Trinity Term
[2014] UKPC 33
Privy Council Appeal No 0041 of 2013

JUDGMENT

FortisTCI Limited (Appellant)

V

Islandcom Telecommunications Limited (Respondent)

On appeal from the Court of Appeal of the Turks and Caicos Islands

before

Lady Hale
Lord Kerr
Lord Clarke
Lord Wilson
Lord Reed

JUDGMENT DELIVERED BY

LORD CLARKE

ON

Thursday 16th October 2014

Heard on 17 June 2014

Appellant
Nigel Pleming QC
Guy Chapman
Angeline Welsh
(Instructed by Allen & Overy LLP)

Respondent
Lawrence West QC
(Instructed by Sharpe Pritchard)

LORD CLARKE:

Introduction

1. At the relevant time the respondent ("lslandcom") provided a cellular telephone service in Providenciales in the Turks & Caicos Islands (the "TCI"). It claims to have been granted an exclusive licence to use a number of frequencies including frequencies in the 902-928 MHz uplink bandwidth ("the 900 MHz frequencies"). It claims that the appellant ("Fortis"), which at the relevant time was known as PPC Limited and provided (and provides) electricity in Providenciales, created such interference with the 900 MHz frequencies that it was impossible for Islandcom to continue to operate, with the consequence that it had to relocate elsewhere at great expense. The alleged interference was caused by the introduction of remote automatic meter reading ("AMR") devices operating within the same bandwidth. In this action it seeks to recover both that expenditure and compensation for loss of business from Fortis.

2. Fortis admits that its devices caused interference but denies that Islandcom had an exclusive licence to use the spectrum in which it operated. Its case is that the 900 MHz frequencies were reserved both internationally and regionally for Industrial Medical and Scientific ("ISM") devices which anyone could use with appropriate apparatus. Islandcom relied upon a licence granted on 21 July 2006, at which time it said that there was no ISM band on the islands.

3. The action came before Martin J ("the judge") on 31 May and 1 and 2 June 2011. On 4 June 2011 he gave judgment on three preliminary issues. He did so on the basis that it had become clear that there was insufficient time for a full trial of the action. As formulated by the judge, the three issues were: (1) whether Fortis' meters caused interference such as to make operations impossible; (2) if so, whether Fortis was acting unlawfully for lack of a licence; and (3) whether, even if it was operating lawfully, it could do so within the bandwidth allocated to Islandcom. In identifying the issues, the judge noted that, if the answer to the first question was no, that was the end of the matter and that, if Islandcom had the exclusive right it claimed, the answer to the third question would be no.

4. In a short and concise judgment the judge answered the questions as follows: (1) the meters installed by Fortis did cause substantial interference; but (2) Fortis did not require a licence for its meters and was operating them lawfully; and (3) Islandcom had not been granted the exclusive right to use the band in which Fortis operated its equipment. The judge concluded that in those circumstances

Islandcom's claim must fail and on 8 June 2011 he dismissed the claim with costs.

5. Islandcom appealed to the Court of Appeal, comprising Zacca P and Mottley and Ground JA. On 4 October 2012, in a judgment given by Ground JA, with whom the other members of the court agreed, the Court of Appeal allowed the appeal and remitted the matter to the Supreme Court to consider what, if any, causes of action the claimant might have. It is submitted on behalf of Fortis that Islandcom has not pleaded the cause of action upon which it relies and that, in any event no relevant cause of action exists. It is not however necessary for the Board to consider those issues in this appeal. If the appeal succeeds the order of the judge dismissing the action will be restored. On the other hand, if it fails, those further issues will be remitted to the Supreme Court for decision.

6. In the Court of Appeal the parties accepted the judge's answer to the first question before him, namely that the meters installed by Fortis caused substantial interference. It considered two questions, which were substantially the second and third questions considered by the judge. They were: (1) whether Fortis was operating its meters on the 900 MHz frequencies unlawfully for lack of a spectrum licence and/or a carrier licence and (2) whether, if Fortis was operating lawfully on the 900 MHz frequencies, it could do so within the bandwidth alleged to have been allocated to Islandcom.

