regard to the question of compellability. As in [**Rowell**] **v. Pratt**, Parliament has decreed that the information as to the call data is to be kept secret and **it is only within the narrow limits as set out in Section 47(2)(a) of the Telecoms Act and Section 16 of the Interception of Communications Act that this secret information must be disclosed.**" (Emphasis supplied. Underlining as in original)

[37] Mangatal J's emphasis was on the fact that section 47(1) of the Telecoms Act mandates secrecy by telecommunications providers. In concluding that a provider was not compellable to produce information of the type required by INDECOM's notice in this case, the learned judge relied on three main factors. The first factor was the restriction provided for by section 21(5) of the INDECOM Act. The second was the principle, used in statutory interpretation, known by the Latin term "*generalia specialibus non derogant*". The third factor was the result of a comparison between section 21 of the INDECOM Act and section 18 of the Contractor-General Act.

[38] In respect of section 21(5) of the INDECOM Act, the learned judge stressed the fact that no person could be compelled by INDECOM to disclose information that that person would not be compelled to disclose in a court of law. The Latin term, "*generalia specialibus non derogant*", summarises a principle of statutory interpretation whereby "general words in a later enactment [are held not to] repeal earlier statutes with a special subject" (Cross, Statutory Interpretation – 3rd Edition).

[39] In her comparison of section 21 of the INDECOM Act and section 18 of the Contractor-General Act, the learned judge pointed to the fact that the sections were very similar except for the fact that section 18(4) of the Contractor-General Act specifically exempted from prosecution for breach of any law requiring secrecy, any person who provided information to the Contractor-General. She held that as the Contractor-General Act (passed 1983) was an older statute than the INDECOM Act (passed 2010), it would have been open to Parliament, if it intended for such an exemption to apply, to have included in section 21 of the INDECOM Act, a provision similar to section 18(4) of the Contractor-General Act.

[40] The learned judge is correct in her reasoning in respect of these matters. Firstly, section 21(5) of the INDECOM Act speaks for itself. It addresses those bases, briefly identified above, where a witness may avoid giving testimony. Secondly, where there is a statutory prohibition against revealing information, that prohibition cannot be undermined by general terms in another statute. The learned judge cited **The "Vera Cruz"** (1884) 10 AC 59 where Earle of Selborne LC, at page 68, stated:

> "Now if anything be certain, it is this. That where there are general words in a later Act, capable of reasonable and sensible application without extending them to subjects specifically dealt with by earlier legislation, **you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so**..." (Emphasis supplied)

[41] Section 47(1) of the Telecoms Act (passed 2000), is that earlier provision specifically requiring a telecommunications provider to keep subscriber information secret. It could not be held abrogated by the later, general provision of the INDECOM Act, which states that INDECOM may require information from any person.

[42] Thirdly, although the structure of section 21 of the INDECOM Act is similar to section 18 of the Contractor-General Act, the protection given by section 18(4) of the latter is absent. Section 18 is set out below for completeness:

> "18-(1) Subject to the provisions of subsection (5) and section 19(1), a Contractor-General may at any time require any officer or member of a public body or any other person who, in his opinion, is able to give any assistance in relation to the investigation of any matter pursuant to this Act, to furnish such information and produce any document or thing in connection with such matter as may be in the possession or under the control of that officer, member or other person.
>
> (2) Subject as aforesaid, a Contractor-General may summon before him and examine on oath-
>
> (a) any person who has made representations to him; or
>
> (b) any officer, member or employee of a public body or any other person who, in the opinion of the Contractor-General, is able to furnish information relating to the investigation,

and such examination shall be deemed to be a judicial proceeding within the meaning of section 4 of the Perjury Act.

(3) For the purposes of an investigation under this Act, a Contractor-General shall have the same powers as a Judge of the Supreme Court in respect of the attendance and examination of witnesses and the production of documents.

(4) **Any obligation to maintain secrecy or any restriction on the disclosure of information or the production of any document or paper or thing** imposed on any person by or under the Official Secrets Act, 1911 to 1939 of the United Kingdom (or any Act of the Parliament of Jamaica replacing the same in its application to Jamaica) or, subject to the provisions of this Act, **by any other law (including a rule of law) shall not apply in relation to the disclosure of information or the production of any document or thing by that person to a Contractor-General** for the purpose of an investigation; and accordingly, no person shall be liable to prosecution by reason only of his compliance with a requirement of the Contractor-General under this section.