7. The Court of Appeal answered those questions in this way. In answering question (1), it held that at all material times Fortis required both a spectrum licence and a carrier licence for the operation of its meters on the 900 MHz frequencies and that, since it held neither of those licences, it had been operating unlawfully for lack of a licence. In answering a somewhat extended question (2), it held that Islandcom had a spectrum licence in the form of a Telecommunications and Spectrum Provisional Licence ("the Provisional Licence") which was lawfully amended by a letter dated 9 July 2008 to allow it to operate its telecommunications network on the 900 MHz frequencies. It further held that Islandcom's use of the 900 MHz frequencies was therefore lawful "at least going forward from that date", that is from 9 July 2008. However, it also held that the licence was not exclusive given the existence of footnote 5.150 in the Interim Spectrum Plan, which entitled ISM users to operate on the 900 MHz frequencies, so that Islandcom was authorised to use the 900 MHz frequencies only from 9 July 2008, and on a non-exclusive basis.

Issues in this appeal

8. Fortis submits that the Court of Appeal erred in reaching those conclusions and in setting aside the order of the judge for three reasons: (1) Fortis did not require a spectrum licence under section 32 of the TCI Telecommunications Ordinance 2004 ("the Ordinance") to operate its meters on the 900 MHz frequencies; (2) the meters installed and operated by Fortis did not constitute a "telecommunications network" and therefore a carrier licence under Section 8(1)(a) of the Ordinance was not required; and (3) Islandcom did not hold a valid spectrum licence for the 900 MHz frequencies and was therefore operating unlawfully on those frequencies at all material times.

9. The parties have agreed a list of facts and issues. However, in order to determine this appeal, it is not necessary to determine all those issues. The Board concludes that this appeal should be allowed. In giving its reasons for reaching that conclusion, the Board will refer briefly to the relevant statutory framework and then consider (so far as necessary or appropriate) the following three questions in this order. (1) Did Islandcom hold a valid spectrum licence for the 900 MHz frequencies? (2) Did Fortis require a spectrum licence? (3) Did Fortis require a carrier licence?

The statutory framework

10. Section 2 of the Ordinance contains detailed definitions of expressions used in the Ordinance including:

> " 'radio-communications' means the emitting or receiving, …, of electromagnetic energy of a frequency which –
>
> (a) conveys messages whether or not received;
>
> (b) actuates or controls machinery or apparatus; or
>
> (c) …;
>
> 'radio-communications apparatus' means apparatus for emitting or receiving radio-communications …;
>
> …
>
> 'spectrum' means the continuous range of electromagnetic wave frequencies from zero to infinity;
>
> …

‘telecommunications’ means any form of transmission, emission, or reception of signs, texts, images and sounds or other intelligence of any nature by wire, radio, optical or other electromagnetic means;

…

‘telecommunications network’ means any … radio … system used to … transmit telecommunications;

…”

11. The functions of the Commission are set out in very wide terms in section 4. Part III, which contains sections 8 - 30, is entitled Telecommunications Network and Services. Section 8 provides:

> “(1) No person shall –
>
> (a) establish, own or operate a telecommunications network without a carrier licence issued in accordance with this Part;
>
> (b) provide public telecommunications services; whether or not for compensation, to the public without a service provider licence issued in accordance with this part.”

As the Board understands it, a service provider licence is a form of carrier licence. Section 13 provides for an application for such a licence to be made to the Commission and, if appropriate, to be granted by the relevant Minister. It is not in dispute that Islandcom’s Provisional Licence was a carrier licence. The case for Fortis is that it (Fortis) does not establish, own or operate “a telecommunication network”, so that it is not required to hold a carrier licence under section 8(1)(a).

12. Part IV of the Ordinance contains sections 31 - 41 and is entitled Spectrum Management. Sections 31, 32 and 33 provide so far as relevant as follows:

> “31(1) The Commission shall, so far as it considers it necessary or desirable, regulate the use for any purpose, of the spectrum within the islands. …
>
> (2) For the purpose of subsection (1) the Commission shall
>
> (a) allocate the spectrum for specified purposes within the Islands …

> 32(1) A person shall·not establish, operate or use a radio-communications apparatus or install, operate or use a radio-communications apparatus unless it is authorised to do so by a spectrum licence ... [with exceptions for receiving television and radio broadcasts, and use by Police, Civil Aviation Department and government departments exclusively for their purposes].
>
> …
>
> 33(1) An application for a spectrum licence shall be made to the Commission in the prescribed form and be accompanied by the prescribed information and application fee.
>
> …"

Further detailed provisions for the application for and grant of a spectrum licence are set out in sections 35-37. By section 38, use of a portion of the spectrum is expressly forbidden unless authorised by a spectrum licence or a special licence. By section 40, the Commission must make a Spectrum Plan; by section 35(1), in considering whether to grant a spectrum licence the Commission must have regard to the Spectrum Plan; and, by section 35(2), where the Commission is satisfied that the applicant complies with the provisions of the Ordinance in relation to a spectrum licence, "the Commission may, on such terms as it thinks fit, grant the licence to the applicant." Further, by section 41, the Commission is under a duty to maintain a public register of spectrum licences which must include the name and address of the licensee and "the radio-communications station or radio-communications apparatus or portion of the spectrum in respect of which the licensee was licensed and the conditions applicable to the licence granted".

13. Spectrum management is further provided for by the Telecommunications (Frequency Management) Regulations 2005 ("the Regulations"), which were made under section 64 of the Ordinance. By regulation 4(1) of the Regulations, the Commission was under a duty to produce and make available an interim Spectrum Plan, based on the Spectrum Plan of the TCI. Regulation 4(2) and (3) provide for consultation and publication of a final Spectrum Plan. Regulation 4(4) provides, so far as relevant:

> "(4) The interim Spectrum Plan and the final Spectrum Plan each shall … specify: ... (b) which uses shall require a spectrum licence or shall be exempt from such a requirement; (c) which bands shall be available for shared use, and which may be licensed on an exclusive basis."

Regulation 4(5) gives the Commission power to amend the Spectrum Plan. Regulation 7(1)(a) provides that, where the Commission has determined that frequencies are to be re-allocated, it shall cause to be published a public notice containing details of the frequencies being re-allocated.

14. In respect of spectrum licences, the issues are whether Islandcom ever had a spectrum licence which extended to the 900 MHz frequencies and whether Fortis was required to have a spectrum licence. The Board turns to the questions identified in para 9 above.

(1) Did Islandcom hold a valid spectrum licence for the 900 MHz frequencies?

15. Islandcom operated its mobile telecommunications network from September 2007 to March 2009. For that purpose it used the 905.0 – 914.8 MHz and the 950 – 959.8 MHz bands. On 21 July 2006 Islandcom was granted its Provisional Licence under the Ordinance. By paragraph 1.1 the licence was stated to be granted by the Minister "in accordance with section 13 (Grant of License) and section 34 [now 35] (Grant of Spectrum)" of the Ordinance. By paragraph 4.6 it was provided that "in no event does this license grant any exclusive right to operate any telecommunications network or to provide any telecommunications service".

16. By paragraph 6.1 it was provided that Islandcom was licensed to use the spectrum

> "set out in Annex D (Spectrum License) or such other spectrum as is assigned to the Licensee by the Commission following the establishment of the Spectrum Plan in accordance with Section 4 of the [Regulations.]"

The spectrum was defined in Annex D, so far as is material, as:

> "1800 band. 1800 spectrum: Minimum of 2 x 10 MHz approved but specific bandwidths for uplink and downlink to be specified for approval by the Commission at a later date."

As the Court of Appeal observed, in agreement with the judge, "at that stage Annex D only granted the 1800 MHz spectrum, and nothing on the 900 band". It is thus clear the Provisional Licence did not permit Islandcom to use the 900 MHz frequencies.