(5) No person shall, for the purpose of an investigation, be compelled to give any evidence or produce any document or thing which he could not be compelled to give or produce in proceedings in any court of law." (Emphasis supplied)

[43] Mr Manning's observations as to the similarity of section 18(4) of the Contractor-General Act, section 17(8) of the Financial Investigations Division Act and section 17(4) of the Public Defender (Interim) Act are correct. The interpretation of the meaning of a statute is, however, not usually secured by comparing its provisions with those of other statutes. Lord Wright in **Rowell v Pratt** made that observation at page 105:

"On the other hand, it is seldom that the construction of one statute can be determined by comparison with other statutes. Apart from some general rules of construction,

> each statute, like each contract, must be interpreted on its own merits."

Nonetheless, Mr Manning's submission is attractive. Given the disparate ages of these statutes, it seems that Parliament has always been alive to the issue of providing protection to persons supplying information. Where it provides that protection in so many other circumstances, its omitting to do so in the case of INDECOM may well be taken to have been deliberate.

[44] It is significant that, like the INDECOM Act, the Contractor-General Act also provides for absolute privilege for anything said or done in proceedings conducted pursuant to the provisions of that Act. The terms of the provision (section 23(2)) of the Contractor-General Act are identical in all material respects to section 27(2) of the INDECOM Act. Section 27(2) of the INDECOM Act states:

> "(2) Anything said or any information supplied or document or thing produced by any person for the purpose or in the course of, any investigation carried out under this Act **shall be absolutely privileged in the same manner as if the investigation were proceedings in a court of law**." (Emphasis supplied)

[45] These sections are not enhancement of the powers of the respective commission of Parliament but provide protection for the party of whom information is requested. This is because the powers of a judge being provided to the particular entity (INDECOM or the Contractor-General) do not constitute its proceedings as court proceedings. It is accepted that there is absolute privilege afforded to witnesses who testify in court proceedings (see **Watson v M'Ewan** [1905] AC 480 at page 486).

[46] Based on the reasoning of the learned trial judge and the statutory provisions set out above, it must be said that the powers of a judge having been given to INDECOM, did not entitle it to compel the breach of a statutory provision for confidentiality and against disclosure. The fact that a court may compel disclosure and the fact that a person testifying in court is afforded absolute privilege by virtue of public policy, does not entitle the court to ignore statutory prohibitions against disclosure. **Rowell v Pratt** is strong authority for that proposition.

[47] In **Rowell v Pratt**, the House of Lords held that a party should not be compelled to testify in court about matters which a statute stipulated should not be disclosed in reports to Parliament and sanctioned any disclosure by making it a criminal offence. Their Lordships were convinced that the prohibition extended to legal proceedings in general and could only be disclosed in the circumstances outlined in the relevant statute. They found that as any disclosure that was not in accordance with the Act, was a criminal offence, there was an absolute prohibition outside of the situations specified in the Act.

[48] **Crawford Adjusters** and **Marrinan v Vibart**, relied on by Mr Williams, do not address the issue of statutory prohibition; they speak to the general immunity granted to persons who testify or otherwise participate in the course of court proceedings. Although informative of the principle of absolute privilege, they do not assist the analysis of the issue of compellability in the face of a statutory prohibition.

The privilege/offence issue

[49] The failure of Mr Williams' arguments in respect of the constable and judge issues leaves, for analysis, the question of whether the information in Digicel's possession was privileged. Learned counsel addressed this issue along two lines. The first was whether Digicel would have committed an offence if it had provided the information to INDECOM or anyone else. The second was whether Digicel had a discretion whereby it could have, depending on the circumstances made disclosure to INDECOM. The offence aspect will be dealt with first.

[50] Mr Williams submitted that the provider could only be excused from disclosing the information if it were privileged or if it were sanctioned as a criminal offence. In that context, learned counsel submitted that the learned judge was wrong to have found that a provider would, unless certain conditions existed, have committed an offence if it obeyed a section 21 demand, made pursuant to the INDECOM Act. He contended, that the learned judge was in error when she found that obedience to a section 21 demand was not compellable, having regard to the provisions of section 47(1) of the Telecoms Act and sections 15 and 16 of the Intercept Act.

[51] In reaching the decision that a provider could not be compelled to obey a section 21 demand, Mangatal J, to be fair to her, did not refer to any of the information required under INDECOM's notice as "privileged". The learned judge used the terms "protected", "secret" and "confidential" in that regard. She did so in the context of the prohibition, imposed by both the Telecoms and Intercept Acts, from disclosing that information. The aspect of prohibition has been addressed in the context of the judge

issue. Mangatal J did, however, make reference to the protection that every person has from being required to commit an offence. Her reasoning on this point is concisely set out in paragraph [39] of her judgment. A large portion of that paragraph has already been quoted above, but the learned judge went on to say:

> "[39]...Sub-Section 15(2) of the Interception of Communications Act to my mind demonstrates that disclosure outside of the specially defined circumstances and specifically defined persons is prohibited, and indeed is an extremely serious offence, carrying with it a sanction for the person who commits the offence. The offender is liable to a relatively steep fine, or imprisonment or both. As stated by Lord Wright in **Rowell v. Pratt**, **'a court cannot compel a man to commit a criminal offence'**." (Emphasis supplied. Underlining as in original)

[52] Mr Williams is correct in pointing out that nothing in the notice of 27 September 2011 required Digicel to commit a criminal offence. Firstly, neither section 47 nor any other section of the Telecoms Act creates any criminal offence whatsoever for a breach of the requirement to keep the customer's information secret.

[53] Secondly, no section of the Intercept Act, including sections 15 and 16, creates any criminal offence in respect of a provider supplying information that comes into his custody by virtue of its normal operation. Section 15 creates offences for intentionally disclosing the contents of any communication obtained by means of a warrant or obtained in contravention of the Intercept Act. Section 16 makes it an offence for a provider to inform any unauthorised person of the existence of a request for a warrant to intercept any communication. It also creates offences for the disclosure by an authorised officer of any communications data obtained under that Act.

[54] In this case, the information required by the notice was information already in the Digicel's possession. It was not secured by way of any interception or by warrant, but in the normal course of operation. There was no warrant in place that would trigger any possibility of wrongful disclosure of its existence. In this regard, Mangatal J erred in implying that Digicel was being asked, through the notice, to commit any criminal offence.

[55] Mangatal J, again to be fair to her, did not specifically state that what had been required amounted to the commission of a criminal offence. The learned judge only implied that situation as a part of her assessment of the issues raised before her. Her emphasis was more on the fact that section 47(1) of the Telecoms Act mandates secrecy by telecommunications providers.

[56] Digicel was, therefore, not prohibited by any criminal sanction from disclosing the information requested by the notice.

The privilege/discretion issue

[57] The question of whether Digicel had a discretion to provide or withhold the information turns on the interpretation of the respective statutory provisions. The privilege/discretion issue, raised by Mr Williams, focuses on section 47(2) of the Telecoms Act. Section 47(1) clearly states that the requirement to keep subscribers' information secret is subject to the provisions of section 47(2). For convenience, the relevant portions of that subsection are repeated below:

"(2) A carrier or service provider-

(a) **shall disclose** the information referred to in subsection (1) to [the list of persons identified to receive the information]

(b) **may disclose** such information-

(i) to the Office **or pursuant to the provisions of any law for the time being in force which requires such disclosure for the purpose of the investigation or prosecution of a criminal offence**;

(ii) with the written consent of the customer; or

(iii) where the disclosure is necessary in defence of the carrier or service provider in any proceedings brought against the carrier or service provider." (Emphasis supplied)

[58] The issue raised by Mr Williams in this context is whether the word "may", as used in paragraph (b), carries a mandatory impact. Learned counsel, submitted that Mangatal J was in error when she interpreted the word "may" to give an unfettered discretion to the provider as to whether or not it would provide the information requested. He argued that the wide powers, set out in section 4 of the INDECOM Act, to investigate offences, which generally obliges compliance by all persons, could not be restricted to voluntary compliance in the case of a telecommunications provider. He submitted that once a request was made pursuant to the relevant provision of the INDECOM Act, the provider had no option but to provide the information requested. Mr Williams pointed to a number of authorities which confirmed that the word "may" is not infrequently construed to mean the mandatory, "shall". These included **Attorney**

General and Another v Antigua Times Limited [1976] AC 16 and **DaCosta v R** (1990) 38 WIR 201.