17. The question is whether such use was permitted as a result of a valid amendment to Annex D. It was submitted on behalf of Islandcom that the terms of Annex D were validly extended by an amendment made orally in February 2007 and, in any event, by the letter dated 9 July 2008.

18. The chronology is as follows. In June 2007, the Commission published its Interim Spectrum Plan for the TCI. By footnote 5.150 the 902 – 928 MHz frequencies were

> "… also designated for industrial, scientific and medical (ISM) applications. Radio-communication services operating within these bands must accept harmful interference which may be caused by these applications. …".

Although it did not seek the permission of the Commission, on 31 July 2007, by a letter to the Minister of Works and Utilities and by a press release, Fortis publicly announced its intention to commence installation of its AMR operation using new ISM meters. On 1 August 2007 it commenced installation. The judge's conclusion that Fortis' AMR meters are a type of ISM device is not in dispute. Islandcom's telecommunications network began to use the 900 MHz frequencies in September 2007. Between September 2007 and March 2009 Fortis and Islandcom operated within the 900 MHz frequencies simultaneously.

19. The difference between the parties' respective operations is that Islandcom were using the 900 MHz frequencies for the operation of their mobile telecommunications network, whereas Fortis were using ISM devices and bands, which are described in the Interim Spectrum Plan in this way:

> "*Industrial, Scientific and Medical (ISM) Applications (of radio frequency energy)*: Operation of equipment or appliances designed to generate and use locally radio frequency energy for industrial, scientific, medical, domestic or similar purposes, excluding applications in the field of telecommunications."

At para 14 the judge adopted evidence that an ISM band is shared by many other applications which must be tolerant of each other; and that a plethora of devices operate within the 905 – 928 spectrum, including wireless sensors and routers, Local Area Networks (or LANs), cordless telephones, remote controls of all types and personal area networks. One example given is a digital electricity meter emitting signals to be picked up by a meter reader. Others include a microwave oven and devices such as medical diathermy machines and, as one

witness put it, the ISM 900 is also used for cordless telephones, remote-controlled gate and garage openers, X-ray machines and wireless routers.

20. The underlying facts relating to Fortis' operations are not in dispute. As the judge observed at para 1 of his judgment, Fortis had installed thousands of AMR meters operating within the same spectrum. It installed some 8,000 metres on Providenciales to permit customers' electricity meters to be read by Fortis' meter reading equipment remotely, usually from a public road. They constantly emit radio signals which can be picked up remotely by a meter reader. They were programmed to operate within a band used by Islandcom and could not be re-programmed to operate outside it. As the judge explained at para 4, the ISM band where these meters operated had become very congested. In an attempt to cope with the problem they were calibrated to transmit on a frequency for 200 microseconds, then to switch off for 20 seconds, then to transmit on another frequency within the band for 200 microseconds and to switch off for 20 seconds and so on.

21. On 9 July 2008 the then chairman of the Commission wrote to the then CEO of Islandcom as follows:

> "It is further our understanding that Annex D does not properly reflect a decision from the Commission dated February 12, 2007, which confirmed that Islandcom may use microwave frequencies for its operations as follows.
>
> …
>
> Finally Annex D should be altered to show that the operating frequencies in the 900 MHz band should be added as follows:
>
> Uplink: 905.0 – 914.8 MHz
>
> Downlink: 950.0 – 959.8 MHz.
>
> A revised Annex D is attached with the appropriate changes made."

A revised Annex D was in fact attached.

22. On 2 March 2009 the Commission moved Islandcom off the 900 MHz frequencies because of the interference. The Final Spectrum Plan was issued on 21 March 2011. It was similar to the Interim Spectrum Plan. The footnotes in the Final Plan included 5.150 in similar terms to that in the Interim Plan but also included TCI specific notes T9, T10 and T 11 as follows:

> "T9 The following bands 905 – 928MHz [and others] have been identified for … ISM applications, and have been designated in the plan to be operated by certain low power and short range devices.
>
> T10 The spectrum bands referred to in T9 are allocated to point to multipoint broadband services. Mobility is permitted as long as there is no handover of services between base stations.
>
> T11 In the bands referred to in T9, cellular mobile services are prohibited."