[59] Mr Manning submitted that the context in which the term "may" was used meant that it could only be interpreted to grant a discretion to the provider. Learned counsel submitted that where Parliament intended a mandatory connotation, as in the case of paragraph (a), it used the term "shall". He argued that, with the term "shall" being used in paragraph (a), a mandatory connotation for paragraph (b) would be wrong. He traced the history of the legislation to show that Parliament had deliberately restricted the term "shall" to the situation stipulated in paragraph (a). Learned counsel submitted that if the term "may" in paragraph (b) meant "shall", there would have been no need for a distinction to be drawn between the two paragraphs.

[60] Mr Manning further submitted, in respect of subparagraph (i) of paragraph (b), that the Office of Utilities Regulation (Office) did not need the information contemplated by section 47(1). It would be wrong, learned counsel submitted in respect of subparagraph (iii), to stipulate that a provider would be obliged to disclose the relevant information in defending a claim brought against it by a subscriber. Mr Manning argued that, whether or not the provider does so, would clearly be within the discretion of the provider and dependent on the nature of the claim. Learned counsel, in contemplating that sub-paragraph (ii) may impose some degree of compulsion on a provider, submitted that where the term "may" could not be consistently applied in paragraph (b) to mean "shall", it must be construed to mean "may" throughout.

[61] The terms "shall" and "may" are usually clear in their respective meanings. The former is usually directory, and is usually construed to mean "must". The latter is usually construed to give an enabling or discretionary power. Whereas there is rarely any difficulty with the use of the term "shall" in statutory interpretation, the term "may" has not enjoyed such a smooth career. It has, in some contexts, been construed to impose a duty to exercise the power conferred. When, however, it is used in close proximity to the term "shall", it is difficult not to strike a contrast and find that the term could only mean the provision of an unfettered discretion.

[62] The situation arose in **DaCosta v R**. Section 6(1) of the Gun Court Act stipulated that in certain circumstances, a resident magistrate for a certain area was required to take a particular step. The subsection used the term "shall forthwith". In section 6(2) the term used, in similar circumstances, but for a resident magistrate for a different area, was "may". The latter term was held to have a mandatory connotation. Lord Lowry, in delivering the opinion of the Privy Council, explained the principle behind treating the word "may" as being mandatory rather than as being permissive. He did so, at page 213, by citing two authorities:

> "Talbot J said in **Sheffield Corporation v Luxford** [1929] 2 KB 180 at page 183:
>
> > "'May" is a permissive or enabling expression; but there are cases in which, for various reasons, as soon as the person who is within the statute is entrusted with the power it becomes his duty to exercise it.'
>
> An authoritative modern textbook (Bennion, Statutory Interpretation (1984) page 27) puts the matter thus:

> 'Where a court or tribunal is given in terms a power to exercise a certain jurisdiction, this may be construed as imposing a mandatory duty to act. **This will arise where there is no justification for failing to exercise the power**. In such cases, as is often put, "may" is held to mean "shall"." (Emphasis supplied)

[63] A similar position was taken in **Regina v Tower Hamlets London Borough Council ex parte Chetnik Developments Ltd** [1988] 2 WLR 654. The House of Lords in that case used administrative law principles to find that a statutory authority was obliged to repay certain sums on principle, despite the fact that the legislation used the term "may" in the context of a request for repayment being made. The headnote states in part:

> "...the purpose...of the [legislation] was to enable rating authorities to give redress and to remedy the injustice that would (at least prima facie) otherwise ordinarily occur, if an authority were to retain sums to which they had no right, in circumstances where persons had paid rates which they were not liable to pay; that Parliament must have intended rating authorities to act in the same high principled way expected by the court of its own officers and not to retain rates paid under a mistake of law or upon an erroneous valuation, unless there were special circumstances justifying retention of the amount paid..."

It is true that a telecommunications provider may not be bound by the same "high principles" that applies to a statutory authority, but where the provider's entitlement is based on a statutory provision, its discretion would not, unless the context stipulated otherwise, be expected to be an unfettered one.

[64] In considering the positions taken by the opposing parties in this case against the background of those principles, it may be said that neither position is entirely

without merit. Learned counsel have, however, both cited the extreme positions at either end of the spectrum in order to support their respective arguments. It seems, however, that a middle ground is the appropriate position to be taken in the interpretation of subsection 47(2)(b) of the Telecoms Act.

[65] In assessing section 47(2)(b) in the context set out in **DaCosta v R**, the question to be asked is, whether any situation existed where there would be no justification for a telecommunications provider to fail to provide the information requested. That principle should be applied to situations to which each of the three subparagraphs referred, instead of, as the learned judge did, applying it to the paragraph as a whole. Discrete applications may garner different results. Whereas there could be no justification for refusing to provide the information in the cases mentioned in subparagraph (i) of that subsection, there would clearly be a discretion arising from subparagraph (iii), as to whether or not the provider would use the information in litigation with its customer.

[66] In section 47(2)(b)(i) the relationship between a telecommunications provider and the Office is brought into play. By virtue of section 4(1)(e) of the Office of Utilities Regulation Act, the Office is entitled to carry out investigations to "determine whether the interests of consumers are adequately protected". In carrying out that mandate, the Office is allowed by section 10 of that Act, to "require a licensee...to furnish such information...as the Office may require in relation to the operations of that licensee". It is an offence for a licensee to fail to comply with a demand by the Office. The protection of the subscriber's information is sought to be protected despite a disclosure

to the Office. Section 5 of the Office of Utilities Regulation Act mandates, with penal consequences for disobedience, the officers and employees of the Office to keep secret the information of the licensee and its customers.

[67] If, therefore, the Office requested information from a provider, there could be no justification for the provider not complying with that request. Mr Manning's suggestion as to the unlikelihood of that occurring is not an answer to the principle.

[68] Similarly, where the information is required for the investigation or prosecution of an offence, there could be no justification, in the context of section 47(2)(b)(i) of the Telecoms Act, for the provider withholding the information. The term "may", in this context, as in the case of the requirement of the Office, would have a mandatory connotation from the perspective of the provider, but a permissive connotation from the point of view of the subscriber. In addressing the subscriber the statute states that the provider is allowed to supply the information in those circumstances.

[69] INDECOM, in this context, would fall into the category of entities that could require information from telecommunications providers. As was recognised by the learned judge, INDECOM has significant responsibilities for investigating criminal offences by agents of the state. She included that concept in one of her declarations set out above, but which is repeated here for convenience:

> "5. The Independent Commission of Investigations Act is a law which contains provisions which would require the disclosure of the subscriber information for the purpose of investigating a criminal offence."

[70] In coming to that position the learned judge quoted from the judgments in **Gerville Williams and Others v Commissioner of the Independent Commission of Investigations and Others** [2012] JMFC Full 1. In his judgment Sykes J said, at paragraph 131, that Jamaica was criticised for "not doing enough to investigate thoroughly, professionally and independently incidents of complaints against the security forces". Mangatal J accepted that INDECOM had been entrusted by Parliament with addressing the situation described by Sykes J. INDECOM, with its wide investigative powers, like the Office, could not properly be denied information where it indicated that it was acting in accordance with its mandate. There could be no justification, in the context of section 47(2)(b)(i) of the Telecoms Act, for the provider withholding the information.

[71] With respect to section 47(2)(b)(ii) the situation is different. A situation could exist where, although a customer consents to the information being revealed, the provider may have a justifiable reason for refusing the request for disclosure. It may depend upon who has made the request, whether the information would prejudice the provider, or upon some other reason, which is not immediately predictable. The situation is, however, not utterly inconceivable. It would seem, therefore, that in the case of subparagraph (ii), a provider may have a discretion. It would depend on the circumstances of the specific request. In such circumstances the issue of reasonableness, as Mangatal J suggested, would be the objective test.

[72] With respect to section 47(2)(b)(iii) of the Telecoms Act the situation is entirely within the discretion of the provider. It may or may not suit the provider to introduce

the subscriber's information into litigation. Its view of its best interest will determine whether or not it discloses that information.