23. The Court of Appeal held (at para 17) that any allocation of bands to Islandcom before the Interim Plan was outside the authority conferred by the licence on the Commission because it limited further assignments to a time "following the establishment of the Spectrum Plan" in accordance with regulation 4 of the Regulations. The Board agrees. However, the Court of Appeal held that, once the Interim Plan came into force, that power was triggered and was properly exercised by the letter of 9 July 2008 amending Annex D. It held that the amendment was lawful and effective and that the judge's conclusions to the contrary about lack of formality were misconceived: the licence itself contained the power to extend on the Commission. It further held that the extension was within the allocation envisaged by the Interim Plan, but inevitably subject to the caveat in footnote 5.150.

24. It was submitted on behalf of Fortis that that conclusion is wrong for two principal reasons. First, the legislation sets out a clear framework for the allocation of spectrum to a user. It is not permissible to side step the Regulations by including a provision in a licence which permits the further allocation without compliance with the application procedure and the publication procedure. Secondly, in any event, the licence could only be triggered where the Interim Plan assigned the 900 MHz frequencies to Islandcom, whereas (as indicated above) there was no mention of the allocation to Islandcom in the Interim Plan.

25. The Board accepts those submissions and prefers the view of the judge to that of the Court of Appeal. There is no evidence of an application having been made for the allocation of the 900 frequencies to Islandcom pursuant to section 33 of the Ordinance or of the purported amendment to the Provisional Licence appearing on the register as required by section 41 of the Ordinance and (as just stated) there was no mention of the allocation to Islandcom in the Interim Plan. Moreover, there is no evidence that any public notice was given under regulation 7. In the absence of compliance with those provisions, the Board is of the opinion that the amendment or amendments relied upon were not legally valid.

26. The judge held (at para 22) that the Commission had power to amend the Provisional Licence but that the informal procedure adopted fell far short of what was required formally to amend it. In particular, he noted the significance of regulation 7(1)(a) (summarised in para 13 above), and the fact that the Commission did not comply with it. He held that the Provisional Licence was not effectively amended. The Board agrees.

27. For these reasons, the Board concludes that the letter of 9 July 2008 did not amount to the lawful allocation of the 900 MHz frequencies to Islandcom, even though Islandcom did use the frequencies and indeed paid for doing so.

28. The same analysis applies to the suggestion that there was such an allocation by an oral agreement amending the Provisional Licence in February 2007. That submission faces the further problem that the Court of Appeal concluded that the amendment could not lawfully have been made before the Interim Spectrum Plan in June 2007. There is no cross appeal or respondent's notice challenging that conclusion.

29. It follows that the Board allows the appeal on the first issue and answers question (1), namely whether Islandcom held a valid spectrum licence for the 900 MHz frequencies, in the negative.

30. The Board adds, however, that, even if a different view were taken to this question, and the position were as stated by the Court of Appeal, it is difficult to see how this would assist Islandcom in this action if it is held that Fortis was acting lawfully and did not require a carrier licence or a spectrum licence. However, in the light of the Board's answer to this question, that issue does not arise in the context of question (1).

Questions (2) and (3)

31. The remaining questions are whether Fortis required a spectrum licence or a carrier licence. It should be noted as a preliminary to these questions that the Court of Appeal correctly held at para 17 that the extension of the allocation to Islandcom by amendment was, as it put it, "inevitably subject to the caveat in footnote 5.150" so that it would not have exclusive use of the frequencies. Moreover, footnote 5.150 to the Interim Spectrum Plan quoted in para 18 above, expressly provided that radio-communication services operating within the relevant bands, namely 902 – 928 MHz, must accept harmful interference which may be caused by the ISM applications. In these circumstances the sole remaining questions are whether Fortis required the licences. If it did not, there is no reason for holding that Fortis did not act lawfully.