[73] It is only to a limited extent that these views depart from those of Mangatal J. In its notice of appeal, INDECOM has specifically asked for orders in respect of this aspect of the issue:

> "(c) A Declaration that Digicel is compellable to provide subscriber or traffic data to INDECOM by virtue of section 47(2)(b) of the Telecommunications Act.
>
> (d) A Declaration that that [sic] the Commissioner of INDECOM or any INDECOM investigator may be given subscriber or traffic [data] by Digicel having regard to section 47(2)(b)(i) of the Telecommunications Act;"

It is to be noted in the instant case, however, and the learned judge stressed in her judgment, that INDECOM's notice did not inform Digicel that it was investigating an offence. Digicel would not, in those circumstances, have been required by the provisions of section 47(2)(b)(i) of the Telecoms Act to provide that information; it did not communicate that it was acting in accordance with its mandate to investigate criminal offences.

[74] Based on the reasoning above, and the appeal by INDECOM, an adjustment is required for declaration 6 made by Mangatal J. Instead of:

> "6. Whilst INDECOM is not entitled to the subscriber information, as Digicel has a discretion pursuant to sub-section 47(2)(b)(i) in respect of disclosure, in appropriate circumstances, such as if the Notice had properly specified the purpose for which the Notice was issued, which purpose was the investigating of a criminal offence, Digicel could have exercised its discretion in favour of INDECOM's request."

The declaration should read as follows:

> "6. Whilst INDECOM, if it had properly specified the purpose for which the Notice was issued, which purpose was the investigating of a criminal offence, would have been entitled to the subscriber information from Digicel, pursuant to sub-section 47(2)(b)(i) of the Telecommunications Act, the notice did not specify the purpose and Digicel was, therefore, obliged to refuse INDECOM's request."

[75] Finally, in respect of the privilege/offence versus privilege/discretion issues Mr Williams submitted that the learned judge was inconsistent in her findings that a discretion was afforded to a provider by section 47(2) of the Telecoms Act. Learned counsel submitted that if, by disclosing the information the provider would have committed a criminal offence, there was no basis for finding that the provider could have had a discretion whether or not to do so. As mentioned above, however, section 47 of the Telecoms Act does not create any offence that is applicable to this context. There was, therefore, no inconsistency in Mangatal J's finding that the provider has a discretion, where an investigation of a criminal offence is being pursued, to disclose or conceal the information. As reasoned above, however, the provider would have been obliged to supply the information in those circumstances.

Conclusion

[76] Based on the above analysis, INDECOM cannot compel a provider of telecommunications services to supply information that falls within the purview of section 47(1) of the Telecoms Act. The provider is prohibited from disclosing that information, except in the circumstances set out in section 47(2) of that Act. INDECOM

is not one of the persons or entities out in section 47(2)(a) to whom disclosure must be made.

[77] Although section 47(2)(b) of the Telecoms Act uses the term "may" in the context of disclosure of information by a provider, the term should be construed differently according to the circumstances to which each subparagraph is applied. It should be construed as being directory in the context of subparagraph (i) while it is clearly discretionary or enabling in respect of subparagraph (iii). Its construction would be less definitive in respect of subparagraph (ii). The term could be either directory or simply enabling depending on the circumstances of the particular case.

[78] Where INDECOM indicates that it requires "disclosure for the purpose of the investigation or prosecution of a criminal offence", the provision of section 47(2)(b)(i) of the Telecoms Act would have been satisfied. In that case the telecommunications provider must disclose the required information. It would then have the protection, provided by section 47(3) of the Act, from civil action or suit.

[79] The notice issued by INDECOM in the instant case did not satisfy the requirement of section 47(2)(b)(i) of the Telecoms Act. Digicel was, therefore, correct in refusing to disclose the information required.

Costs

[80] In the court below, the learned judge made no order as to costs because of the spirit of co-operation in which the claim had been filed. The appeal has been argued along the same bases of seeking clarification. It is appropriate that there should be no

order as to costs in this court as well, especially as each party has had a measure of success.

DUKHARAN JA

ORDER

1. Appeal allowed in part.
2. Declaration 6 by Mangatal J is set aside and replaced by the following declaration:

> "6. Whilst INDECOM, if it had properly specified the purpose for which the notice dated 27 September 2011 was issued, which purpose was the investigating of a criminal offence, would have been entitled to the subscriber information from Digicel, pursuant to sub-section 47(2)(b)(i) of the Telecommunications Act, the notice did not specify the purpose and Digicel was, therefore, obliged to refuse INDECOM's request."

3. All other orders by Mangatal J are affirmed.
4. No order as to costs.