32. The Commission initially, on 20 April 2010, took the view that Fortis required both a spectrum licence and a carrier licence. However it subsequently changed its view. On 19 January 2011 counsel for the Commission (which at that time was a party to the proceedings) expressly accepted that Fortis did not need a spectrum licence. Incidentally he also accepted that, although Islandcom was at one time authorised by the Commission to use cellular frequencies on the 900 MHz band, the authorisation was not made part of the Provisional Licence originally issued to Islandcom and that no other formal licence was issued to Islandcom to use those frequencies. As the Board understands it, the Commission did not at that time (or perhaps at all) contend that Fortis needed a carrier licence within section 8(1)(a) of the Ordinance. Moreover it did not subsequently maintain that Fortis needed a service provider licence within section 8(1)(b).

(2) Did Fortis require a spectrum licence?

33. The judge held that it did not, whereas the Court of Appeal held that it did. The Court of Appeal held that Fortis was the operator of radio-communications apparatus within section 32(1) of the Ordinance on the basis that radio-communications apparatus is defined as apparatus for emitting or receiving radio-communications which, as the Court of Appeal noted, is defined broadly. The Board recognises that the expression is capable of being construed in the way preferred by the Court of Appeal. However, as in every case, the relevant provision must be construed in its context.

34. As explained above, the meters installed by Fortis are calibrated to operate on given frequencies within the 900 MHz band. They use radio waves to communicate one way with the receiving reader. This would be true of many other ISM devices. In the opinion of the Board, section 32 must not be construed in isolation but in the context, in particular, of sections 31 and 40 of the Ordinance. The Board accepts the submission made on behalf of Fortis that the only way to give rational and practical effect to section 32 is to hold that it does not apply to ISM devices. It cannot sensibly be held that it was intended, for example, that individuals would require a spectrum licence in order to operate, for example, their TV remote controls, especially since, if they were, it would be a criminal offence to do so without a licence.

35. Lord Millett put the principle thus in *R (on the application of Edison First Power Ltd) v Central Valuation Officer* [2003] UKHL 20; [2003] 4 All ER 209, at para 116, 117:

> "The courts will presume that Parliament did not intend a statute to have consequences which are objectionable or undesirable; or

> absurd; or unworkable; or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless. … The more unreasonable a result, the less likely it is that Parliament intended it."

The court must consider the purpose for which the legislation was enacted and construe it accordingly. In the instant case, it cannot have been intended that different ISM devices should be approached differently.

36. The Court of Appeal recognised the problem. In para 23 it said this:

> "… there plainly should be some means of giving a blanket exemption to the plethora of radio emitting devices in the modern world, and the Commission has assumed such a power in the Final Plan for properly certified devices operating in the 900 MHz bandwidth. Normally that would be sufficient, because if the Commission is not going to insist on licensing for such devices it may be that as a matter of general practice no-one else is going to enforce the criminal sanctions in sections 55 – 60 of the Ordinance in respect of them. Unfortunately, as the facts of this case demonstrate, in some instances a third party may seek to rely on the absence of a licence in an attempt to establish and enforce its private rights."

The Court of Appeal relied upon the unqualified terms of section 32.

37. In the opinion of the Board, the legislature cannot have intended to leave the protection of the ISM operator entirely in the hands of the prosecutor, with the expectation that the operator would not be prosecuted, but with the result that it could be proceeded against in civil proceedings by a private entity. As the Board reads the provisions, it is lawful for the Commission to grant an exemption from the requirement to obtain a spectrum licence to certain categories of user but, subject to that, the user is either under a duty to obtain a licence or it is not. The operator of an ISM device is not under such a duty. It is inconceivable that it was intended that the statute should apply to the operator of some ISM devices but not others. To leave the operator of an ISM device who should be protected to the vagaries of the prosecutor but to leave him unprotected against a civil action would be irrational. As Lord Scott put it in the *Edison First Power* case at para 139, there must be an "interpretive presumption that Parliament does not intend to bring about results that are unreasonable or unfair or arbitrary."

38. For these reasons the Board answers question (2), namely whether Fortis required a spectrum licence, in the negative and allows the appeal on this ground.

(3) Did Fortis require a carrier licence?

39. The answer to this question depends upon whether the AMR meters operated by Fortis constituted a "telecommunications network" within the meaning of section 8(1)(a) of the Ordinance within the definition of that expression in section 2 quoted in para 10 above. This point was not considered by the judge because the point does not appear to have been taken before him. He did, however, consider whether Fortis provided "public telecommunications services" within the meaning of section 8(1)(b) on the basis that, if it did, it required a service provider licence. The judge rejected the submission on the simple ground that it did not provide public telecommunications services. He plainly regarded the point as self-evident because he gave no reasons. The Board agrees that it is self-evident that the ISM digital meters operated by Fortis did not amount to public telecommunication services.

40. Complaint is made on behalf of Fortis that, since the point was not taken by the judge, neither party adduced evidence as to whether or not the meters amounted to a "telecommunications network" and it is submitted that the Court of Appeal's conclusion that they did was not supported by evidence and should be set aside. There is some force in that point but the Board concludes that it should determine the issue if it can.

41. As will be recalled from para 10 above, a "telecommunications network" means "any … radio … system used to … transmit telecommunications" and "telecommunications" means "any form of transmission, emission, or reception of signs, texts, images and sounds or other intelligence of any nature by wire, radio, optical or other electromagnetic means". It was submitted on behalf of Fortis to the Court of Appeal and to the Board that, since each of the digital meters is a standalone device and there is no interconnection between them, there is no system and therefore no network. The Court of Appeal rejected that submission on the basis that Fortis' "large scale operation" consisting of 8,000 devices was to be construed as a "system" and therefore a "network". The question is whether the Court of Appeal was correct so to hold.

42. The Board concludes that it was not. In the opinion of the Board, it does not follow from the fact that there were a large number of meters that they amounted to a system or network in circumstances where, as was the case, the meters were individual meters with no connection between them. As Fortis puts it in its case, there was no mechanism providing for an electronic or other 'hand-shake' between them. Each meter worked separately, speaking, not to other meters, but to the meter reader individually. On that basis, the Board accepts Fortis' submission that the Court of Appeal was wrong to hold that the meters together amounted to a system or telecommunications network.

43. It was further submitted on behalf of Fortis that the ISM devices used by Fortis were not a type of telecommunication device at all. The definition of ISM devices in the Interim Spectrum Plan makes it clear that they are not telecommunications apparatus. As stated in para 19 above it defined ISM applications as:

> "Operation of equipment or appliances designed to generate and use locally radio frequency energy for industrial, scientific, medical, domestic or similar purposes, excluding applications in the field of telecommunications."

The Board accepts the submission made on behalf of Fortis that, even if (contrary to the view expressed above) ISM devices such as the remote control to operate a garage door, or the Fortis meters, could sensibly be said to "convey messages whether or not received", it could not sensibly be said that they are used for the "transmission, emission or reception of signs, texts, images and sounds or other intelligence of any nature" within the meaning of the definition in section 2 of the Ordinance. In short, the Board accepts the submission made on behalf of Fortis that section 8(1) of the Ordinance has no application to its ISM meters, which are akin to the remote garage door opener in that they function outside the walls of the house but each meter is limited in usage to the single household or business.

44. For these reasons the Board answers question (3), namely whether Fortis required a carrier licence, in the negative and allows the appeal on this ground.

CONCLUSION

45. For these reasons the Board will humbly advise Her Majesty that the appeal be allowed, that the order of the judge be restored and that the action be dismissed. It appears to the Board that costs should follow the event and that Islandcom should pay Fortis' costs before the Board and in the Court of Appeal. The Board will make an order in these terms unless submissions to the contrary are made within 21 days of this judgment being handed down, in which case the Board will consider those submissions and any submissions made in reply within 14 days of the receipt of those submissions.